

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

BEDIVERE INSURANCE COMPANY  
F/D/B/A ONEBEACON INSURANCE  
COMPANY,

Plaintiff,

vs.

BLUE CROSS AND BLUE SHIELD OF  
KANSAS, INC. AND ALLIED WORLD  
SURPLUS LINES INSURANCE COMPANY  
F/K/A DARWIN SELECT INSURANCE  
COMPANY; BLUE CROSS BLUE SHIELD  
ASSOCIATION

Defendants.

Case No. 2:18-cv-0237-DDC-JPO

**FIRST AMENDED COMPLAINT**

**GENERAL ALLEGATIONS**

1. Plaintiff Bedivere Insurance Company f/d/b/a OneBeacon Insurance Company (hereinafter “OneBeacon”) brings this Complaint (“Complaint”) for declaratory relief against Defendant Blue Cross and Blue Shield of Kansas, Inc. (“BCBS-KS”), and for declaratory relief and monetary relief against Allied World Surplus Lines Insurance Company f/k/a Darwin Select Insurance Company (“Allied World”) and the Blue Cross Blue Shield Association (“BCBSA”) (collectively, “Defendants”).

2. Allied World issued BCBS-KS a primary Managed Care Organization Errors and Omissions Liability Policy (the “Allied World Primary E&O Policy”) with a \$10 million limit of liability for claims relating to antitrust. A copy of Allied World’s Primary E&O Policy is attached hereto as **Exhibit 1**. Allied World also issued BCBS-KS a primary Healthcare Organization's Directors and Officers (“D&O”) Liability Policy (the “Allied World Primary

D&O Policy”) with a \$15 million limit of liability for claims relating to antitrust. Allied World’s Primary D&O Policy is attached hereto as **Exhibit 2**.

3. OneBeacon issued BCBS-KS a Managed Care Errors and Omissions (“E&O”) Excess Indemnity Policy (the “OneBeacon Policy”). OneBeacon’s Policy is attached hereto as **Exhibit 3**.

4. BCBS-KS entered into a Blue Cross License Agreement and Blue Shield License Agreement (the “License Agreements”) with BCBSA.

5. BCBS-KS and BCBSA have been sued in several class actions across the nation alleging violations of antitrust laws (the “Underlying Lawsuits”) arising out of the License Agreements. These lawsuits were later consolidated for pretrial discovery proceedings in the Northern District of Alabama (collectively with the component class actions, the “MDL Action”).

6. BCBS-KS tendered both the Allied World Primary E&O Policy and the Allied World Primary D&O Policy to Allied World for coverage of the Underlying Lawsuits and/or MDL Action seeking reimbursement of defense expenses and indemnity.

7. Allied World accepted BCBS-KS’s tender under the Primary E&O Policy and agreed to reimburse defense expenses incurred by BCBS-KS above the \$500,000 retention, subject to the terms, conditions, limitations and exclusions of the E&O Policy, and subject to Allied World’s reservation of rights. However, Allied World denied coverage under the Allied World Primary D&O Policy.

8. BCBS-KS contends it is entitled to coverage under the Allied World Primary D&O Policy. BCBS-KS filed a counter-claim against Allied World in the pending coordinated

action *Allied World v. Blue Cross-Blue Shield Kansas and related counter claim*, Case No. 2:18-cv-02515 claiming Allied world wrongfully denied coverage.

9. Pursuant to the License Agreements between BCBS-KS and BCBSA, BCBSA agreed to defend and hold BCBS-KS harmless against claims arising from activities such as those alleged in the Underlying Lawsuits.

10. Upon information and belief, BCBS-KS has not tendered its defense or sought indemnity from BCBSA pursuant to the terms of the License Agreements.

11. Upon information and belief, BCBSA has not paid any defense expenses on behalf of BCBS-KS under the License Agreements with respect to the Underlying Lawsuit and/or MDL Action.

12. Allied World's Primary E&O Policy's limit of \$10 million has allegedly been exhausted and OneBeacon has begun reimbursing BCBS-KS for defense expenses under the OneBeacon Policy, despite the Allied World Primary D&O Policy not having been exhausted and BCBSA's failure to assume the defense of BCBS-KS.

13. OneBeacon therefore seeks a judicial declaration that OneBeacon's Policy is not triggered and there is no coverage under it until BCBS-KS exhausts the Allied World Primary D&O Policy.

14. In addition, OneBeacon has been attempting to investigate coverage for the Underlying Lawsuits since 2012 and for the MDL Action following the MDL Transfer Order in December of 2012. As the parties to the Underlying Lawsuits and/or MDL Action explore informal resolution, OneBeacon has been and will continue to be asked to evaluate coverage for any potential settlement or judgment. Throughout its investigation, OneBeacon has reasonably requested information and documents necessary for OneBeacon to (1) assess BCBS-KS's

potential liability in the Underlying Lawsuits consolidated in the MDL Action and (2) make determinations regarding coverage.

15. Rather than comply with OneBeacon's requests, BCBS-KS has, through its coverage counsel, refused to provide the majority of the requested information and has taken the position that OneBeacon's requests are covered by the mediation privilege. As to many of the documents, BCBS-KS's coverage counsel claims disclosure is barred by the attorney-client privilege and/or work product doctrine.

16. Additionally, BCBS-KS has not agreed to assist OneBeacon with its efforts to obtain subrogation from BCBSA and Allied World and, in failing to provide the requested cooperation, has prejudiced OneBeacon's potential or actual right of recovery and forced it to prematurely reimburse defense expenses.

17. As a result, OneBeacon has been forced to file this action to, among other things, seek a declaration regarding its right to the requested information. OneBeacon also seeks a judicial declaration that it is entitled to compliance from BCBS-KS with respect to cooperation provisions contained in the policies.

18. OneBeacon seeks to recover monetary damages by way of subrogation against Allied World and BCBSA for amounts paid by OneBeacon on behalf of BCBS-KS for defense expenses incurred in the Underlying Lawsuits and/or MDL Action.

19. Finally, OneBeacon also seeks a declaration that it has no obligation to provide coverage for any damages BCBS-KS is obligated to pay that do not qualify as "Loss" as that term is defined by the OneBeacon Policy, as well as a declaration that it has no obligation to provide coverage for BCBS-KS's alleged intentional conduct. There may be other applicable conditions or exclusions impacting coverage but OneBeacon cannot determine the applicability

of those other conditions or exclusions until BCBS-KS complies with the cooperation provisions and provides the requested documents and information.

OneBeacon accordingly alleges and seeks relief at this point as follows:

**The Parties**

20. Plaintiff OneBeacon is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in the State of Pennsylvania, and at all relevant times was permitted to do business in the State of Kansas.

21. Upon information and belief, OneBeacon alleges that defendant BCBS-KS is a corporation organized and existing under the laws of the State of Kansas with its principal place of business in the State of Kansas.

22. Upon information and belief, OneBeacon alleges that defendant Allied World, is a corporation organized and existing under the laws of the State of Arkansas with its principal place of business in the State of New York. OneBeacon is also informed and believes that Allied World is licensed to do business in the State of Kansas.

23. Upon information and belief, OneBeacon alleges that defendant BCBSA is a corporation organized and existing under the laws of the State of Illinois with its principal place of business in the State of Illinois. OneBeacon is also informed and believes that BCBSA is licensed to do business in the State of Kansas.

**Jurisdiction and Venue**

24. This is a diversity action for declaratory relief and subrogation pursuant to 28 U.S.C. § 2201 to declare the rights and other legal relations of the parties regarding insurance policies.

25. The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). There is complete diversity of citizenship between OneBeacon, BCBS-KS, Allied World and BCBSA. The amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

26. The Court has personal jurisdiction over OneBeacon, BCBS-KS, Allied World and BCBSA, and venue is proper in this District under 28 U.S.C. § 1391.

**Nature of the Action**

27. This action is brought pursuant to 28 U.S.C. § 2201, which provides that the Court may declare the rights and other legal relations of the parties. An actual controversy of a judicial nature exists between OneBeacon, BCBS-KS, Allied World and BCBSA involving the parties' rights and liabilities under the excess OneBeacon Policy (which follows the form of the Allied World Primary E&O Policy) and the Allied World Primary D&O Policy, both of which potentially provide liability insurance to BCBS-KS, as well as OneBeacon's right to seek subrogation against Allied World for payments made on its behalf and BCBSA pursuant to the terms in the License Agreements. The construction of those policies and Agreements and the controversy existing between OneBeacon, BCBS-KS, Allied World and BCBSA may be determined by a judgment of the Court.

28. This action also seeks monetary relief against Allied World and BCBSA by way of subrogation for defense expenses that OneBeacon has been forced to prematurely reimburse on behalf of BCBS-KS in the Underlying Lawsuits and/or MDL Action.

## **BACKGROUND ALLEGATIONS**

### **The MDL Action**

29. In 2012, several class action lawsuits were filed by providers and subscribers plaintiffs against multiple Blue Cross Blue Shield entities or member plans (“BCBS” or the “Blues”) and BCBSA, alleging violations of antitrust laws in the Underlying Lawsuits. The Underlying Lawsuits allege generally that, under the License Agreements, the Blues and BCBSA conspired to leverage their economic power and market dominance to under-compensate healthcare providers for their services and to increase healthcare costs to subscribers by coordinating their operations and limiting their activities through restrictions in their trademark licenses.

30. On December 12, 2012, the Judicial Panel on Multidistrict Litigation consolidated and transferred such actions for pretrial proceeding to the United States District Court for the Northern District of Alabama, creating the MDL litigation referred to as *In Re: Blue Cross Blue Shield Antitrust Litigation*, Master File No 2:13-cv-20000-RDP. A copy of the December 12, 2012 MDL Transfer Order is attached hereto as **Exhibit 4**. In consolidating the providers’ and the subscribers’ individually filed class actions, the MDL Panel found: “Here, the actions involve substantial common questions of fact relating to the state BCBS entities’ relationship with the national association, BCBSA, and the licensing agreements that limit the Blue Plans’ activity to exclusive service areas, among other restrictions.” (Ex. 4 at p. 2.)

31. Pursuant to an Order issued by the MDL Court, two consolidated complaints were filed in the MDL Action on July 1, 2013, one for the “subscriber track” and the other for the “provider track.” On April 17, 2017, the subscribers filed a Subscriber Track Third Amended Consolidated Class Action Complaint (Document No. 1082 in Master File No 2:13-cv-20000-

RDP; hereinafter referred to as the “Subscriber Complaint”). On April 18, 2017, the providers filed a Consolidated Fourth Amended Provider Complaint (Document No. 1083 in Master File No 2:13-cv-20000-RDP; hereinafter referred to as the “Provider Complaint”).

32. BCBS-KS and BCBSA are named as defendants in both the Provider and Subscriber Complaints.

33. The Provider Complaint alleges that, under the License Agreements, the Blues have been engaged for many years in an agreement not to compete against one another, but instead to cooperate and coordinate their activities on a nationwide basis in order to maximize their profits. The Provider Complaint contends that the Blues agreed to cease competing and to impose operational uniformity on themselves decades ago by carving out exclusive service areas, setting up their national programs (including Blue Card), and establishing BCBSA’s uniform rules and regulations. The Blues allegedly formalized their cooperation agreement through the restrictions in their trademark licenses, such as the requirement of mandatory participation in the national programs.

34. The asserted conspiracy has allegedly perpetuated and strengthened the dominant market position each Blue enjoys in its specifically defined geographic market which, in turn, has enabled the Blues to force healthcare providers to accept anticompetitive rates and terms. The Provider Complaint alleges that healthcare providers have been subjected to lower rates and less favorable terms than would have been the case in the absence of the conspiracy.

35. The Provider Complaint seeks injunctive relief prohibiting the Blues, including BCBS-KS, from entering into, honoring, or enforcing the agreements that restrict territories or geographic areas, enjoining the Blues from utilizing the Blue Card Program to pay healthcare providers, and enjoining the Blues from developing any other program or structure that is

intended to fix, or has the effect of fixing, prices paid to healthcare providers. The Provider Complaint also seeks relief in the form of treble damages.

36. The Subscriber Complaint similarly alleges that the Blues, under the License Agreements, have been engaged for many years in an agreement not to compete against one another, but instead to cooperate and coordinate their activities on a nationwide basis in order to maximize their profits. The Subscriber Complaint alleges that the Blues agreed to cease competing and to impose operational uniformity on themselves decades ago by carving out exclusive service areas and establishing BCBSA's uniform rules and regulations, including BCBSA's Membership Standards and Guidelines under the License Agreements. The Blues allegedly formalized their cooperation agreement in License Agreements.

37. The Subscriber Complaint seeks injunctive relief prohibiting the Blues, including BCBS-KS, from entering into, honoring, or enforcing the agreements that restrict territories or geographic areas, and it also seeks to eliminate restrictions on the Blues' activities. The complaint further seeks relief in the form of treble damages of the amount by which the plaintiffs allege premiums were artificially inflated above their competitive levels.

38. The Provider Complaint and the Subscriber Complaint are based upon the same or related conduct of the Blues relating to the Blues' "relationship with the national association, BCBSA, and the Licensing Agreements that limit the Blue Plans' activity . . . ." (Ex. 4 [MDL Transfer Order] at p. 2.) The Provider and Subscriber Complaints differ only with respect to the alleged harm to the providers and the subscribers. Both complaints seek relief in excess of the Court's jurisdictional limit and invoke federal question jurisdiction.

39. The Provider Complaint and the Subscriber Complaints, seek damages including, but not limited to injunctive relief, restitution and treble damages.

## THE INSURANCE POLICIES

### The Allied World Primary E&O Policy

40. The Allied World Primary E&O Policy, policy no. 0303-4114, provides certain coverage to BCBS-KS in excess of the Court’s jurisdictional threshold pursuant to the policy’s terms, conditions, and exclusions. The Allied World Primary E&O Policy has a maximum limit of liability of \$10 million for each claim and in the aggregate for all claims, as well as a \$10 million maximum limit of liability for each claim for antitrust activity and in the aggregate for all claims for antitrust activity pursuant to the policy’s terms, conditions, and exclusions. A copy of the Allied World Primary E&O Policy is attached hereto as **Exhibit 1**.

41. The Insuring Agreement in the Allied World Primary E&O Policy provides:

The **Underwriter** will pay on behalf of any **Insured Loss** which the **Insured** is legally obligated to pay as a result of a **Claim** that is first made against the **Insured** during the **Policy Period** or during any applicable Extended Reporting Period.

(Ex. 1, § I.)<sup>1</sup>

42. The term “**Claim**” is defined, in relevant part, as “any written notice received by any **Insured** that a person or entity intends to hold an **Insured** responsible for a **Wrongful Act** which took place on or after the retroactive date listed in ITEM 7 of the Declarations.” (Ex. 1, § IV, Definition (C).)

43. The term “**Wrongful Act**” is defined, in relevant part, as “any actual or alleged act, error or omission in the performance of, or any failure to perform, a **Managed Care**

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<sup>1</sup> All policy provisions quoted in this Complaint have been quoted directly from the respective policies, including all bold and capitalized terms.

**Activity** by any **Insured Entity** or by any **Insured Person** acting within the scope of his or her duties or capacity as such.” (Ex. 1, § IV, Definition (W).)

44. The term “**Managed Care Activity**,” is defined as:

“**Managed Care Activity**” means any of the following services or activities: **Provider Selection; Utilization Review**; advertising, marketing, selling, or enrollment for health care or workers’ compensation plans; **Claim Services**; establishing health care provider networks; reviewing the quality of **Medical Services** or providing quality assurance; design and/or implementation of financial incentive plans; wellness or health promotion education; development or implementation of clinical guidelines, practice parameters or protocols; triage for payment of **Medical Services**; and services or activities performed in the administration or management of health care or workers’ compensation plans. **Managed Care Activity** shall include all such services and activities listed above, whether provided on paper, in person, electronically, or via any other medium.

(Ex. 1, § IV, Definition (K), as amended by Endorsement No. 10; *see also* Endorsement 5 and Endorsement 37 [deleting endorsement 5].)

45. The term “**Loss**” is defined as:

**Defense Expenses** and any monetary amount which an **Insured** is legally obligated to pay as a result of a **Claim**; including punitive, exemplary or multiple damages (hereafter referred to as “Punitive Damages”) awarded in connection with any **Claim** covered by this Policy, other than **Claims** for **Antitrust Activity**, and only if such Punitive Damages are insurable under applicable law. **Loss** shall not include:

- (1) fines, penalties, taxes; provided that if fines, penalties or Punitive Damages are awarded in connection with any **Claim** for **Antitrust Activity**, the maximum amount payable by the Insurer is the amount indicated in Item 3(b) of the Declarations (which amount is part of, and not in addition to, the amount listed in ITEM 3(a) of the Declarations), but only if such fines, penalties or Punitive Damages are insurable under applicable law.
- (2) fees, amounts, benefits or coverage owed under any contract with any party including providers of health care services, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;
- (3) non-monetary relief or redress in any form, or equitable relief including without limitation the restitution or disgorgement of funds or the cost of complying with any injunctive, declaratory or administrative relief; with regard to government claims involving fraud and abuse type activities such as or in connection with Medicare/Medicaid, only **Defense Expenses** will be covered.

Determination of the insurability of any **Loss** shall be made under the laws most favorable to the insurability of **Loss** of either: (a) of the jurisdiction of the **Named Insured's** principal place of business, or (b) the jurisdiction where the **Wrongful Act** giving rise to such **Loss** occurred.

(Ex. 1, § IV, Definition (J), as amended by Endorsements 4 and 17.) Pursuant to Endorsement No. 23, “**Loss**” is also amended to also include “plaintiff’s attorneys fees where awarded by the court in a covered **Claim** under this Policy.” (Ex. 1, Endorsement 23.)

46. The Allied World Primary E&O Policy provides that:

Except for **Defense Expenses**, the **Underwriter** shall not pay **Loss** for any **Claim** brought about or contributed to by:

- (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission committed intentionally by any **Insured**;
- (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation; or
- (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled.

For the purposes of determining the applicability of this EXCLUSION (A); no **Wrongful Act** of any **Insured** shall be imputed to any other **Insured**. Determination of the applicability of this EXCLUSION (A) may be made by an admission under oath, or a final adjudication, in a proceeding constituting the **Claim**, or in a proceeding separate from or collateral to any proceeding constituting the **Claim**.

(Ex. 1, § II, Exclusion (A), as amended by Endorsement Nos. 11, 35 and 36.)

47. The Allied World Primary E&O Policy includes the following Assistance and Cooperation Condition:

In the event of a **Claim**, the **Insureds** shall provide the **Underwriter** with all information, assistance and cooperation that the **Underwriter** reasonably requests.

(Ex. 1, § III, Condition (E).)

48. The Allied World Primary E&O Policy includes the following Subrogation Condition:

In the event of any payment hereunder, the **Underwriter** shall be subrogated to the extent of any payment to all of the rights of recovery of the **Insureds**. The **Insureds** shall execute all papers and do everything necessary to secure such rights, including the execution of any documents necessary to enable the **Underwriter** effectively to bring suit in their name. The **Insureds** shall do nothing that may prejudice the **Underwriter's** position or potential or actual rights of recovery. The obligations of the **Insureds** under this CONDITION (F) shall survive the cancellation or other termination of this Policy.

(Ex. 1, § III, Condition (F).)

49. The Allied World Primary E&O Policy includes the following Other Insurance/Other Indemnification Condition:

This Policy shall be excess of and shall not contribute with:

- (a) any other insurance or plan or program of self-insurance (whether collectible or not), unless such other insurance or self-insurance is specifically stated to be in excess of this Policy; and
- (b) any indemnification to which an **Insured** is entitled from any entity other than another **Insured**.

This Policy shall not be subject to the terms of any other policy of insurance or plan or program of self-insurance.

(Ex. 1, § III, Condition (G), as amended by Endorsement No. 19.)

**The Allied World Primary D&O Policy**

50. The Allied World Primary D&O Policy, policy no. 0303-4116, provides certain coverage to BCBS-KS in excess of the Court’s jurisdictional threshold pursuant to the policy’s terms, conditions, and exclusions. The Allied World Primary D&O Policy has a maximum limit of liability of \$15 million for each claim and in the aggregate for all claims, as well as a \$15 million maximum limit of liability for each claim for antitrust activity and in the aggregate for all claims for antitrust activity pursuant to the policy’s terms, conditions, and exclusions. A copy of the Allied World Primary D&O Policy is attached hereto as **Exhibit 2**.

51. The Allied World Primary D&O Policy contains the following Insuring Agreement:

In consideration of the payment of the premium and in reliance upon the **Application**, which shall be deemed to be attached to, incorporated into, and made a part of this Policy, DARWIN NATIONAL ASSURANCE COMPANY (the “**Insurer**”) and the **Named Insured**, on behalf of all **Insureds**, agree as follows:

\* \* \*

**D. Antitrust Activities Coverage**

The **Insurer** shall pay on behalf of the **Insureds**, subject to the Sublimit of Liability set forth in Item 3.C. of the Declarations, the **Loss** arising from a **Claim**, first made during the **Policy Period** (or Discovery Period, if applicable) against the **Insureds**

for **Antitrust Activities**, and reported to the **Insurer** in accordance with Section VII. of this Policy.

(Ex. 2, Insuring Agreement (D).)

52. The Allied World Primary D&O Policy defines the term “**Claim**,” in relevant part, as any:

- (1) written demand for monetary, non-monetary or injunctive relief made against an **Insured**, [or]
- (2) judicial, administrative or regulatory proceeding, whether civil or criminal, for monetary, non-monetary or injunctive relief commenced against an **Insured**, including any appeal therefrom, which is commenced by:
  - (a) service of a complaint or similar pleading;
  - (b) return of an indictment, information or similar document (in the case of a criminal proceeding); or
  - (c) receipt or filing of a notice of charges.

(Ex. 2, § II, Definition D.(1) & (2).)

53. The Allied World Primary D&O Policy defines the term “**Defense Costs**” as:

- (1) reasonable and necessary fees, costs, charges or expenses incurred by or on behalf of an **Insured** in the investigation, defense or appeal of a **Claim**;
- (2) premium for an appeal, attachment or similar bond, but without any obligation to apply for and obtain such bond, in connection with a **Claim**; or

- (3) any fees, costs, charges or expenses incurred by the **Insured** at the specific written request of the **Insurer** to assist the **Insurer** in the investigation, defense or appeal of a **Claim**.

“**Defense Costs**” do not include: (a) amounts incurred by the **Insured** prior to the date a **Claim** is first made and reported to the **Insurer**; or (b) compensation or benefits of any **Insured Person** or any overhead expenses of the **Company**.

(Ex. 2, § II, Definition (H).)

54. The Allied World Primary D&O Policy defines the term “**Loss**,” in pertinent part, as:

- (1) damages, settlements or judgments;
  - (2) pre-judgment or post-judgment interest;
  - (3) legal costs or attorneys fees awarded by a court in favor of the claimant;
  - (4) punitive or exemplary damages, or the multiple portion of any multiplied damages award, subject to any applicable Sublimit of Liability but only to the extent that such damages are insurable under the applicable law most favorable to the insurability of such damages;
- \* \* \*
- (9) **Defense Costs**; and
  - (10) the costs of complying with any injunctive, declaratory or equitable relief, remedy or order.

“**Loss**” does not include:

- (a) amounts which an **Insured** is not legally obligated to pay;
- (b) taxes; other than as specifically included above in this Definition, and if insurable under law;
- (c) fines or penalties, except as specifically provided for in this Definition or in an Endorsement to this Policy, and only if insurable under law;
- (d) amounts deemed uninsurable under law; or
- (e) costs or liability incurred by any **Insured** to modify any building or property to make it more accessible or accommodating to any disabled person, or in connection with any educational, sensitivity or other corporate program, policy or seminar.

However, this Policy shall provide coverage for **Defense Costs** incurred in a **Claim** seeking amounts specified in paragraphs (a) through (f) above, subject to all other terms, conditions and exclusions of this Policy.

(Ex. 2, § II, Definition (R), as amended by Endorsement No. 6.)

55. The Allied World Primary D&O Policy has a “Managed Care Exclusion” that states Allied World will not cover any **Loss** in connection with any **Claim** “alleging, arising out of, based upon, or attributable to, any actual or alleged act, error or omission in the performance of, or failure to perform, **Managed Care Activities** by any **Insured** or by any individual or entity for whose acts, errors or omissions an **Insured** is legally responsible, except that this Exclusion shall not apply to that portion of an otherwise covered **Claim** for **Provider Selection Practices.**” (Ex. 2, § III, Exclusion (N).)

56. The Allied World Primary D&O Policy defines the term “**Managed Care Activities**” as any of the following services or activities:

**Provider Selection Practices; Utilization Review**; advertising, marketing, selling, or enrollment for health care, workers’ compensation, life, dental, vision, short-term disability, long-term disability, behavioral health, pharmacy benefit and consumer-directed health plans; **Claim Services**; establishing health care provider networks; reviewing the quality of **Medical Services** or providing quality assurance; design and/or implementation of financial incentive plans; wellness or health promotion education; development or implementation of clinical guidelines, practice parameters or protocols; triage for payment of **Medical Services**; and services or activities performed in the administration or management of health care, workers’ compensation, life, dental, vision, short-term disability, long-term disability, behavioral health, pharmacy benefit and consumer-directed health plans.

(Ex. 2, § II, Definition (T).)

57. The Allied World Primary D&O Policy’s Defense and Settlement of a Claim provision states, in pertinent:

F. **Right to Tender Defense**

- (1) Notwithstanding the foregoing, the **Insureds** shall have the right to tender the defense of a **Claim** to the **Insurer**.
- (2) The right to tender the defense of a **Claim** to the **Insurer** shall be exercised by the **Named Insured** on behalf of all **Insureds** by providing written notice to the **Insurer**, by certified mail or by email to the address of the **Insurer** set forth in Item 8.A. of the

Declarations, specifically requesting the **Insurer** to assume the defense of such **Claim**. In the event that coverage is provided for a **Claim** exclusively against an **Insured Person**, then such **Insured Person** shall have the right to tender the defense of the **Claim** to the **Insurer** at his or her option. The **Insured's** right to tender the defense of a **Claim** shall terminate if it is not exercised within thirty (30) days of the date the **Claim** is first made against an **Insured**. Further, from the date the **Claim** is first made against an **Insured** to the date when the **Insurer** accepts the tender of the defense of such **Claim**, the **Insureds** shall take no action, or fail to take any required action, that prejudices the rights of any **Insured** or the **Insurer** with respect to such **Claim**. In the event the **Insureds** have complied with all of the foregoing, the **Insurer** shall be obligated to assume the defense of the **Claim**, even if such **Claim** is groundless, false or fraudulent.

(Ex. 2, § VI, Subsection (F).)

### **The OneBeacon Policy**

58. The excess OneBeacon Policy, policy number MCX-1778-12, provides certain coverage to BCBS-KS in excess of the Court's jurisdictional threshold pursuant to the policy's terms, conditions, and exclusions. The OneBeacon Policy provides \$10 million in coverage per claim and in the aggregate. A copy of the OneBeacon Policy is attached hereto as **Exhibit 3**.

59. The OneBeacon Policy's Insuring Agreement (A) provides:

The Underwriter shall provide the **Insured** with insurance excess of the **Underlying Insurance** set forth in ITEM 4 of the Declarations for **Claims** first made against the **Insured** during the **Policy Period**, provided that the **Underlying Insurance** also applies and has been exhausted by actual payment thereunder, or would apply but for the exhaustion of the applicable limit(s) of liability thereunder.

(Ex. 3, § I, Insuring Agreement (A).)

60. The OneBeacon Policy describes “**Underlying Insurance**” as the Allied World Primary E&O Policy.

61. The OneBeacon Policy is a “follow form excess policy” that includes Insuring Agreement (B):

This Policy will apply in conformance with, and will follow the form of, the terms, conditions, agreements, exclusions, definitions and endorsements of the **Underlying Insurance**, except:

- (1) the Underwriter will have no obligation under this Policy with respect to any **Claim** that is settled without the Underwriter’s written consent;
- (2) with respect to any provisions to the contrary contained in this Policy;
- (3) the applicable limit of liability of the **Underlying Insurance** shall be deemed to be reduced or exhausted solely as a result of payments for loss or damages (including costs, charges and expenses) that are covered under this Policy; and

- (4) the coverage provided by this Policy shall not be broader than any **Underlying Insurance** unless expressly provided herein, including any endorsement hereto.

(Ex. 3, § I, Insuring Agreement (B).)

62. The OneBeacon Policy also includes the following Insuring Agreement (C):  
The Underwriter will not have any obligation to make any payment hereunder unless and until the full amount of the applicable limit of liability of the **Underlying Insurance** has been paid by the issuer(s) of the **Underlying Insurance**.

(Ex. 3, § I, Insuring Agreement (C).)

63. The OneBeacon Policy contains the following Definitions (B)-(G):

“**Claim**” has the meaning ascribed to it in the **Underlying Insurance**.

“**Defense Expenses**” has the meaning ascribed to it (or similar term) in the **Underlying Insurance**.

“**Insured**” means the persons or organizations insured under the **Underlying Insurance**.

“**Policy Period**” means the period from the inception date to the expiration date in ITEM 2 of the Declarations, or to any earlier cancellation date.

“**Primary Policy**” means the policy scheduled as such in ITEM 4 of the Declarations.

“**Underlying Insurance**” means all policies scheduled in ITEM 4 of the Declarations and any policies renewing or replacing them.

(Ex. 3, § II, Definitions (B)-(G), as amended by Endorsement 1.)

64. The OneBeacon Policy includes the following Underlying Insurance provision (C):

No amendment or modification to any **Underlying Insurance** shall be binding upon the Underwriter or effective in extending the coverage or limits of liability afforded by this Policy without the express written agreement of the Underwriter.

(Ex. 3, § III, Underlying Insurance (C).)

65. The OneBeacon Policy contains the following Claim Participation provision:

The Underwriter may, at its sole discretion, elect to associate in the investigation, settlement or defense of any **Claim** against the **Insured**, even if the **Underlying Insurance** has not been exhausted. If the Underwriter so elects, the **Insured** will cooperate with the Underwriter and will make available all such information and records as the Underwriter may reasonably require.

(Ex. 3, § VI, Claim Participation.)

66. The OneBeacon Policy contains the following Subrogation and Recoveries provision:

In the event of any payment under this Policy, the Underwriter will be subrogated to all the **Insured's** rights of recovery against any person or entity, and the **Insured** shall execute and deliver all instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing that may prejudice the Underwriter's position or potential or actual right of recovery. The obligations of the **Insured** under this provision shall survive the expiration or termination of this Policy. The expenses of all such recovery proceedings shall be first subtracted

from the amount of any recovery and the remaining amount so recovered shall be apportioned in the inverse order of payment to the extent of actual payment.

(Ex. 3, § VII, Subrogation and Recoveries.)

### **LIABILITY OF BCBSA**

67. Pursuant to the License Agreements between BCBS-KS and BCBSA, BCBS-KS has a right to indemnity with respect to claims that arise out of activities such as those alleged in the Underlying Lawsuits. *See* License Agreements between the Blue Cross and Blue Shield Association and Blue Cross and Blue Shield of Kansas, Inc., copies of the License Agreements are attached as **Exhibit 5** and **Exhibit 6**.

68. Anthem and Cigna were involved in a lawsuit related to the failed merger of the companies. The “Anthem-Cigna Litigation” refers to the lawsuit which was filed on February 14, 2017 in the State of Delaware, Court of Chancery, referred to as *In Re: Anthem-Cigna Merger Litigation*, C.A. No. 2017-0114-JTL and consolidated with C.A. No. 2017-0109-JTL.

69. Documents and testimony provided by Anthem in the Anthem-Cigna Litigation, according to the Subscribers, demonstrate that certain Blues believe that the purpose of the BCBSA’s National Best Efforts rule (“NBE”) is to restrict competition.

70. The Subscribers in the MDL Action filed a Memorandum of Points and Authorities in Support of Subscriber Plaintiffs’ Motion for Certification of Nationwide Injunctive Class or, in the Alternative, Alabama Injunctive Class alleging that certain Blues believe that the limitation on non-Blue revenue caused by the national best efforts rule only protects and enhances the Blue brand by restricting competition against the Blue brand.

71. Additionally, as argued by the Plaintiffs in the MDL Action, as early 2005, at least one Blue contended that BCBSA’s efforts to restrict unbranded business outside of

exclusive territories could raise concerns over potential violations of antitrust laws. *See* a copy of the March 14, 2005 letter from Clifford D. Stromberg to Roger G. Wilson, attached as **Exhibit 7**.

### **NATURE OF THE CONTROVERSY**

72. BCBS-KS contends that it timely provided notice of the Underlying Lawsuits, and subsequently the Provider and Subscriber Complaints, to Allied World and requested coverage under both the Allied World Primary E&O Policy and the Allied World Primary D&O Policy.

73. Allied World accepted BCBS-KS's tender of the Allied World Primary E&O Policy and agreed to reimburse defense expenses incurred by BCBS-KS above the \$500,000 retention, subject to the terms, conditions, limitations, and exclusions of the Allied World Primary E&O Policy, and subject to Allied World's reservation of rights.

74. Allied World denied coverage under the Allied World Primary D&O Policy and has refused to reimburse defense expenses or provide BCBS-KS with indemnity under that policy.

75. BCBS-KS contends it is entitled to coverage under the Allied World Primary D&O Policy.

76. BCBS-KS has brought an action against Allied World claiming it wrongfully denied coverage under the Primary D&O Policy.

77. The License Agreements between BCBS-KS and BCBSA require that BCBSA defend and indemnify BCBS-KS in connection with the Underlying Lawsuits.

78. Upon information and belief, BCBSA has failed to pay defense expenses on behalf of BCBS-KS with respect to the Underlying Lawsuits and/or MDL Action.

79. Upon information and belief, the \$10 million limits of the Allied World Primary E&O Policy have been exhausted by payment of defense expenses related to the Underlying Lawsuits/MDL Action.

80. OneBeacon has begun reimbursing BCBS-KS's defense expenses despite the risk that OneBeacon will be prejudiced in or precluded from seeking reimbursement and/or subrogation of any amounts it was prematurely forced to reimburse due to Allied World's denial under the Allied World Primary D&O Policy and BCBSA's failure to pay defense expenses on behalf of BCBS-KS.

81. In addition, OneBeacon has been attempting to investigate coverage for the Underlying Lawsuits/MDL Action since 2012. As the parties to the Underlying Lawsuits and/or MDL Action explore informal resolution, OneBeacon has been and will continue to be asked to evaluate coverage for any potential settlement or judgment. Despite OneBeacon's requests, BCBS-KS refuses to provide reasonably requested information and documents necessary for OneBeacon to (1) assess BCBS-KS's potential liability in the Underlying Lawsuits consolidated in the MDL Action and (2) make determinations regarding coverage. Additionally, BCBS-KS has not agreed to assist OneBeacon in pursuing subrogation against BCBSA. Thus, there is a bona fide present dispute between OneBeacon and BCBS-KS regarding the scope of the obligations of the parties under the Claim Participation/Assistance and Cooperation clause and the Subrogation Clause.

82. Further, questions exist regarding whether the relief sought in the Prescriber Complaint and Subscriber Complaint qualify as a covered loss within the coverage afforded by the OneBeacon Policy and whether OneBeacon has an obligation to provide coverage to BCBS-

KS for any loss brought about or contributed to by willful and/or intentional conduct on the part of BCBS-KS.

83. There are bona fide present disputes between OneBeacon, BCBS-KS, Allied World and BCBSA regarding:

- a. whether BCBS-KS must exhaust all primary insurance, including both the Allied World Primary E&O Policy and the Allied World Primary D&O Policy, by the payment of covered loss by the issuer of the policies, before coverage is triggered under the excess OneBeacon Policy;
- b. the scope of the obligations of the parties under the Claim Participation/Assistance and Cooperation clauses;
- c. whether, pursuant to the Subrogation and Recoveries clauses, OneBeacon has the right to seek subrogation from other persons or entities, including Allied World and BCBSA;
- d. whether, pursuant to the Claim Participation/Assistance and Cooperation Clauses and Subrogation and Recoveries clauses, OneBeacon has no obligation to provide coverage when BCBS has not agreed to assist OneBeacon in its efforts to obtain subrogation against Allied World and BCBSA and has prejudiced OneBeacon's potential or actual right of recovery;
- e. whether OneBeacon has a right of equitable subrogation against Allied World based upon its coverage denial and failure to reimburse defense expenses on behalf of BCBS-KS under the Allied World Primary D&O Policy; and

- f. whether the damages sought in the Provider Complaint and Subscriber Complaint qualify as a covered loss within the coverage afforded by the OneBeacon Policy; and
- g. whether OneBeacon has an obligation to provide coverage for damages brought about or contributed to by the willful and/or intentional conduct of BCBS-KS.

**FIRST COUNT**

**(Declaratory Relief Against BCBS-KS and Allied World: Exhaustion of All Primary Policies)**

84. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 83 (including all subparagraphs) of this Complaint.

85. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS and Allied World, on the other, with respect to whether BCBS-KS is required to exhaust all primary insurance, including the Allied World Primary D&O Policy, in order to trigger coverage under the excess OneBeacon Policy.

86. An actual controversy also exists as to whether the Other Insurance/Other Indemnification Condition in the Allied World Primary E&O Policy – to which the OneBeacon Policy follows form – establishes that the OneBeacon policy is not yet triggered given the liability of Allied World and BCBSA to BCBS-KS as alleged herein. This Condition states, in pertinent part:

This Policy shall be excess of and shall not contribute with:

- (a) any other insurance or plan or program of self-insurance (whether collectible or not), unless such other insurance or self-insurance is specifically stated to be in excess of this Policy; and
- (b) any indemnification to which an **Insured** is entitled from any entity other than another **Insured**.

(Ex. 1, § III, Condition (G), as amended by Endorsement No. 19.)

87. BCBS-KS contends that it timely provided notice of the Underlying Lawsuits to Allied World and requested coverage under both the Allied World Primary E&O Policy and the Allied World Primary D&O Policy.

88. Allied World denied coverage under the Allied World Primary D&O Policy and has refused to provide BCBS-KS coverage.

89. BCBS-KS contends it is entitled to coverage under the Allied World Primary D&O Policy.

90. BCBS-KS has filed suit to obtain coverage under the Allied World Primary D&O Policy.

91. OneBeacon is entitled to a declaratory judgment in its favor that the OneBeacon Policy is excess and that BCBS-KS must properly exhaust all other insurance and indemnity to which it is entitled before the OneBeacon Policy is triggered.

### **SECOND COUNT**

#### **(Declaratory Relief Against BCBS-KS: Duties Under Claim Participation and Cooperation Provisions of the OneBeacon Policy and the Allied World Primary E&O Policy)**

92. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 91 (including all subparagraphs) of this Complaint.

93. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to the parties' duties and obligations under the OneBeacon Policy (and by extension the Allied World Primary E&O Policy described above). Because OneBeacon has elected to associate in the investigation and has begun reimbursing defense expenses on behalf of BCBS-KS in the Underlying Litigation and the MDL Action, OneBeacon contends that BCBS-KS must comply with the following Claim Participation clause in the OneBeacon Policy:

The Underwriter may, at its sole discretion, elect to associate in the investigation, settlement or defense of any **Claim** against the **Insured**, even if the **Underlying Insurance** has not been exhausted. If the Underwriter so elects, the **Insured** will cooperate with the Underwriter and will make available all such information and records as the Underwriter may reasonably require.

(Ex. 3, § VI.)

94. Similarly, OneBeacon contends that BCBS-KS must comply with the Assistance and Cooperation clause in the Allied World Primary E&O Policy, to which the OneBeacon Policy follows form:

In the event of a **Claim**, the **Insureds** shall provide the **Underwriter** with all information, assistance and cooperation that the **Underwriter** reasonably requests.

(Ex. 1, § III, Condition (E).)

95. OneBeacon further contends that the above-noted Claim Participation and Assistance and Cooperation clauses require BCBS-KS to provide information and documents reasonably requested by OneBeacon, including, but not limited to:

- a. All written analyses or reports relating to BCBS-KS's potential exposure (including assessment of settlement value of the Subscriber and Provider claims);
- b. All analyses of the liability allocation percentage for BCBS-KS;
- c. Summaries of all depositions taken in the MDL Action;
- d. Any analyses of the impact of depositions taken in the MDL Action;
- e. Any analyses regarding expert witnesses (including expert disclosures, reports and depositions) involved in the MDL Action;
- f. Any analyses of the impact of recent rulings in the MDL Action including, but not limited to, the standard-of-review issue in the MDL Action;
- g. Any discovery requests and responses thereto from the MDL Action;
- h. All privilege logs served in the MDL Action, including but not limited to the privilege log as certified in November of 2017;
- i. All documents produced by BCBS-KS in the MDL Action;
- j. Any key documents (meaning those identified by BCBS-KS or other counsel for the Blues as having an impact on the merits of the MDL Action) produced, obtained or received in discovery;
- k. All analyses of settlement offers or demands in the MDL Action;
- l. Any communications regarding allocation of liability between BCBS-KS and other defendants in the underlying litigation, including regarding any formula that has been proposed to BCBS-KS to determine its allocation of any settlement or judgment;

- m. Any communications regarding the expected contribution or percentage allocation of any settlement to the Association in the MDL Action;
- n. Any internal communications regarding allocation of any aggregate settlement among potentially covered and uncovered causes of action in the MDL Action (excluding any communications between BCBS-KS and its coverage counsel);
- o. Any communication regarding any allocation of any aggregate settlement among the requested relief and damages in the MDL Action;
- p. All Term Sheets exchanged in the MDL Action and related to potential settlement of the MDL Action;
- q. All written agreements, including licensing agreements, between BCBS-KS and the Association;
- r. All communications received by BCBS-KS relating to the class action complaints and the MDL Action prior to retention of defense counsel;
- s. All information, analysis, reports, PowerPoint presentations or other documents regarding potential claims in the MDL Action concerning ASOs (including the value of such claims, damage estimates and the value of any release of ASO claims in any settlement);
- t. Any communications with an ASO relating to the MDL Action;

96. To date, and despite reasonable requests by OneBeacon, BCBS-KS has not provided the majority of the information or documents described in the preceding paragraph.

97. Instead, BCBS-KS has, through its coverage counsel, refused to provide the majority of the requested information and documents and has taken the position that

OneBeacon's requests are covered by the mediation privilege. As to many of the documents, BCBS-KS's coverage counsel claims disclosure is barred by the attorney-client privilege and/or work product doctrine.

98. Therefore, an actual controversy presently exists between OneBeacon and BCBS-KS regarding the parties' rights and obligations and BCBS-KS's compliance with the cooperation clauses in the policies. OneBeacon is entitled to a declaratory judgment in its favor stating BCBS-KS must comply with the Claim Participation and Assistance and Cooperation clauses in order to be entitled to any coverage under the OneBeacon Policy. Moreover, OneBeacon requests a declaratory judgment concerning the scope of the rights and obligations of the parties under the applicable Claim Participation and Assistance and Cooperation clauses.

### **THIRD COUNT**

#### **(Declaratory Relief Against BCBS-KS: Obligation to Comply with Claim Participation and Cooperation Provisions of the OneBeacon Policy and the Allied World Primary E&O Policy)**

99. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 98 (including all subparagraphs) of this Complaint.

100. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to whether BCBS-KS is obligated to comply with the Claim Participation and Assistance and Cooperation clauses in the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) and whether its failure to do so prevents it from seeking coverage.

101. The above-noted cooperation clauses obligate BCBS-KS to disclose all of the facts within its knowledge, provide requested information and documents, and otherwise aid the insurer in its determination of coverage under the policy.

102. BCBS-KS refuses to provide reasonably requested and relevant information and documents necessary for OneBeacon's coverage investigation as required under the Claim Participation and Assistance and Cooperation clauses in the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form).

103. BCBS-KS's failure to comply with the above-noted cooperation clauses has substantially prejudiced OneBeacon.

104. OneBeacon is entitled to a declaratory judgment in its favor, stating that cooperation is a condition to coverage and BCBS-KS's failure to comply with the Claim Participation and Assistance and Cooperation clauses in the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) prevents it from seeking coverage.

#### **FOURTH COUNT**

##### **(Declaratory Relief Against BCBS-KS: Specific Compliance)**

105. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 104 (including all subparagraphs) of this Complaint.

106. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to whether BCBS-KS complied with the Claim Participation and Assistance and Cooperation Clauses in the OneBeacon Policy and the Allied Work Primary

E&O Policy (to which the OneBeacon Policy follows form), and OneBeacon is entitled to a declaration that it is entitled to the requested information and documents.

107. The Claim Participation and Assistance and Cooperation Clauses in the OneBeacon Policy and the Allied Work Primary E&O Policy (to which the OneBeacon Policy follows form) obligate the insured to disclose all of the facts within its knowledge and otherwise to aid the insurer in its determination of coverage under the policy.

108. BCBS-KS continues to refuse to provide OneBeacon with reasonably requested and relevant information and documents necessary for OneBeacon's coverage investigation in contravention of the Claim Participation and Assistance and Cooperation clauses in the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form).

109. OneBeacon has no adequate remedy at law to obtain the requested information and documents. Monetary damages are inadequate.

110. OneBeacon will suffer irreparable injury absent BCBS-KS's cooperation as required by both the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form).

111. OneBeacon is entitled to a declaratory judgment in its favor stating that it is entitled to compliance by way of production of the requested information and documents from BCBS-KS.

**FIFTH COUNT**

**(Declaratory Relief Against BCBS-KS: Extent of OneBeacon's Subrogation Rights)**

112. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 111 (including all subparagraphs) of this Complaint.

113. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to the extent of OneBeacon's Subrogation Rights under the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form).

114. The \$10 million limits of the Allied World Primary E&O Policy is alleged to have been exhausted due to on-going defense expenses related to the Underlying Lawsuits and/or the MDL Action.

115. BCBS-KS has tendered its defense expenses to OneBeacon for reimbursement despite failing to comply with the Other Insurance/Other Indemnification Condition.

116. OneBeacon has begun reimbursing defense expenses to BCBS-KS and OneBeacon has and will continue to be prejudiced if it is precluded from seeking reimbursement and/or subrogation of the amounts it has and will continue to prematurely reimburse due to Allied World's denial under the Allied World Primary D&O Policy and BCBSA's failure to assume payment of defense expenses on behalf of BCBS-KS.

117. Thus, an actual controversy exists regarding OneBeacon's right to seek subrogation against another person or entity as it is being forced to prematurely reimburse defense expenses on behalf of BCBS-KS under the excess OneBeacon Policy.

118. OneBeacon is entitled to a declaratory judgment in its favor stating that OneBeacon has the right, pursuant to the Subrogation and Recoveries provisions of the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form), to seek subrogation against another person or entity, including Allied World and BCBSA, for any sums that OneBeacon has been prematurely forced to reimburse to BCBS-KS relating to the Underlying Lawsuits and/or the MDL Action.

### **SIXTH COUNT**

#### **(Declaratory Relief Against BCBS-KS: Obligation to Comply with Subrogation and Recoveries Clauses of the OneBeacon Policy and the Allied World Primary E&O Policy)**

119. OneBeacon hereby incorporates by references and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 118 (including all subparagraphs) of this Complaint.

120. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to whether BCBS-KS is obligated to comply with the Other Insurance/Other Indemnification Condition in the Allied World Primary E&O Policy and the Subrogation and Recoveries clauses in the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) and whether its failure to do so prevents it from seeking coverage.

121. The Other Insurance/Other Indemnification Condition in the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) states:

This Policy shall be excess of and shall not contribute with:

\* \* \*

- (b) any indemnification to which an **Insured** is entitled from any entity other than another **Insured**.

(Ex. 1, § III, Condition (G), as amended by Endorsement No. 19.)

122. The Subrogation condition in the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) states:

In the event of any payment hereunder, the **Underwriter** shall be subrogated to the extent of any payment to all of the rights of recovery of the **Insureds**. The **Insureds** shall execute all papers and do everything necessary to secure such rights, including the execution of any documents necessary to enable the **Underwriter** effectively to bring suit in their name. The **Insureds** shall do nothing that may prejudice the **Underwriter's** position or potential or actual rights of recovery. The obligations of the **Insureds** under this CONDITION (F) shall survive the cancellation or other termination of this Policy.

(Ex. 1, § III, Condition (F).)

123. The Subrogation and Recoveries condition in the OneBeacon Policy states:

In the event of any payment under this Policy, the Underwriter will be subrogated to all the **Insured's** rights of recovery against any person or entity, and the **Insured** shall execute and deliver all instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing that may prejudice the Underwriter's position or potential or actual right of recovery. The obligations of the **Insured** under this provision shall survive the expiration or termination of this Policy. The expenses of all such recovery proceedings shall be first subtracted from the amount of any recovery and the remaining amount so recovered shall be apportioned in the inverse order of payment to the extent of actual payment.

(Ex. 3, § VII, Subrogation and Recoveries.)

124. On July 16, 2019, OneBeacon advised BCBS-KS that it was seeking subrogation from BCBSA as a result of OneBeacon's reimbursement of defense expenses on behalf of BCBS-KS in the Underlying Litigation and the MDL Action and requested that BCBS-KS provide certain information and documentation in order to assist OneBeacon with its subrogation efforts.

125. BCBS-KS has not agreed to cooperate with OneBeacon in its efforts to obtain subrogation from BCBSA and/or Allied World and has prejudiced OneBeacon's potential or actual right of recovery by, among other things, failing to pursue indemnification from the BCBSA.

126. OneBeacon is entitled to a declaratory judgment in its favor, stating that BCBS-KS's failure to comply with the Other Insurance/Other Indemnification Condition and the Subrogation and Recoveries conditions in the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) precludes it from seeking reimbursements or coverage under the OneBeacon Policy.

### **SEVENTH COUNT**

#### **(Subrogation Against Allied World)**

127. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 126 (including all subparagraphs) of this Complaint.

128. The Subrogation and Recoveries provisions of the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) provide that OneBeacon may seek subrogation against another person or entity for sums that OneBeacon has prematurely paid to BCBS-KS relating to the Underlying Lawsuits and/or the MDL Action.

129. OneBeacon has begun reimbursing BCBS-KS's defense expenses incurred in the Underlying Lawsuits and/or the MDL Action.

130. Allied World is obligated, pursuant to the Allied World Primary D&O Policy to, among other things, reimburse BCBS-KS for defense expenses incurred in the Underlying Lawsuits and/or the MDL Action.

131. BCBS-KS alleges that Allied World has improperly denied coverage to BCBS-KS under the Allied World Primary D&O Policy.

132. As a result of Allied World's improper denial of coverage to BCBS-KS under the Allied World Primary D&O Policy, OneBeacon has been forced to prematurely reimburse defense expenses on behalf of BCBS-KS.

133. Therefore, OneBeacon seeks damages from Allied World, in an amount to be determined at trial, for those sums that OneBeacon has been forced to reimburse to BCBS-KS due to Allied World's denial of coverage under the Allied World Primary D&O Policy.

### **EIGHTH COUNT**

#### **(Equitable Subrogation Against Allied World)**

134. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 133 (including all subparagraphs) of this Complaint.

135. Allied World issued the Allied World Primary D&O Policy to BCBS-KS.

136. The Allied World Primary D&O Policy issued to BCBS-KS requires that Allied World make payment of defense expenses to BCBS-KS in connection with the Underlying Lawsuits and/or the MDL Action.

137. Pursuant to the terms of the policies, OneBeacon has no obligation to make payment of defense expenses on behalf of BCBS-KS until all other primary policies are exhausted, including the Allied World Primary D&O Policy.

138. Allied World has improperly denied coverage to BCBS-KS under the Allied World Primary D&O Policy and has refused to reimburse BCBS-KS's defense expenses incurred in the Underlying Lawsuits and/or the MDL Action.

139. OneBeacon has begun reimbursing BCBS-KS for defense expenses incurred in the Underlying Lawsuits and/or the MDL Action.

140. As a result of Allied World's denial of coverage under BCBS-KS the Allied World Primary D&O Policy, OneBeacon has been forced to prematurely reimburse BCBS-KS's defense expenses under its excess Policy.

141. Therefore, OneBeacon seeks damages from Allied World, in an amount to be determined at trial, for those sums that OneBeacon has been forced to reimburse on BCBS-KS's behalf due to Allied World's denial of coverage under the Allied World Primary D&O Policy.

### **NINTH COUNT**

#### **(Subrogation Against BCBSA)**

142. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 141 (including all subparagraphs) of this Complaint.

143. The Subrogation and Recoveries provisions of the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) provide that OneBeacon has the right to seek subrogation against another person or entity for sums that

OneBeacon has prematurely reimbursed BCBS-KS for relating to the Underlying Lawsuits and/or the MDL Action.

144. OneBeacon has begun reimbursing BCBS-KS's defense expenses incurred in the Underlying Lawsuits and/or the MDL Action.

145. The Allied World Primary E&O Policy includes the following Other Insurance/Other Indemnification Condition:

This Policy shall be excess of and shall not contribute with:

\* \* \*

(b) any indemnification to which an **Insured** is entitled from any entity other than another **Insured**.

(Ex. 1, § III, Condition (G), as amended by Endorsement No. 19.)

146. BCBSA is obligated, pursuant to the License Agreements between BCBS-KS and BCBSA, to save, defend, indemnify and hold BCBS-KS harmless with respect BCBSA's conduct as alleged in the Underlying Lawsuits and/or MDL Action.

147. OneBeacon is informed and believes that BCBS-KS has not pursued the indemnification it is entitled to from BCBSA, and BCBSA has failed to defend and/or pay defense expenses on behalf of BCBS-KS.

148. As a result of BCBSA's failures, OneBeacon has been forced to reimburse defense expenses on BCBS-KS's behalf.

149. Therefore, OneBeacon seeks damages from BCBSA, in an amount to be determined at trial, for those sums that OneBeacon has been forced to reimburse on BCBS-KS's behalf due to BCBSA's failure to defend and/or pay defense expenses on BCBS-KS's behalf pursuant to the License Agreements between BCBSA and BCBS-KS.

**TENTH COUNT**

**(Declaratory Relief Against BCBS-KS: No Obligation to Provide Coverage For Damages That Are Not Covered Loss)**

150. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 149 (including all subparagraphs) of this Complaint.

151. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to whether the damages sought by the plaintiffs in the Subscriber Complaint and Provider Complaint qualify as covered “Loss” under the OneBeacon Policy and the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form).

152. The Insuring Agreement in the Allied World Primary E&O Policy (to which the OneBeacon Policy follows form) provides:

The **Underwriter** will pay on behalf of any **Insured Loss** which the **Insured** is legally obligated to pay as a result of a **Claim** that is first made against the **Insured** during the **Policy Period** or during any applicable Extended Reporting Period.

(Ex. 1, § I.)

153. The term “**Loss**” is defined as:

**Defense Expenses** and any monetary amount which an **Insured** is legally obligated to pay as a result of a **Claim**; including punitive, exemplary or multiple damages (hereafter referred to as “Punitive Damages”) awarded in connection with any **Claim** covered by this Policy, other than **Claims** for **Antitrust Activity**, and only if such Punitive Damages are insurable under applicable law. **Loss** shall not include:

- (1) fines, penalties, taxes; provided that if fines, penalties or Punitive Damages are awarded in connection with any **Claim** for **Antitrust Activity**, the maximum amount payable by the Insurer is the amount indicated in Item 3(b) of the Declarations (which amount is part of, and not in addition to, the amount listed in ITEM 3(a) of the Declarations), but only if such fines, penalties or Punitive Damages are insurable under applicable law.
- (2) fees, amounts, benefits or coverage owed under any contract with any party including providers of health care services, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;
- (3) non-monetary relief or redress in any form, including without limitation restitution or disgorgement of funds or the cost of complying with any injunctive, declaratory or administrative relief; with regard to government claims involving fraud and abuse type activities such as or in connection with Medicare/Medicaid, only **Defense** Expenses will be covered.

Determination of the insurability of any **Loss** shall be made under the laws most favorable to the insurability of **Loss** of either: (a) of the jurisdiction of the **Named Insured's** principal place of business, or (b) the jurisdiction where the **Wrongful Act** giving rise to such **Loss** occurred.

(Ex. 1, § IV, Definition (J), as amended by Endorsements 4 and 17.) Pursuant to Endorsement No. 23, “**Loss**” is also amended to also include “plaintiff’s attorneys fees where awarded by the court in a covered **Claim** under this Policy.” (Ex. 1, Endorsement 23.)

154. The OneBeacon Policy is a “follow form excess policy” (to the Allied World Primary E&O Policy) that includes Insuring Agreement (B):

This Policy will apply in conformance with, and will follow the form of, the terms, conditions, agreements, exclusions, definitions and endorsements of the **Underlying Insurance**, except:

- (1) the Underwriter will have no obligation under this Policy with respect to any **Claim** that is settled without the Underwriter’s written consent;
- (2) with respect to any provisions to the contrary contained in this Policy;
- (3) the applicable limit of liability of the **Underlying Insurance** shall be deemed to be reduced or exhausted solely as a result of payments for loss or damages (including costs, charges and expenses) that are covered under this Policy; and
- (4) the coverage provided by this Policy shall not be broader than any **Underlying Insurance** unless expressly provided herein, including any endorsement hereto.

(Ex. 3, § I, Insuring Agreement (B).)

155. The Provider Complaint and the Subscriber Complaints, seek damages including, but not limited to injunctive relief, restitution and treble damages, some or all of which do not qualify as “Loss”.

156. Thus, an actual controversy exists as to whether the damages sought in the Provider Complaint and Subscriber Complaint qualify as “Loss”.

157. OneBeacon is entitled to a declaration that the damages sought in the Provider Complaint and Subscriber Complaint do not qualify as “Loss” and, further that, OneBeacon has no obligation to provide coverage to BCBS-KS for damages or remedies obtained by the plaintiffs in the Provider Complaint and Subscriber Complaint that do not qualify as “Loss” under the OneBeacon Policy.

#### **ELEVENTH COUNT**

##### **(Declaratory Relief Against BCBS-KS: No Obligation to Provide Coverage For Conduct Excluded Under the Policy)**

158. OneBeacon hereby incorporates by reference and re-alleges as if fully stated herein, each and every allegation of Paragraphs 1 through 157 (including all subparagraphs) of this Complaint.

159. An actual controversy exists between OneBeacon, on the one hand, and BCBS-KS, on the other, with respect to whether the claims upon which the plaintiffs in the Subscriber Complaint and Provider Complaint seek recovery are brought about or contributed to by any willful or dishonest and/or intentional conduct or the insured gaining any profit, remuneration or advantage to which it was not legally entitled on the part of BCBS-KS.

160. The Allied World Primary E&O Policy provides that:

“[e]xcept for **Defense Expenses**, the **Underwriter** shall not pay **Loss** for any **Claim** brought about or contributed to by:

- (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission committed intentionally by any **Insured**;
- (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation; or
- (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled.

For the purposes of determining the applicability of this EXCLUSION (A); no **Wrongful Act** of any **Insured** shall be imputed to any other **Insured**. Determination of the applicability of this EXCLUSION (A) may be made by an admission under oath, or a final adjudication, in a proceeding constituting the **Claim**, or in a proceeding separate from or collateral to any proceeding constituting the **Claim**.

(Ex. 1, § II, Exclusion (A), as amended by Endorsement Nos. 11, 35 and 36.)

161. The Provider Complaint and the Subscriber Complaints allege violations of antitrust laws and claim generally that, under the License Agreements, the Blues and BCBSA conspired to leverage their economic power and market dominance to under-compensate healthcare providers for their services and to increase healthcare costs to subscribers by coordinating their operations and limiting their activities through restrictions in their trademark licenses.

162. Thus, an actual controversy exists as to whether BCBS-KS brought about or contributed to any “Loss” based upon (1) willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission committed intentionally; (2) a willful violation of any law,

statute, ordinance, rule or regulation; or (3) gained any profit, remuneration or advantage to which BCBS-KS was not legally entitled.

163. OneBeacon is entitled to a declaration that it has no obligation to provide coverage to BCBS-KS for “Loss” brought about or contributed to by BCBS-KS’s 1) willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission committed intentionally; (2) a willful violation of any law, statute, ordinance, rule or regulation; or (3) gained any profit, remuneration or advantage to which BCBS-KS was not legally entitled.

**WHEREFORE**, OneBeacon prays for relief as follows:

1. For a declaration of the rights, duties, and obligations of the parties herein as follows:
  - a. That BCBS-KS must exhaust all primary insurance, including the Allied World Primary D&O Policy, by the payment of covered loss by the issuer of the policies, before coverage is triggered under the excess OneBeacon Policy;
  - b. That OneBeacon is entitled to BCBS-KS’s cooperation under the OneBeacon Policy including, but not limited to, the specific documents and information requested in Paragraph 95 that have not yet been provided;
  - c. That BCBS-KS failed to comply with the Claim Participation/Assistance and Cooperation clauses of the OneBeacon Policy and the Allied World Primary E&O Policy;
  - d. That BCBS-KS’s failure to comply with the Claim Participation/Assistance and Cooperation clauses of the OneBeacon Policy

and the Allied World Primary E&O Policy prevents it from seeking coverage under the OneBeacon Policy;

- e. For specific compliance by way of production of information and documents required by the Claim Participation/Assistance and Cooperation clauses of the OneBeacon Policy and the Allied World Primary E&O Policy;
- f. That OneBeacon has no obligation to provide coverage to BCBS-KS because its failure to comply with the Other Insurance/Other Indemnification Conditions and the Subrogation and Recoveries Conditions in the OneBeacon and Allied World Primary E&O Policy has prejudiced OneBeacon;
- g. That OneBeacon has the right to seek subrogation against another person or entity, including Allied World and BCBSA, for any sums that OneBeacon is prematurely forced to reimburse BCBS-KS for relating to the Underlying Lawsuits and/or the MDL Action;
- h. That OneBeacon is entitled to recover damages in subrogation against Allied World and BCBSA for amounts incurred by OneBeacon for defense expenses reimbursed on BCBS-KS's behalf as a result of Allied World and BCBSA's failure to pay defense expenses on BCBS-KS's behalf;
- i. That OneBeacon is entitled to recover damages in equitable subrogation against Allied World for amounts incurred by OneBeacon for defense

expenses paid on BCBS-KS's behalf as a result of Allied World's failure to pay defense expenses on behalf of BCBS-KS;

- j. That the allegations of damages in the Provider Complaint and Subscriber Complaint do not constitute covered "Loss" and OneBeacon has no obligation to provide coverage therefore; and
- k. That OneBeacon has no obligation to provide coverage for damages brought about or contributed to by conduct excluded under the policy issued to BCBS-KS.

- 2. For costs of suit; and
- 3. For such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all triable issues.

**DESIGNATION OF PLACE OF TRIAL**

Pursuant to D. Kan. Local Rule 40.2, Plaintiff hereby designates Kansas City, Kansas as the location for trial.

Dated: October 14, 2019

Respectfully submitted,

*/s/ Brent N. Coverdale*

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**CERTIFICATE OF SERVICE**

I certify that on this 14th day of October, 2019, a true copy of the foregoing document was served electronically via this Court's CM/ECF system on all parties receiving electronic notice.

*/s/ Brent N. Coverdale*

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Attorney for Plaintiff Bedivere Insurance  
Company f/d/b/a OneBeacon Insurance  
Company