

THE HONORABLE ROBERT J. BRYAN

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

C. P., by and through his parents,
Patricia Pritchard and Nolle Pritchard;
and PATRICIA PRITCHARD,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

Case No. 3:20-cv-06145-RJB

**DEFENDANT BLUE CROSS BLUE SHIELD
OF ILLINOIS' RESPONSE TO NOTICE OF
SUPPLEMENTAL AUTHORITY [DKT 135]**

1 Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) hereby responds to the Plaintiff
2 Class’s Notice of Supplemental Authority (the “Notice”) [Dkt. 135].

3 On December 6, 2022, the Plaintiff Class filed a Notice to inform the Court of an opinion
4 issued by a district court in another jurisdiction in *Kadel v. Folwell*, No. 1:19CV272, 2022 WL
5 17415050 (M.D.N.C. Dec. 5, 2022). The Plaintiff Class cites *Kadel* based on the court’s
6 determination in that case that, under the Department of Health and Human Services (“HHS”)
7 2022 proposed rulemaking implementing Section 1557, “the term ‘health program or activity’ in
8 Section 1557 plainly includes health insurance providers and plans.” *Id.* at *2.

9 *Kadel* is not on point. That case did not involve claims brought against third-party
10 administrators (“TPAs”) such as BCBSIL. Instead, it involved claims against a state
11 governmental health department and state governmental health plan. This distinction is significant
12 for two reasons.

13 *First*, the *Kadel* court based its ruling on language in the 2022 Proposed Rulemaking;
14 however, that same proposed rulemaking makes clear that unlike health insurers and governmental
15 entities, TPAs such as BCBSIL may only be liable (1) when the TPA is “responsible for the
16 underlying discriminatory plan design feature”; or (2) when “responsibility for the decision or
17 other action being challenged in the complaint” lies with the TPA, rather than with the plan
18 sponsor. *See* Nondiscrimination in Health and Health Education Programs or Activities, 87 Fed.
19 Reg. 47,824, 47,876-47,877 (August 4, 2022) (the “2022 Proposed Rulemaking”). Neither is true
20 here, as detailed in BCBSIL’s Response to Plaintiffs’ Cross-Motion for Summary Judgment and
21 Reply in Support of Motion for Summary Judgment, [Dkt 118] at 4-7.

22 *Second*, unlike the state governmental health plan in *Kadel*, where there was “no question”¹
23 that the plan received federal funds, Section 1557 does not apply in this case because BCBSIL’s
24 operations as a TPA for self-funded ERISA plans do not receive federal financial assistance. *See*
25 [Dkt. 118] at 17-19. HHS’s 2020 Rule implementing Section 1557, which is currently in effect,
26 specifies that healthcare entities are subject to Section 1557 only for the specific parts of their

27 ¹ *See* 2022 WL 17415050, at *2 n.2.

1 operations that receive and are earmarked for federal financial assistance. *See* 45 C.F.R. § 92.3(b)
2 (“For any entity not principally engaged in the business of providing healthcare, the requirements
3 applicable to a ‘health program or activity’ under this part shall apply to such entity’s operations
4 only to the extent any such operation receives Federal financial assistance.”)

5 Thus, *Kadel* does not support a finding that a TPA such as BCBSIL can be liable under
6 Section 1557, particularly when the exclusion at issue was designed by the plan sponsor, the plan
7 sponsor had final decisionmaking authority over claims subject to the exclusion, and the TPA does
8 not receive any federal funding to administer the plan on behalf of the plan sponsor.

9 Dated this 8th day of December, 2022.

10 KILPATRICK TOWNSEND & STOCKTON LLP

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY [DKT 135], to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

<p>Eleanor Hamburger SIRIANNI YOUTZ SPOONEMORE HAMBURGER 3101 WESTERN AVENUE STE 350 SEATTLE, WA 98121 206-223-0303 Fax: 206-223-0246 Email: ehamburger@sylaw.com</p>	<p><input checked="" type="checkbox"/> by CM/ECF <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>
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DATED this 8th day of December, 2022.

KILPATRICK TOWNSEND & STOCKTON
 LLP

By: /s/ Gwendolyn C. Payton
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