

No. 03-0821

In the
Supreme Court of Texas

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,
PETITIONER

v.

BLUE CROSS BLUE SHIELD OF TEXAS, INC., *ET AL.*
RESPONDENTS

**On Petition for Review from the Third Court
of Appeals of Austin, Texas**

AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER'S PETITION FOR REVIEW

Lauren A. Sobel, Attorney at Law
California State Bar No. 167458
Scott R. Benbow, Attorney at Law
Massachusetts State Bar No. 555870
Consumers Union of U.S., Inc.
West Coast Regional Office
1535 Mission Street
San Francisco, CA. 94103
(415) 431-6747 Telephone
(415) 431-0906 Facsimile

TABLE OF CONTENTS

Statement Of Interest Of Consumers Union In Filing Amicus Curiae Brief	2
Argument.....	4
I. Policymakers And Courts In Many States Have Decided That Blue Cross And Blue Shield Organizations, Including Those Organized And Operated Like Blue Cross And Blue Shield Of Texas, Are Charitable Corporations That Must Set Aside Their Assets When They Either Merge With Out-Of-State Plans And/Or Convert To For-Profit Corporations	4
A. BCBST Is The Exception To The Charitable Trust Rule Even Among Its Affiliated Companies	6
B. Kansas Court Ruled That Blues Plan Owed A Charitable Asset Obligation To The People Of Kansas	7
C. Missouri Courts Ruled That Blues Plan Had Charitable Trust Obligation.....	8
D. Blue Cross And Blue Shield Of Colorado Preserves Its Assets For The Benefit Of Coloradans	9
E. Blue Cross And Blue Shield Of New Hampshire Merged With An Out-Of-State Mutual In A Transaction That Preserved Its Assets For The Benefit Of The People Of New Hampshire	9
F. Attorney General And Blue Cross And Blue Shield Plan In Maine Negotiate The Terms Of The Company’s Charitable Asset Obligation To The People Of The State	10
G. Regulators In Wisconsin Set Aside \$250 Million After Its Blue Cross And Blue Shield Plan Converted To For-Profit Status.....	11
H. After Years Of Empire BCBS Acknowledging Its Charitable Obligation, The New York Legislature Tries To Re-Define Charitable Asset	12
I. Rejections By Regulators And Withdrawals By Blues Plans.....	13

J. The South Dakota Supreme Court Rules Unequivocally That Out-of-State Nonprofit Hospital Chain Must Leave Sale Proceeds in South Dakota.....	14
II. This Court Should Grant The Attorney General's Motion For En Banc Reconsideration Because, Despite The Company's Assertions To The Contrary, Blue Cross And Blue Shield Of Texas Was A Charitable Corporation And Its Charitable Assets Must Be Preserved For The People Of Texas	15
Conclusion	15

No. 03-0821

In the
Supreme Court of Texas
Austin, Texas

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,
PETITIONER

v.

BLUE CROSS BLUE SHIELD OF TEXAS, INC., *ET AL.*
RESPONDENTS

On Petition for Review from the
Third Court of Appeals at Austin, Texas

**AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER'S PETITION FOR REVIEW**

Amicus Curiae Brief

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW CONSUMERS UNION and files this Amicus Curiae brief
in the above-referenced cause, and would respectfully show the Court the
following:

STATEMENT OF INTEREST OF CONSUMERS UNION

IN FILING AMICUS CURIAE BRIEF

Consumers Union of the U.S., Inc. (hereinafter "Consumers Union"), the nonprofit publisher of Consumer Reports, files this *amicus curiae* brief to provide the Court with a national perspective on the sale and conversion of nonprofit health care corporations. Consumers Union has been monitoring the sale and conversion of nonprofit health care corporations for over seventeen years. For the past six years, Consumers Union, along with its partner organization Community Catalyst, has assisted consumer groups, legislators, regulators, courts, and regulators reviewing these transactions in more than 42 states, the District of Columbia, and Puerto Rico.

As a result of regulatory scrutiny over the sale and conversion of nonprofit health care corporations, to date over \$16 billion in health assets have been set aside in foundations to continue the charitable missions of nonprofit organizations that have converted to for-profit corporations. Almost \$5 billion of this amount has come from Blue Cross and Blue Shield conversions.¹

Consumers Union is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health, and personal finance. We work to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is derived solely from the sale of Consumer Reports, other publications, services, noncommercial contributions, grants, and fees.

Consumer Reports, with approximately 4 million paid circulation, and ConsumerReports.org, with approximately 1.2 million paid subscribers, regularly carry articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions that affect consumer welfare. Additionally, Consumer Reports Health Letter has approximately 400,000 paid subscribers. Consumers Union's publications carry no advertising and receive no commercial support.

Consumers Union has been monitoring the merger of the Texas and Illinois Blue Cross and Blue Shield plans since 1996. In 1999, Consumers Union filed an *amicus curiae* brief with this Court to highlight the threat to consumer interests posed by the nonprofit health insurers that undertake significant corporate restructurings without fulfilling their charitable obligations to the public. Furthermore, the brief asserted that Blue Cross and Blue Shield of Texas (BCBST) had been, from its inception, a charitable organization with an obligation to set aside assets when it merged with the plan in Illinois. The Appellees repeatedly denied this assertion before the Trial Court and the Third Court of Appeals. In their brief on the merits, BCBST stated that "BCBST has NEVER received any gifts or charitable contributions." Br. of Appellees at 21. In responding to the *amicus curiae* brief filed by Consumers Union in 1999, BCBST stated that Consumers Union "implies BCBST received initial funding from nonprofit, publicly-supported sources," and

¹ See Addendum A.

responded, without equivocation, that "BCBST has never received a charitable contribution." Br. of Appellees at 5.

The Attorney General has discovered and shared with this Court information suggesting Appellees' unequivocal assertions on issues fundamental to this case were contradicted by a written history, which was authorized, underwritten, and published by BCBST. Samuel Schaal, *Lone Star Legacy: The Birth of Group Hospitalization and the Story of Blue Cross and Blue Shield of Texas* (1999).

Because of Consumers Union's longstanding interest in the case before this Court, we submit this brief to describe the recent history of Blue Cross and Blue Shield restructurings in the four years since we filed our first *amicus* brief with the Third Court of Appeals.

Consumers Union files this *amicus curiae* brief to highlight the detrimental impact this case will have on important consumer interests if this Court does not grant the petition and reverse the judgment of the Third Court of Appeals.

ARGUMENT

I. POLICYMAKERS AND COURTS IN MANY STATES HAVE DECIDED THAT BLUE CROSS AND BLUE SHIELD ORGANIZATIONS, INCLUDING THOSE ORGANIZED AND OPERATED LIKE BLUE CROSS AND BLUE SHIELD OF TEXAS, ARE CHARITABLE CORPORATIONS THAT MUST SET ASIDE THEIR ASSETS WHEN THEY EITHER MERGE WITH OUT-OF-STATE PLANS AND/OR CONVERT TO FOR-PROFIT CORPORATIONS.

Throughout most of its history, the national Blue Cross and Blue Shield Association (BCBSA) prohibited the use of its trademark for for-profit purposes. In 1994, however, BCBSA began allowing BCBS plans to operate as for-profit

companies. Blue Cross of California (BCC) was the first plan to take advantage of the ability to conduct for-profit activity. Although BCC initially tried to deny it had charitable assets, regulators forced BCC to place \$3.2 billion in charitable assets in two nonprofit foundations, The California Endowment and the California HealthCare Foundation, for the benefit of Californians. Since then, over 25 charitable nonprofit BCBS plans have proposed some type of conversion transaction. Many plans, like BCC, originally tried to avoid their charitable obligations. Regulators, the courts, and legislators, however, have acted in the vast majority of states to prevent BCBS plans from denying their charitable histories and taking charitable assets away from their communities.

Texas established the first plan that initiated the Blue Cross and Blue Shield movement. The precedents set in other states are particularly relevant given that they, like BCBST, were treated as charitable trusts because, among other reasons, they solicited and accepted donations from the community. BCBST, incorporated in 1939 as a charitable and benevolent organization, has a long history of helping otherwise uninsured patients obtain the health care they needed by providing low cost insurance first on its own and later through government programs such as Medicare. We urge the Court to consider the recent histories of other states' Blues plans as relevant to the determination of whether BCBST was a charitable organization when it merged with Blue Cross and Blue Shield of Illinois (BCBSIL). The Blue Cross and Blue Shield plans may have been established independently in each state but they all are tied to each other by a common

trademark, historically representing to the public that they would meet certain guidelines and standards – the most prominent being that they were nonprofit insurers created to serve the public good. This has been their slogan, their message, and their mode of operation for over half a century.

A. BCBST is the Exception to the Charitable Trust Rule Even Among Its Affiliated Companies

Not only does the absence of a charitable asset set aside make the BCBST conversion unique nationally, it also makes it unique among the three plans with which it is directly affiliated. In 2001, Health Care Service Corporation (HCSC), the mutual holding company that controls BCBSIL and BCBST, acquired Blue Cross and Blue Shield of New Mexico (BCBSNM). HCSC agreed to set aside the full, fair market value of BCBSNM, \$20 million, in a foundation dedicated to addressing the health care needs of New Mexicans.

Similarly, on December 11, 2002, HCSC entered into a settlement agreement with the Attorney General of Illinois, under which it set aside \$124.6 million in a health care foundation dedicated to the health needs of the children of Illinois.

HCSC has set aside assets in New Mexico and in Illinois. If the judgment of the Third Court of Appeals stands, HCSC will be allowed to treat Texans differently than similarly situated New Mexicans and Illinoisans. Texans will forever lose this valuable charitable health asset.

B. Kansas Court Ruled That Blues Plan Owed a Charitable Asset Obligation to the People of Kansas

Like BCBST, Blue Cross and Blue Shield of Kansas (BCBSK) denied that it had an obligation to set aside assets for the people of its state. In 1997, BCBSK filed a lawsuit against the Kansas Attorney General seeking a declaration that the plan had no charitable trust obligation to the people of Kansas. In January 1998, the court ruled in favor of the Kansas Attorney General. The court denied BCBSK's motion to dismiss, holding that the Attorney General had the right to enforce charitable obligations and seek damages against BCBSK if the Attorney General prevailed in the case. The Kansas Commissioner of Insurance intervened in the case in support of the Attorney General.

In January 2000, ruling on a summary judgment motion, the court found that BCBSK had possessed charitable assets from its inception in the early 1940s through 1969, the year the Kansas legislature repealed the enabling statutes that created Blue Cross and Blue Shield. Blue Cross and Blue Shield of Kansas v. Stovall, No. 97 CV 608, (Kan. Dist. Ct. Shawnee County, Jan. 7, 2000). See also Blue Cross and Blue Shield of Kansas v. Stovall, No. 97 CV 608 (Kan. Dist. Ct. Shawnee County, Apr. 5, 2000).

C. Missouri Courts Ruled That Blues Plan Had Charitable Trust Obligation

Like Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of Missouri (BCBSMO) emphatically denied that it was a charitable organization when it “restructured” in 1994. As part of its restructuring, BCBSMO moved approximately 80% of its business into a for-profit subsidiary called RightCHOICE, but it neither set aside charitable assets nor acknowledged its obligation to do so. When the Department of Insurance sought to review this restructuring, BCBSMO sued the state. The court agreed with the state regulator and ruled that the Blues plan maintained a charitable trust obligation. Order and Judgment, Blue Cross and Blue Shield of Kansas City, Inc. et al., v. Nixon, No. CV197-330CC (Mo. Cir. Ct. Cole County, Sept. 11, 1998). The court based its decision, in part, on the fact that for more than 50 years, BCBSKC “took advantage of tax considerations and status in the community based on its pledge to serve a public benefit mission.” Id. The Court of Appeals of Missouri agreed with the trial court. Blue Cross and Blue Shield of Kansas City, Inc. v. Nixon, 2000 Mo. App. Lexis 939 (2000).

After the Missouri court of appeals ruled, the parties settled. The settlement called for the creation of the Missouri Foundation for Health Inc., which subsequently received approximately \$13 million in start-up cash and 15 million shares of common stock in RightChoice. The foundation was valued at

approximately \$900 million when RightChoice was acquired in 2000 by California-based WellPoint.

D. Blue Cross and Blue Shield of Colorado Preserves Its Assets for the Benefit of Coloradans

In November 1999, Colorado's Insurance Commissioner, William Kirven III, approved BCBSCO's proposed conversion and sale to Anthem Insurance Companies Inc. (Anthem). As part of the approval process, Kirven ensured that the full fair market value of BCBSCO would be preserved. A total of \$155 million was placed in the Caring for Colorado Foundation, a health conversion foundation.

Like BCBST, the Colorado plan had been a social welfare organization, organized under federal law until 1987 as a section 501(c)(4) organization. Further, the plan, like BCBST, charged premiums for health insurance coverage and covered an identified group of people. Yet the Colorado Insurance Commissioner preserved the nonprofit assets, which had accumulated in the nonprofit insurer, for the broader public.

E. Blue Cross and Blue Shield of New Hampshire Merged with an Out-of-State Mutual in a Transaction that Preserved Its Assets for the Benefit of the People of New Hampshire

In 1999, Anthem and Blue Cross and Blue Shield of New Hampshire (BCBSNH) announced that Anthem would purchase BCBSNH. Under the terms

of the deal, the full fair market value of BCBSNH, approximately \$83 million in charitable assets, was set aside in the Endowment for Health, Inc., a foundation whose purpose is to improve the health of the people of New Hampshire.

Like the Texas plan, BCBSNH had been a social welfare organization organized under federal law until 1987 as a section 501(c)(4) organization, had covered an identified group of people, had charged premiums, and had not been the insurer of “last resort.” Yet, unlike BCBST, the plan itself acknowledged that, upon a merger with an out-of-state mutual insurer, it had an obligation to set aside its assets to benefit the people of New Hampshire.

F. Attorney General and Blue Cross and Blue Shield Plan in Maine Negotiate the Terms of the Company’s Charitable Asset Obligation to the People of the State

In 1996, Blue Cross and Blue Shield of Maine (BCBSME) proposed joint ventures with two nonprofit hospitals in Maine in order to establish for-profit HMOs. Soon thereafter, BCBSME and the Attorney General announced that they had reached an "agreement in principle" on BCBSME's charitable status. Because of the longstanding common law charitable trust doctrine, the agreement included provision for the passage of legislation that would require a charitable set-aside in the event of an outright sale to a for-profit corporation.

Ultimately, in 2002, Maine did codify this long standing common law charitable trust doctrine, requiring a charitable asset set aside. When BCBSME and Anthem Insurance Companies announced plans to "affiliate" in 1999, the

companies were required to set aside assets for the people of Maine. Pursuant to the state law, Maine established a foundation with assets valued at approximately \$81 million from the proceeds of the sale.

G. Regulators in Wisconsin Set Aside \$250 Million After Its Blue Cross and Blue Shield Plan Converted to For-Profit Status

In 1999, Blue Cross Blue Shield United of Wisconsin (BCBSUW) announced its plans to convert from nonprofit to for-profit status. BCBSUW proposed to set aside \$250 million in a foundation to support the state's two medical schools. The Insurance Commissioner approved the plan, but required that 35% of the funds be spent on public health projects.

Community organizations in Wisconsin thought that the full \$250 million should be spent on public health projects, and filed a petition for judicial review challenging the Insurance Commissioner's decision. A trial judge heard the case in August 2000 and, in remarks from the bench, upheld the commissioner's decision, reasoning that he could only reverse the commissioner's decision if she exceeded her statutory authority. The Wisconsin court of appeals agreed, reasoning that, "[w]hile we are not bound by an agency's conclusions of law in the same manner as we are bound by its factual findings, we may nonetheless defer to an agency's legal conclusions." *ABC for Health, Inc. v. Commissioner of Ins.*, 640 N.W.2d 510, 514 (Wis. Ct. App. 2001) (stating that Wisconsin statute § 701.01(2) defined a charitable trust as one in which the "income or principal

presently or in the future must be used by the trustee exclusively for a charitable purpose").

H. After Years Of Empire BCBS Acknowledging its Charitable Obligation, The New York Legislature Tries to Re-Define Charitable Asset

When Empire Blue Cross and Blue Shield (Empire), the largest BCBS plan in New York, proposed to convert in 1997, it publicly acknowledged its nonprofit obligations and agreed to preserve 100% of its assets for nonprofit charitable purposes. Like BCBST, Empire was a health insurance plan with paying subscribers, was organized as a nonprofit corporation and was categorized as a 501(c)(4) social welfare organization, which exempted both plans from all federal taxes until 1987.

After the Attorney General issued an opinion that Empire could not convert to a for-profit corporation without a technical change in the nonprofit code, the New York legislature passed legislation seizing 95% of the charitable assets, and sending the remaining 5% to a foundation. (Chapter One of New York's Laws of 2002; Ins. L. §7317.)

Although the legislature recognized that all of the assets belonged in the public realm and could not be diverted to private uses, the law passed allows the charitable assets to be used for a purpose other than Empire's original purpose. The Public Asset was allocated to fund salary increases for health care workers, many of whom are members of the union which supported the legislation.

In August 2002, Consumers Union, Disabled in Action, Housing Works, the New York Chapter of the National Multiple Sclerosis Society, the New York StateWide Senior Action Council, and several individual policyholders filed suit against New York State and Empire Blue Cross to block the conversion as proposed, on the grounds that the state legislation that authorizes it is unconstitutional. *Consumers Union, et al. v. State of New York*, No. 118699/02 (N.Y. Sup. Ct. filed Aug. 21, 2002). While the case is being litigated, the proceeds of Empire initial public offering are in escrow.

I. Rejections by Regulators and Withdrawals By Blues Plans

Regulators in Kansas and Maryland rejected proposals for their Blues plans to convert by deeming that the proposal in each state was not in the public interest. In North Carolina, a Blues plan withdrew its proposal to convert when it faced difficult questions from regulators about the degree to which the Blues plan proposed to maintain authority over the foundation created to receive assets from the conversion. Similarly, the Regence Group, the Blues plans in Idaho, Oregon, Utah, and Washington, withdrew proposals to "affiliate" with Illinois-based Health Care Service Corporation after regulators began examining the degree of control that HCSC was proposing to exert over the charitable assets and the corporate governance of the four states' Blues plans. Regulators questioned whether the companies' proposals to affiliate could more accurately be described

as a *merger*, with ultimate control over the plans' charitable assets being ceded to a company outside of the Northwest region.

J. The South Dakota Supreme Court Rules Unequivocally That Out-of-State Nonprofit Hospital Chain Must Leave Sale Proceeds in South Dakota

Charitable assets must be protected whenever a nonprofit corporation attempts to alter its mission or control of its assets. When nonprofit BCBST merged with an out-of-state corporation, BCBCSIL, its mission and control of its assets were fundamentally changed.

Similarly, Banner Health System, a nonprofit hospital chain, had attempted to remove from South Dakota the proceeds from the sale of seven hospitals and nursing homes to reinvest them in its nonprofit facilities in Arizona and Colorado. When the South Dakota Attorney General objected, Banner Health System sued him in federal court. The South Dakota Supreme Court took this case as a "certified question" from the U.S. District Court.

The South Dakota Supreme Court explicitly held that the assets of a nonprofit health care corporation, as well as the proceeds from the sale of those assets, are subject to the law of charitable trust. 663 N.W.2d 242 (2003). The court also held that an out-of-state corporation must leave these proceeds with the local community upon divestiture.

Like Banner, BCBST should be required to leave the assets with the local community in Texas.

II. THIS COURT SHOULD GRANT THE PETITIONER'S PETITION FOR REVIEW BECAUSE, DESPITE THE COMPANY'S ASSERTIONS TO THE CONTRARY, BLUE CROSS AND BLUE SHIELD OF TEXAS WAS A CHARITABLE CORPORATION AND ITS CHARITABLE ASSETS MUST BE PRESERVED FOR THE PEOPLE OF TEXAS

BCBST took the first step in providing pre-paid nonprofit insurance to those who otherwise would be unable to obtain health care. For years after, the plan continued to advertise and hold itself out as distinct from traditional private insurance. Like many of its sister plans throughout the country, BCBST has a special character and history that cannot be erased. When courts and policymakers in other states have been confronted with the same arguments asserted by Appellee, the vast majority of them have ruled in favor of the beneficiaries of the charitable trust.

CONCLUSION

BCBST was incorporated and has historically operated with the mission of providing a charitable and public service to the people of Texas. BCBST is a charitable organization under Texas common law and as such must preserve its charitable assets for the benefit of Texans. Some BCBS plans have acknowledged their charitable organization status and have willingly preserved their charitable assets. Others, including BCBSTX, have denied their charitable asset obligations. And BCBSTX continues to deny its obligations despite the clear, contradictory assertions in its own book, Lone Star Legacy. When BCBS plans have tried to evade their charitable trust obligations, courts, regulators, and legislatures across the

country have stepped in to protect the charitable assets. This Court must do the same to protect the people of Texas by holding BCBST to its historical obligation to preserve its charitable assets.

WHEREFORE, PREMISES CONSIDERED, we request that this Court grant the Petitioner's petition for review and reverse the judgment of the court of appeals.

Respectfully Submitted,

Lauren A. Sobel, Attorney at Law
California State Bar No. 167458
Scott R. Benbow, Attorney at Law
Massachusetts State Bar No. 555870
Consumers Union of U.S., Inc.
West Coast Regional Office
1535 Mission Street
San Francisco, California 94103
(415)431-6747 Telephone
(415)431-0906 FAX

Proceeds Set Aside from the Conversion
of Blue Cross and Blue Shield Plans

Prepared by Consumers Union

STATE	APPROXIMATE PROCEEDS SET ASIDE
California	\$3.2 billion
Missouri	\$400 million
Wisconsin	\$250 million
Virginia	\$175 million
Colorado	\$155 million
Georgia	\$124 million
New Hampshire	\$83 million
Maine	\$82 million
Kansas	\$75 million
Kentucky	\$45 million
Connecticut	\$41 million
Ohio	\$28 million
New Mexico	\$20 million
Texas	\$10 million (lawsuit pending for \$350 million)
Nevada	\$1.5 million

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on February 9, 2004 *via* facsimile delivery as indicated below, to:

<p>Will D. Davis Dudley McCalla Heath Davis & McCalla 200 Perry Brooks Bldg. Austin, Texas 78701 Phone: (512) 478-5671 Fax: (512) 476-1451</p> <p>William M. Parrish Howard Nirken Jenkins & Gilchrist, P.C. 2200 One American Center 600 Congress Avenue Austin, Texas 78701-3248 Phone: (512) 499-3893 Fax: (512) 404-3502</p> <p>J. Michael Wylie Robert B. Gilbreath Tyree C. Collier Jenkins & Gilchrist, P.C. 1445 Ross Avenue Suite 3200 Dallas, Texas 75202 Phone: (214) 855-4500 Fax: (214) 855-4300 COUNSEL FOR RESPONDENTS</p>	<p>R. Ted Cruz Cassandra Burke Robertson John W. Vinson Office of the Attorney General P. O. Box 12548 Austin, Texas 78711-2548 Phone: (512) 936-1700 Fax: (512) 474-2697 COUNSEL FOR PETITIONER</p>
---	--

Scott Benbow, Staff Attorney
Consumers Union of U.S., Inc.
West Coast Regional Office
1535 Mission Street
San Francisco, CA, 94103
(415) 431-6747 Telephone
(415) 431-0906 FAX