

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
ATHENS DIVISION**

SKYLER MUSGROVE,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE BOARD OF REGENTS OF THE	)
UNIVERSITY SYSTEM OF GEORGIA,	)
JAMES HULL, in his official capacity as Chair	)
of the Board of Regents of the University	)
System of Georgia, UNIVERSITY OF	)
GEORGIA, JERE MOREHEAD, in his official	)
capacity as President of the University of	)
Georgia, KARIN ELLIOT, in her official	)
capacity as Interim Vice Chancellor of Human	)
Resources of the University System of Georgia,	)
BLUE CROSS BLUE SHIELD	)
HEALTHCARE PLAN OF GEORGIA, INC.,	)
METROPOLITAN LIFE INSURANCE	)
COMPANY, and METLIFE, INC.,	)
	)
Defendants.	)
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CASE NO.  
3:18-cv-00080-CDL

**DEFENDANT BLUE CROSS BLUE SHIELD HEALTHCARE PLAN  
OF GEORGIA, INC.’S SUPPLEMENTAL BRIEF REGARDING THE APPLICATION  
OF ELEVENTH AMENDMENT IMMUNITY**

Defendant Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. (“Blue Cross”<sup>1</sup>) submits this Supplemental Brief in response to the Court’s December 21, 2018 Order requesting supplemental briefing from the parties as to the applicability of the Eleventh Amendment to this case. Plaintiff has asserted a claim for damages against both Defendant Board of Regents of the

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<sup>1</sup> As discussed in BCBSHP’s Motion to Dismiss, Plaintiff erroneously named Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. (“BCBSHP”) in this matter when it should have named Blue Cross Blue Shield of Georgia, Inc. (“BCBSGA”). While no basis exists for Plaintiff’s claims against BCBSHP, BCBSHP addresses herein the Eleventh Amendment’s applicability to BCBSGA and/or BCBSHP and refers to BCBSGA and BCBSHP collectively as “Blue Cross.”

University System of Georgia (the “BOR”) and Blue Cross in Count I of the Complaint for an alleged violation of the Americans with Disabilities Act (“ADA”), and the BOR has urged the Court to dismiss Count I based on its Eleventh Amendment immunity. As described below, the Eleventh Circuit has applied Eleventh Amendment immunity to private entities acting pursuant to agreements with state entities in circumstances very similar to those applicable to Blue Cross. Plaintiff’s claims against Blue Cross should be dismissed from the case to the extent Plaintiff’s claims against the BOR are dismissed under the Eleventh Amendment.

### **Summary of Relevant Facts**

The facts as alleged in Plaintiff’s Complaint and the documents attached to Plaintiff’s Complaint reflect that Plaintiff participates in a health benefits plan sponsored by the BOR (the “Plan”). Under the terms of the Plan, the University System of Georgia is “the legal entity that has adopted the Plan and has authority regarding its operation, amendment, and termination. *The Plan Sponsor is not the Claims Administrator.*” (Doc. 1-2 p. 92, emphasis in original.) Thus, the Plan’s terms are chosen “by the Plan Sponsor to fund and provide delivery of the Employer’s health benefits.” (*Id.*) Under the Plan, as recognized by Plaintiff, as set forth in the Plan documents, and as is common with self-funded plans, BCBSGA is only the claims administrator and has no authority to change the Plan’s coverage or exclusions. (Doc. 1 ¶ 55; Doc. 1-2 p. 92; Doc. 1-6 p. 2.)

As the Plan documents make clear, the Plan Sponsor – the BOR – is responsible for paying for all of the benefits offered to employees such as Plaintiff. The Plan expressly places the financial burden associated with claims on the Board of Regents: “Blue Cross and Blue Shield of Georgia, Inc. was chosen to administer this Plan. The Claims Administrator provides administrative claims payment *and does not assume any financial risk or obligation with respect to claims.*” (Doc. 1-2, p. 87 (emphasis added).) Because the BOR’s Plan is self-insured, BCBSGA

has a fiduciary obligation to administer the contract benefits as established by the BOR and has no flexibility to override the benefits as determined by the BOR. (Doc. 1-6, p. 2.) In other words, because the BOR is responsible for paying all benefits, Blue Cross has no authority or discretion to countermand the benefits exclusions applicable to Plan participants like Plaintiff, as Blue Cross explained to Plaintiff in denying his claim for benefits. (*Id.*)

### Argument

The Eleventh Circuit has applied Eleventh Amendment immunity to private entities when those entities are acting as “an arm” of the state, and particularly when a state would be financially responsible for a judgment against a private entity. When considering the application of Eleventh Amendment immunity to a private entity, “[t]he pertinent inquiry is not into the nature of a corporation's status in the abstract, but its function or role in a particular context. Thus[,] the question in this case is whether and to what extent the[] corporation[] [is] contractually acting as representative[] of the State.” *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). Agency itself is not determinative, but when “a judgment would expose the government to financial liability,” the private entity is to be afforded Eleventh Amendment immunity. *Id.* That exposure does not need to be in the form of a monetary judgment; so long as the effect of the judgment “would ultimately affect the state treasury,” immunity is appropriate. *Id.* at 1312.

The Eleventh Circuit has articulated its test for determining whether a defendant acts as an arm of the state with respect to the transactions underlying a given lawsuit. First, a court should determine “the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise.” *Lake v. Skelton*, 840 F.3d 1334, 1337 (11th Cir. 2016) (quoting *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003 (en banc))). The court then applies

a four-factor test to “determine whether the defendant is an ‘arm of the State’ in his performance of the function.” *Id.* The four factors are: “(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.” *Id.* at 1337-38. In suits for which the state would bear the burden of any judgment, that factor has been described as “dispositive.” *Rosario v. Am. Corrective Counseling Servs.*, 506 F.3d 1039, 1044 (11th Cir. 2007). Viewed in their totality and placing special weight on the fourth factor as *Rosario* directs, the law supports finding of immunity in this case.

Indeed, the facts in *Shands* are similar to the allegations in this case. There, a hospital sued the administrators of a health benefits plan offered and funded by the State of Florida to recover amounts for services provided by the hospital to participants in the plan. 208 F.3d at 1309-10. The hospital had contracted with the administrators to participate in the administrators’ provider network. *Id.* The administrators claimed immunity from suit under the Eleventh Amendment, noting that any judgment would necessarily be satisfied by the health benefits plan and, therefore, the state. *Id.* Noting that immunity under the Eleventh Amendment encompasses state instrumentalities, the Eleventh Circuit stated, “[t]he question in this case is whether and to what extent these corporations are contractually acting as representatives of the State.” *Id.* at 1311. Moreover, the court explained, “The dispositive question for Eleventh Amendment purposes is whether a judgment against [the administrators] would implicate the state treasury or interfere with the administration of the state group insurance program, or whether the claims constitute a private

cause of action, arising out of tort or contract, for which [the administrators] would be financially responsible.” *Id.* at 1311-12.<sup>2</sup>

That “dispositive question” is answered in this case decidedly in favor of Eleventh Amendment immunity. The Plan documents make clear that the BOR bears all financial responsibility for the claims. Consistent with the Eleventh Circuit’s precedent, when a judgment would implicate state funds, Eleventh Amendment immunity applies to an action against a private entity acting as an arm of the state. *Id.* at 1312; *Rosario*, 506 F.3d at 1044. Because the BOR is responsible for funding all benefits and is financially responsible for the Plan, any damages award based on a failure to award benefits would implicate the funds of the BOR and the state.

In addition, Blue Cross is acting as a representative of the state by acting as claims administrator for the BOR’s health benefits plan. As noted above, Georgia law authorizes the BOR to create health benefits plans as part of its plenary authority to manage the affairs of the state’s university system, consistent with the Georgia Constitution’s vesting in the BOR “exclusive power” over the “government, control, and management of the University System of Georgia.” Ga. Const. art. VIII, § 4, para. 1(b); *see also* O.C.G.A. §§ 20-3-31, 20-3-51. As Plaintiff acknowledges in the Complaint, the BOR has elected to establish a self-funded health benefits plan for which it has selected the benefits levels and exclusions, and it specifically has authorized an exclusion of the benefits that Plaintiff has sought in this case. The Plan documents attached to the Complaint establish that Blue Cross, as claims administrator, has no control over the benefits exclusion and must act in accordance with the Plan. Accordingly, the BOR maintains complete

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<sup>2</sup> Though a court has concluded that the Eleventh Circuit abrogated *Shands*’ test for Eleventh Amendment immunity, *see S.K. v. Lutheran Servs. Fla., Inc.*, No: 2:17-cv-691-FtM-99MRM, 2018 WL 2100122 at \*5 (M.D. Fla. May 7, 2018), in fact the test articulated in *Shands* is virtually identical to the test as articulated in *Manders* and restated in *Lake*. *Compare* 208 F.3d at 1311 with *Manders*, 338 F.3d at 1308-09, and *Lake*, 840 F.3d at 1337.

control over the aspects of the Plan that are the subject of this case, and “it is clear that [Blue Cross is] simply [an] administrator[] acting at the behest of the State” with respect to the Plan such that a finding of immunity of warranted. *Shands*, 208 F.3d at 1311.

Because the BOR selected the benefits covered under the Plan and Blue Cross is responsible for administering the Plan subject to the BOR’s decisions, and because the BOR is financially responsible for any benefits to be provided and consequently for any award, Blue Cross is entitled to immunity under the Eleventh Amendment for those claims based on Blue Cross’s allegedly improper failure to pay benefits for Plaintiff’s medical services.

### **Conclusion**

For these reasons, Blue Cross submits that Count I should be dismissed against it as against the BOR, and Blue Cross further submits that all claims against it should be dismissed for the reasons set forth in its Motion to Dismiss.

Respectfully submitted, this 23rd day of January, 2019.

/s/ James A. Washburn

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2019, I filed the foregoing Defendant Blue Cross Blue Shield Healthcare Plan of Georgia's Supplemental Brief Regarding the Application of Eleventh Amendment Immunity via the Court's CM/ECF system which will serve a copy on all counsel of record.

/s/ James A. Washburn

Counsel for Blue Cross Blue Shield  
Healthcare Plan of Georgia, Inc.