

No. 08-1442 and No. 08-1443

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ARKANSAS BLUE CROSS AND BLUE SHIELD,
A MUTUAL INSURANCE COMPANY,
AND USABLE CORPORATION**

**APPELLANTS/
CROSS-APPELLEES**

v.

**ST. VINCENT INFIRMARY MEDICAL CENTER,
LITTLE ROCK CARDIOLOGY CLINIC, P.A., AND
LITTLE ROCK HMA, INC., d/b/a SOUTHWEST
REGIONAL MEDICAL CENTER**

**APPELLEES/
CROSS-APPELLANTS**

On Appeal From
The United States District Court for the Eastern District of Arkansas

The Honorable James M. Moody, Presiding Judge

**APPELLEES' JOINT BRIEF ON CROSS-APPEAL AND
JOINT RESPONSE BRIEF ON APPEAL**

Thomas B. Staley (#75123)
ROBINSON, STALEY,
MARSHALL & DUKE, P.A.
28th Floor, Regions Bank Building
400 West Capitol, Suite 2891
Little Rock, AR 72201-3415
Telephone: (501) 374-3818
*Counsel for Little Rock HMA, Inc.,
d/b/a Southwest Regional Medical Center*

Niki Cung (#96153)
Erin Thompson (#2005250)
KUTAK ROCK, LLP
214 West Dickson Street
Fayetteville, AR 72701-5221
Telephone: (479) 973-4200
*Counsel for St. Vincent Infirmary
Medical Center*

Jess Askew III (#86005)
Janet L. Pulliam (#79223)
Benjamin D. Brenner (#2004172)
Stephen A. Hester (#2002031)
WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, AR 72201
Telephone: (501) 372-0800
*Counsel for Little Rock Cardiology
Clinic, P.A.*

CORPORATE DISCLOSURE STATEMENT

Appellee Little Rock Cardiology Clinic, P.A. is an Arkansas professional corporation that is owned by Arkansas physicians and has no parent corporation or public companies as owners.

Appellee Little Rock HMA, Inc., d/b/a Southwest Regional Medical Center, is a corporation that is wholly owned by Health Management Associates, Inc., of Naples, Florida, which is a publicly traded company listed on the New York Stock Exchange under the symbol HMA.

Appellee St. Vincent Infirmary Medical Center is a faith-based not-for-profit full service healthcare organization incorporated under the laws of the State of Arkansas. St. Vincent is wholly-owned subsidiary of Catholic Health Initiatives, a privately held corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	vi
STATEMENT OF THE ISSUES.....	vii
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENT	12
ARGUMENT	13
CONCLUSION	37
CERTIFICATE OF COMPLIANCE.....	39
CERTIFICATE OF SERVICE	40
ADDENDUM	41
Opinion and Order issued by Judge Leon Holmes on March 27, 2006, E.D. Ark. No. 4:03-CV-662	ADD-1
Final Judgment and Order of Dismissal issued by Judge Leon Holmes on March 27, 2006, E.D. Ark. No. 4:03-CV-662	ADD-11
Excerpts from Article VI of the Constitution of Arkansas	ADD-13

TABLE OF AUTHORITIES

CASES

<i>Allee v. Medrano</i> , 416 U.S. 802 (1974)	22
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980).....	28
<i>Andrews v. Daw</i> , 201 F.3d 521, 524 n.1 (4th Cir. 2000).....	27
<i>Atlantic Coast Line RR v. Locomotive Eng'rs</i> , 398 U.S. 281 (1970).....	32
<i>Berman v. Denver Tramway Corp.</i> , 197 F.2d 946 (10th Cir. 1952).....	19
<i>Burr & Forman v. Blair</i> , 470 F.3d 1019 (11th Cir. 2006).....	37
<i>Canady v. Allstate Ins. Co.</i> , 282 F.3d 1005 (8th Cir. 2002)	32
<i>Commissioner of Internal Revenue v. Sunnen</i> , 333 U.S. 591 (1948).....	28
<i>Day v. Moscow</i> , 955 F.2d 807 (2d Cir.), <i>cert. denied</i> , 506 U.S. 821 (1992)	27
<i>In re Mooney</i> , 730 F.2d 367 (5th Cir. 1984).....	15
<i>Jenkins v. Kansas City Missouri School Dist.</i> , 516 F.3d 1074 (8th Cir. 2008)	25, 34, 35, 36
<i>John Morrell & Co. v. Local 304A Food & Comm. Workers</i> , 913 F.2d 544 (8th Cir. 1990), <i>cert. denied</i> , 500 U.S. 905 (1991)	28
<i>Kentucky Ass'n of Health Plans, Inc. v. Miller</i> , 538 U.S. 329 (2003)	2, 10, 13, 26
<i>Kokkonen v. Guardian Life Ins. Co. of Am.</i> , 511 U.S. 375 (1994)	25, 26, 35, 36
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	22

<i>NBA v. Minnesota Prof. Basketball Ltd. P'ship</i> , 56 F.3d 866 (8th Cir. 1995).....	32
<i>Peacock v. Thomas</i> , 516 U.S. 349 (1996)	25, 35, 36
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	22
<i>Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.</i> , 964 F.Supp. 1285 (E.D. Ark. 1997), aff'd, 154 F.3d 812 (8th Cir. 1998).....	1
<i>Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.</i> , 413 F.3d 897 (8th Cir. 2005)	3
<i>Scott v. Kuhlmann</i> , 746 F.2d 1377 (9th Cir. 1984).....	27
<i>Sea-Land Services, Inc. v. Gaudet</i> , 414 U.S. 573 (1974)	28
<i>Telecommunications Research and Action Ctr. v. FCC</i> , 750 F.2d 70 (D.C. Cir. 1984).....	37
<i>Twin City Const. Co. of Fargo v. Turtle Mountain Band of Chippewa Indians</i> , 911 F.2d 137 (8th Cir. 1990).....	23, 24

STATUTES

28 U.S.C. § 1367(c)	5
28 U.S.C. § 1651	36
28 U.S.C. § 2283	7, 13, 32
28 U.S.C. § 2403	9
29 U.S.C. § 1144(a)	14
ARK. CODE ANN. § 23-99-201 through 209	2
ARK. CODE ANN. § 23-99-203(d)	21
ARK. CODE ANN. § 23-99-204.....	2
ARK. CODE ANN. § 23-99-207.....	2, 21, 23

RULES

Fed. R. Civ. P. 60(b)(5).....3

OTHER AUTHORITIES

RESTATEMENT, SECOND, JUDGMENTS § 41(1)(d).....21

RESTATEMENT, SECOND, JUDGMENTS § 27 28, 29

RESTATEMENT, SECOND, JUDGMENTS § 24(1)31

RESTATEMENT, SECOND, JUDGMENTS § 2531

JURISDICTIONAL STATEMENT

The district court dismissed the complaint with prejudice on December 5, 2007. Plaintiffs filed a timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) on December 19, 2007. The district court denied that motion by order entered January 29, 2008. Plaintiffs filed a timely notice of appeal on February 11, 2008, and defendants filed a timely joint notice of cross appeal on February 22, 2008.

Even though all notices of appeal have been filed on a timely basis, the defendants jointly contend that there is no federal subject-matter jurisdiction over the case below or this appeal. In their Jurisdictional Statement, Brief at vii, plaintiffs say both that the case involves a federal question under ERISA and that federal jurisdiction derives from *Prudential I*. These defendants dispute this. The complaint below, App. at 10, states that *Prudential I* — not this case — involved a federal question under ERISA. The only basis for federal jurisdiction alleged below was the *Prudential I* injunction.

The injunction in *Prudential I* had been dissolved for more than two years at the time the plaintiffs filed their complaint in this action. The dissolved injunction in *Prudential I* provided no basis for ancillary jurisdiction in the district court, and there is no other basis for federal jurisdiction in this lawsuit. The absence of federal jurisdiction is one of the points in the defendants' cross appeal.

STATEMENT OF THE ISSUES

- I. **THE INJUNCTION IN *PRUDENTIAL I* DID NOT REACH THE ISSUES IN THIS CASE.**
- II. **THE *PRUDENTIAL I* INJUNCTION DID NOT AFFECT PARTIES WHO WERE NOT BEFORE THE COURT IN THAT CASE.**
- III. **THE *PRUDENTIAL I* INJUNCTION WAS DISSOLVED ON AUGUST 2, 2005 AND CAN HAVE NO CURRENT EFFECT ON THE RIGHTS OR OBLIGATIONS OF THE DEFENDANTS.**
- IV. **PLAINTIFFS' CLAIMS ARE BARRED BY THE ADJUDICATION IN BLUE CROSS I.**
- V. **THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT WITH PREJUDICE UNDER THE ANTI-INJUNCTION ACT.**
- VI. **THERE IS NO FEDERAL SUBJECT-MATTER JURISDICTION.**

STATEMENT OF THE CASE

Plaintiffs claim that the now-dissolved permanent injunction in *Prudential I*¹ reached the three private defendants in this lawsuit by virtue of the intervention of the Arkansas Attorney General in *Prudential I*. The district court rejected this theory and specifically found that the defendants were not parties in *Prudential I* and were not bound by that injunction. This was correct and should be affirmed. The district court furthered found that it lacked subject-matter jurisdiction to hear the case. This was also correct and should also be affirmed.

The most difficult issue in this appeal is sorting through the different lawsuits that are involved. There are in essence five separate cases.² In the Statement of Facts, the defendants will provide a chronology of the different cases and the parties and issues that they involved. In this Statement of the Case, the defendants will describe how the cases relate to one another for purposes of this appeal.

The injunction in *Prudential I* prohibited the named defendants in that case, which included the Arkansas Attorney General, from enforcing the Patient

¹ *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 964 F.Supp. 1285 (E.D. Ark. 1997), *aff'd*, 154 F.3d 812 (8th Cir. 1998). The defendants refer to both this District Court opinion and the opinion on appeal as "*Prudential I*."

² *Prudential I* (enjoining enforcement of the AWP), *Blue Cross I* (federal declaratory judgment action by Blue Cross), *Prudential II* (dissolution of injunction in *Prudential I*), *Blue Cross II* (pending state court action brought by providers, defendants here), and *Blue Cross III* (this current action and appeal).

Protection Act of 1995 (“PPA”).³ There was no claim or determination in *Prudential I* that the Arkansas Attorney General represented the interests of all citizens of Arkansas with respect to private claims for damages under the PPA remedial statute, [ARK. CODE ANN. § 23-99-207](#). In addition, there was no claim or finding that the Arkansas Attorney General had standing to represent any person or health-care provider who had a claim for damages under the AWP statute. The Attorney General had no such claim.

The *Prudential I* injunction was in effect when the Supreme Court decided *Miller*, the Kentucky AWP case.⁴ Shortly after that decision, the plaintiffs filed a separate suit against the three defendants in this action in federal court, making exactly the same claims made in the current lawsuit: that the three defendants could not assert claims for damages or other remedies against the plaintiffs by virtue of the pendency of the *Prudential I* injunction. That lawsuit is *Blue Cross I*,⁵

³ [ARK. CODE ANN. § 23-99-201 through 209](#). The PPA includes a specific Any Willing Provider (“AWP”) provision at [ARK. CODE ANN. § 23-99-204](#).

⁴ [Kentucky Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329 \(2003\)](#).

⁵ *Arkansas Blue Cross and Blue Shield, a Mutual Insurance Co., and US Able Corp., plaintiffs, v. St. Vincent Infirmary Medical Center, Little Rock Cardiology Clinic, P.A., Southwest Regional Medical Center; and State of Arkansas, by and through the Attorney General of the State of Arkansas, defendants*, No. 4-03-CV-00662 (E.D. Ark.).

and the pertinent pleadings, orders and judgment are in the appendix.⁶ In addition, the defendants have attached the order and judgment in *Blue Cross I* in their Appellees' Addendum to this Brief.

The plaintiffs in *Blue Cross I* made the same claim that they make in the current lawsuit: that *Prudential I* prohibits any suit for damages under the PPA. App. 53-54, 61-62 (seeking declaration that "... the *Prudential* case, bars any claims against plaintiffs or others similarly situated..." and that "no damages are due to the provider defendants under the AWP statute.") The proceedings in *Blue Cross I* were stayed pending resolution of issues concerning the injunction in *Prudential I* in view of the Kentucky decision. The *Prudential I* defendants first sought a stay and recall of the mandate from this Court, but this Court denied that relief.⁷ Then the defendants in *Prudential I* filed a motion in the district court asking that the permanent injunction be dissolved. That motion was filed under Fed. R. Civ. P. 60(b)(5). The district court dissolved that injunction by order entered February 12, 2004, App. 322-29, and this Court affirmed in an opinion referred to as *Prudential II*.⁸

⁶ *Blue Cross I* Complaint: App. 43-68; *Blue Cross I* Opinion and Order: App. 69-78; *Blue Cross I* Judgment: App. 79-80.

⁷ *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr.*, 413 F.3d 897, 902-03 (8th Cir. 2005) ("*Prudential II*").

⁸ *Supra*, note 7.

The district court dissolved the *Prudential I* injunction in its entirety on February 12, 2004, App. 329, and it stayed the effect of that ruling pending appeal, App. 330-32. This Court affirmed the dissolution of the injunction in part and reversed it in part, holding that the injunction should remain as to ERISA self-funded plans, and the district court entered a new order in accordance with this Court's mandate on August 2, 2005. App. 333-34. This case does not concern ERISA self-funded plans in any way. The *Prudential I* injunction was dissolved entirely insofar as the issues under the PPA involved in this case.

The order on remand from *Prudential I* addressed both the mandate on the appeal from the order dissolving the *Prudential I* injunction and the stay of that order pending appeal. *Id.* The plaintiffs place undue emphasis on this order on remand, arguing that the *Prudential I* injunction remained in effect until August 2, 2005, which is immaterial to the current appeal, and that the federal courts "lifted" the *Prudential I* injunction "prospectively." On this latter point the plaintiffs use the word "lift" in contrast to the word "dissolve," hoping to obtain a rhetorical boost to their appeal. They contend that a "lifted" injunction still exists, and they avoid the use of the word "dissolved," which implies that the injunction no longer exists. This word play assumes great significance in the plaintiffs' theory of the case, and it is a primary ground of dispute.

After the *Prudential I* injunction was dissolved, Chief Judge Leon Holmes determined the merits of the plaintiffs' claims in *Blue Cross I*. Judge Holmes dismissed the plaintiffs' claims with prejudice, holding that the claims were foreclosed by the disposition of the merits of the injunction in *Prudential I*. Appellees' Add. at 6.⁹ That dismissal on the merits and with prejudice serves as the *res judicata* and collateral estoppel bar asserted in the cross appeal in this case.

In *Blue Cross I*, Judge Holmes also dismissed *without* prejudice the defendants' claims for damages under the PPA. Appellees' Add at 8.¹⁰ Judge Holmes determined that the counterclaims raised novel and complex issues of state law that would be better determined by the state courts of Arkansas. Appellees' Add. at 6-9. The defendants then filed a state-court lawsuit, *St. Vincent Infirmary Medical Center; Little Rock Cardiology Clinic, P.A.; and Little Rock HMA, Inc. d/b/a Southwest Regional Medical Center v. Arkansas Blue Cross and Blue Shield*,

⁹ “[T]he medical providers are entitled to judgment as a matter of law on all five counts in the Complaint of Blue Cross and USABLE except in so far as Blue Cross and USABLE request a declaration that the Patient Protection Act may not be enforced as to self-funded plans and as to that claim, there is no case or controversy to be adjudicated. Accordingly, the Complaint of Blue Cross and USABLE will be dismissed with prejudice, except as to its claim for a declaration that the Patient Protection Act does not apply to self-funded plans; and as to that claim the Complaint will be dismissed without prejudice.”

¹⁰ Judge Holmes found that Count II of the counterclaims “is a claim for monetary damages under Arkansas law brought by Arkansans against Arkansans.” Judge Holmes exercised his discretion under 28 U.S.C. § 1367(c) to decline to exercise supplemental jurisdiction with respect to the claims for monetary damages asserted by these Arkansas medical providers against these Arkansas insurers.

a Mutual Insurance Company, and USABLE Corporation, Circuit Court of Pulaski County, Arkansas, Sixth Division, Case No. CV-2006-4935 (herein “*Blue Cross II*”), as a continuation of their counterclaims in *Blue Cross I*. *Blue Cross II* remains pending, and the plaintiffs in the current appeal are the defendants there. In *Blue Cross II*, the current plaintiffs have made arguments identical to those raised below and in this appeal concerning the effect of the dissolved *Prudential I* injunction. App. 131-32. The state court judge has rejected those arguments.

In the current lawsuit, plaintiffs assert the same claims that they asserted in *Blue Cross I*: declaratory and injunctive relief prohibiting the prosecution of the damages claims under the PPA. Compare current complaint, App. 7-10, 12-15, to *Blue Cross I* complaint, App. 49-54.¹⁰ However, plaintiffs did not sue the state court judge or the state of Arkansas in the case below.

The defendants moved to dismiss for lack of federal jurisdiction because the claims in this case are not ancillary to the dissolved injunction in *Prudential I*. Defendants also raised the bars of *res judicata* and collateral estoppel. The specific bars arise from the dismissal with prejudice of the plaintiffs’ identical claims here and in *Blue Cross I*. The district court rejected these grounds for dismissal but dismissed the plaintiffs’ claims with prejudice in any event because

¹⁰ Plaintiffs admit that the case now on appeal was filed in 2007 as a new action, but they allege that it arose from the *Prudential* case because it sought enforcement of the injunction entered in *Prudential I*, Brief at 2.

they are barred by the Anti-Injunction Act, [28 U.S.C. § 2283](#), which prohibits federal-court injunctions against pending state-court lawsuits. App. 440-45. In reaching that conclusion, the district court in this lawsuit specifically found that *Prudential I* did not involve all of the same parties as the instant case. App. 443; Appellants' Addendum ("Aplts Add.") at 7.

Plaintiffs appeal, arguing that Judge Moody had no discretion to dismiss or deny their claims for injunctive and declaratory relief. The cross appeal asserts the same questions concerning federal jurisdiction, *res judicata* and collateral estoppel that were raised in the motion to dismiss.

STATEMENT OF FACTS

Prudential I was filed in 1995 by plaintiffs Prudential Insurance Company of America, Prudential Health Care Plan, Inc. (“Prudential HMO”), HMO Partners, Inc., Arkansas AFL-CIO, Tyson Foods, Inc. and the United Paperworkers International Union, AFL-CIO. 964 F.Supp. at 1289. The plaintiffs here, Blue Cross and US Able Corp., were never parties in *Prudential I*. The defendants in *Prudential I* were the State of Arkansas and the following state officials: the Governor, the Attorney General, the Director of the Department of Health and the Commissioner of the Department of Insurance. *Id.* By an amended complaint the following defendants were added to the case: American Medical International, Inc., d/b/a National Park Medical Center; Bryan Russell, D.C.; Y.Y. King, M.D.; George Haas, O.D.; and Bryan Ashley, O.D. *Id.* The district court dismissed the state officers from the case. *Id.* The three defendants here were never parties to *Prudential I*.

The complaint asserted that the PPA was preempted by three federal statutes, including ERISA, and that the PPA violated 42 U.S.C. § 1983. National Park Medical Center counterclaimed to seek a declaratory judgment that the PPA was exempted from ERISA and an injunction requiring Prudential, Prudential HMO and HMO Partners to comply with the PPA. *Id.* The Attorney General

“intervened in defense of the PPA arguing that the case presented a constitutional challenge to Arkansas statutes affecting the public interest.” *Id.*

The Attorney General’s intervention motion and brief are not in the record but are available as public records in *Prudential I*. The Attorney General asserted a statutory right to intervene under [28 U.S.C. § 2403](#). State of Arkansas’ Motion to Intervene, No. LR-C-95-514 (E.D. Ark.), filed January 24, 1996, at p. 2. This federal statute permits a state to intervene to present evidence and argument on the question of constitutionality of a state statute asserted in a federal case in which the state is not a party. In its brief in support of intervention, the State argued that the complaint in *Prudential I* raised “a constitutional challenge to the PPA under the Commerce Clause and, with respect to their preemption arguments, under the Supremacy Clause of the United States Constitution.” Brief in Support of State of Arkansas’ Motion to Intervene, No. LR-C-95-514 (E.D. Ark.), filed January 24, 1996, at p. 2. There was no claim that the State of Arkansas appeared for any purpose relating to damages claims of any person or entity under the PPA.

Blue Cross I was filed on August 19, 2003, by plaintiffs Blue Cross and USAble Corporation. App. 43. None of the plaintiffs in *Prudential I* was a party to *Blue Cross I*. The defendants were the same defendants as in this case, as well as the State of Arkansas. *Id.*

The complaint in *Blue Cross I* sought a declaratory judgment based on *res judicata* and the permanent injunction in *Prudential I*, App. 53, in addition to claims of implied repeal, violation of due process, ERISA preemption based on *Miller*, the Kentucky AWP case, and construction of the PPA. App. 55-61. The three defendants brought counterclaims for damages under the PPA and for a declaratory judgment that the PPA was not preempted, according to *Miller*. The case was assigned to Judge Eisele and was stayed pending developments in *Prudential* in light of *Miller*. The case was ultimately transferred to Judge Holmes. During the stay, the *Prudential I* injunction was dissolved by Judge Moody, but that Order was stayed pending appeal to this Court. This Court affirmed Judge Moody's decision in *Prudential II*, and the stay was lifted. In March of 2006, Judge Holmes dismissed all of the Blue Cross' claims with prejudice and dismissed the providers' counterclaims without prejudice. Appellees' Add. at 9, 11.

In *Blue Cross II*, currently pending in state court, the plaintiffs are appellees St. Vincent Infirmary, Little Rock Cardiology Clinic and Southwest Regional Hospital. App. 127. The defendants are appellants Blue Cross and USABLE. *Id.* As the continuation of the counterclaims brought in *Blue Cross I*, the claims are for damages under the PPA. App. 17-22. There are no counterclaims. App. 127-38. The state court has limited the time periods for any claims for damages to the time

beginning October 20, 1998 for St. Vincent; October 23, 1998, for Little Rock Cardiology; and October 21, 1998, for Southwest Regional Medical Center.

App. 373-74. The state court also barred any claim for damages by any of the plaintiffs after the effective date of Act 960 of 2005. App. 371-72.

The current complaint asserts the same claim as Count I of *Blue Cross I*. Compare App. 7-15 with App. 43-44, 49-50, 53-54, 61. The relief sought in the current complaint is an injunction against prosecution of the damages claims in *Blue Cross II*, App. 15, while the relief sought in *Blue Cross I* included a declaration that “damages are not due to the provider defendants under the Arkansas AWP statute.” App. 62.

SUMMARY OF ARGUMENT

Prudential I involved entirely different parties and a different legal question, as Judge Moody correctly concluded. The dissolved injunction in that case offers no support to plaintiffs' effort to halt the prosecution of the state-law damages claims pending in *Blue Cross II*. Even if that injunction had not been dissolved in all respects pertinent to this case, Judge Moody correctly found that his injunction in *Prudential I* did not reach the claims raised in this case. Finally, Judge Moody correctly determined that the Anti-Injunction Act bars the relief requested here. For all of these reasons, the judgment must be affirmed on plaintiffs' appeal.

On the cross appeal, this Court should examine the dismissal on the merits of the identical legal claims raised in *Blue Cross I* and determine that the plaintiffs' claims here are barred by issue and claim preclusion. In the alternative, this Court should examine the rules of ancillary jurisdiction and dismiss this case outright for lack of federal jurisdiction because the dissolved injunction in *Prudential I* supplies no federal jurisdiction over the claims in this case, and there is no independent basis for federal jurisdiction. For these reasons, this Court should affirm the judgment below on the alternate grounds presented by the cross appeal.

ARGUMENT

The plaintiffs argue that the now-dissolved *Prudential I* injunction reached beyond the parties to that action and had binding effects upon the private damages claims of the three defendants in this case by virtue of the intervention of the Arkansas Attorney General. This is wrong on numerous factual and legal grounds.

First, Judge Moody, the author of the now-dissolved injunction, held that the injunction did not have the effect argued by the plaintiffs. Second, the dissolved injunction bound only the parties to that action and had no effect on the damages claims of absent litigants such as these defendants. Third, the *Prudential I* injunction was dissolved no later than August 2, 2005, and can have no effect on the current rights or obligations of any party or person; indeed, in *Miller* the Supreme Court overruled the holding and rationale of *Prudential I*, destroying its use as precedent. Fourth, the same claim asserted by these plaintiffs against these defendants was addressed on the merits and dismissed with prejudice by Judge Holmes in *Blue Cross I*, and that adjudication bars this lawsuit. Fifth, plaintiffs' efforts to enjoin a pending damages action in state court is barred by the Anti-Injunction Act, [28 U.S.C. § 2283](#), as Judge Moody determined below. Finally, because it has been dissolved, the *Prudential I* injunction is no longer in existence and cannot provide a basis for federal subject-matter jurisdiction in cases filed after August 2, 2005, and there is no other basis for federal jurisdiction in this lawsuit.

I. THE INJUNCTION IN *PRUDENTIAL I* DID NOT REACH THE ISSUES IN THIS CASE.

The actual injunction issued by Judge Moody in *Prudential I* is the linchpin of the plaintiffs' legal theory in this case: the only legal grounds on which the plaintiffs assert any right to relief is based on the language of the now-dissolved injunction. In this light, it is remarkable that the plaintiffs never even recite the language of the injunction entered in *Prudential I*. Had they done so, it would be immediately apparent that the injunction did not reach the issues raised in this case.

Before appeal, Judge Moody's injunction in *Prudential I* stated: "Defendants are hereby permanently enjoined from enforcing the PPA 'insofar as it relates to any employee benefit plan described in section 1003 (A)' See [29 U.S.C. § 1144\(a\)](#)." [964 F.Supp. at 1299-1300](#). On appeal, this Court broadened the injunction beyond the ERISA-covered plans. "We hold instead that the Arkansas PPA is pre-empted in its entirety and that appellees are entitled to injunctive relief permanently enjoining appellants from enforcing the Arkansas PPA in its entirety." [154 F.3d at 832](#). On remand, the district court entered an amended order stating that the "Arkansas Patient Protection Act is pre-empted in its entirety and defendants are enjoined from enforcing the Arkansas Patient Protection Act in its entirety." App. at 320.

When the plaintiffs filed their current lawsuit and asserted that the now-dissolved injunction bars litigation of the pending state-court damages action,

Judge Moody held specifically that *Prudential I* did not have the legal effect that the plaintiffs claim. To the contrary, as the author of the dissolved injunction in *Prudential I*, Judge Moody concluded that the plaintiffs argued for enforcement of “an order the . . . court did not make.” Aplt’s Add. at 8 (citation omitted).

In *Prudential*, this Court found that the AWP was pre-empted by ERISA and enjoined the State of Arkansas from enforcing the AWP statute from January 31, 1997 to August 2, 2005. In the state court action, the Providers seek damages from BCBS and USABLE for their refusal to allow the Providers to be included in the BCBS and USABLE healthcare networks. Although a federal court has the authority to enforce its injunctions, this theory “does not support jurisdiction of a court to issue ‘an injunction to enforce an order the . . . court did not make.’” *In re Mooney*, 730 F.2d 367, 374 (5th Cir. 1984).

Aplt’s Add. at 7-8.

The plaintiffs’ legal arguments on appeal confirm that their theory assumes an injunction that Judge Moody did not in fact make. Referring to the time when the *Prudential I* injunction was in effect, the plaintiffs argue “had any of the provider parties filed a lawsuit in state court during that period seeking damages under the Arkansas AWP Act, the district court would have had complete power to enforce its permanent injunction by enjoining such a state court action.” Brief at 13. This hypothetical presumes that Judge Moody would have issued an additional injunction against the additional parties not before him in *Prudential I*. Whether in fact Judge Moody would have taken that action is beside the point; the important and deciding issue is the fact that the remedy would have required an additional

injunction, as the plaintiffs admit. This concession defeats the plaintiffs' legal theory.

Judge Moody, as the author of the *Prudential I* injunction, has a natural advantage over all others when it comes to interpreting the scope of his injunction. He knows what he wrote and what he intended. In view of what he knows and what he wrote, Judge Moody determined in response to the plaintiffs' current lawsuit that they sought enforcement of an order that he did not make. For this reason alone, the dismissal with prejudice should be affirmed.

II. THE *PRUDENTIAL I* INJUNCTION DID NOT AFFECT PARTIES WHO WERE NOT BEFORE THE COURT IN THAT CASE.

A second linchpin to the complaint in this case is that the defendants were bound by the now-dissolved injunction in *Prudential I* notwithstanding the fact that they were not parties to that lawsuit. Although the plaintiffs claim that this effect derives from the intervention of the Arkansas Attorney General in *Prudential I*, the plaintiffs never set forth any legal argument to support this claim. The claim is legally unsupportable, and Judge Moody was correct to reject it.

Judge Moody specifically concluded that the current defendants were not parties in *Prudential I*. "Further, *Prudential* did not involve all of the same parties as the instant case." Aplt's Add. at 7. The parties to *Prudential I* are listed at [964 F.Supp. 1289](#); the three defendants were not parties to *Prudential I*.

While the plaintiffs do not claim that the defendants were named parties in *Prudential I*, they argue that current defendants “must legally be *deemed* parties to the *Prudential* litigation because their interests were represented by the State of Arkansas, whose participation bound all its citizens, including the provider parties, to the results.” Brief at 23-24. To support this argument, the plaintiffs argue that a federal court may extinguish a state-law right of action. Brief at 24. But this theoretical point cannot be true when the federal action having that effect has been dissolved, as has the injunction in *Prudential I*. If *Prudential I* could ever be construed as extinguishing a state-law right of action (which it did not do — the injunction prohibited enforcement of the statute rather than extinguished a cause of action), then the plaintiffs’ legal theory would fail because the federal court action was dissolved as of August 2, 2005, at the very latest. It had no effect on subsequent claims. Moreover, the very nature of the federal action — an injunction against enforcement of an Act of the General Assembly of Arkansas — means that the dissolution of the injunction had the effect of restoring that legislative enactment as the law of Arkansas. By no means can this injunction ever be construed as a federal court action that “extinguished” a cause of action, and the plaintiffs provide no legal support for this argument.

The simple truth of the matter is that the damages claims asserted by these three defendants are set forth in the Patient Protection Act of 1995. Although the

Prudential I defendants were enjoined from enforcing the PPA for a period of years, there was never any federal court action to invalidate that Act or any one of its provisions. To the contrary, the enforcement of the Act was suspended, but the Act remained a part of the law of Arkansas. When the injunction was dissolved, then the law of Arkansas expressed in the PPA was restored.¹¹

The plaintiffs even attempt to rewrite the injunction from *Prudential I* in claiming that the injunction deprived non-parties of damages claims. Thus, they argue that “the district court decreed that the State of Arkansas could not legally confer on its citizens any right to damages under the AWP Act,” and that the “district court necessarily held as well that no citizen could enforce such eliminated derivative rights.” Brief at 25 and 26. This over-exuberant interpretation of the injunction in *Prudential I* strays into fantasy, because there is no language in any of the federal court decisions that supports it. Once again, by their own hand, the plaintiffs demonstrate that they seek enforcement of an order that Judge Moody did not make. Judge Moody did not make an order that reached

¹¹ In their lengthy footnote on pages 20 and 21, plaintiffs complain that it is fundamentally unfair for them to be subjected to the law of Arkansas expressed in the PPA. To the contrary, the plaintiffs operated in violation of the PPA, which is a valid, regularly-enacted statute of Arkansas, for years on the strength of the *Prudential I* injunction, to which *not even the plaintiffs were parties*. See [964 F.Supp. at 1289](#). The plaintiffs acquired no immunities to the provisions of that law, and they have nothing but their own impassioned plea to support their request for a blanket exemption from the PPA from this Court. Their claim of entitlement gets them nowhere.

any and all private damages claims of citizens of Arkansas who were not before the Court in *Prudential I*. We know this both because of the language used in the injunction and because Judge Moody himself told us this as the author of the *Prudential I* injunction in dismissing the complaint below.

The plaintiffs assert two additional authorities to argue that the Attorney General represented the interests of these defendants in their damages claims. They rely on [*Berman v. Denver Tramway Corp.*, 197 F.2d 946 \(10th Cir. 1952\)](#). That case does not help the plaintiffs, because the federal court had entered a final decree permanently enjoining the City and County from raising rates for tram fares beyond certain limits. Twenty-five years later, Mr. Berman filed suit in state court concerning an ordinance that dealt with tram fares, and the Denver Tramway Corp. filed an action in federal court alleging “that the institution and maintenance of the action in the state court constituted an effort on the part of Berman to relitigate matters previously determined and adjudicated in the action in the United States Court.” [197 F.2d at 949](#). The federal courts prohibited Berman from attacking the existing federal injunction in the state-court lawsuit.

Berman involved an injunction that had not been dissolved. In stark contrast, the dissolution of the injunction in *Prudential I* distinguishes this case from *Berman*. Indeed, for the injunction in *Prudential I* to have the effect claimed by the plaintiffs in this action, *Berman* demonstrates that the injunction must still

be in existence. Yet the *Prudential I* injunction has been dissolved, and this supports dismissal of plaintiffs' complaint.

The plaintiffs also rely on bare citation to four separate provisions of the Arkansas Constitution in support of their theory that the Arkansas Attorney General somehow represented and resolved the private damages rights of the current defendants (and all other never-sued citizens of Arkansas) in *Prudential I*. But those constitutional provisions do not support the plaintiffs' theory. Sections 1, 3 and 4 of Article VI to the Arkansas Constitution simply deal with the election of executive officers of the state, including the Attorney General. See attached Appellees' Add. at 13-15. These provisions have nothing to do with the powers of the Attorney General, and they do not even suggest that the Attorney General has the power to represent the private damages interests of citizens of Arkansas. Section 22 of Article VI states that the Attorney General, among the other executive officers of the State, "shall perform such duties as may be prescribed by law." See attached Appellees' Add. at 17. The plaintiffs do not follow this by citing any provision of Arkansas law that would permit the Attorney General to represent the private damages interests of citizens of the State of Arkansas in any lawsuit, let alone in the circumstances of *Prudential I*. These constitutional citations do not support the plaintiffs' legal argument, and in fact they reveal that their legal argument is woefully incomplete, because the Constitution requires

other statements of positive law in order to complete the argument, and these authorities are not presented.¹²

The plaintiffs assume but do not examine whether the Arkansas Attorney General would even have standing under Article III of the United States Constitution to represent the interests of parties not before the Court in *Prudential I*. This is another gaping omission in the plaintiffs' legal argument. The Arkansas Attorney General would never have had standing to assert a claim for damages pursuant to [ARK. CODE ANN. § 23-99-207](#) as it existed before 2005 because that cause of action existed only on behalf of a "person adversely affected" by a violation of the PPA, former [ARK. CODE ANN. § 23-99-207](#), and the class did not include the Arkansas Attorney General. (After amendment in 2005, the statute eliminated the damage remedy and limited the proper parties to a "health care provider" in [ARK. CODE ANN. § 23-99-203\(d\)](#), a definition that does not include the

¹² For the same reason, the plaintiffs gain nothing from their citation to RESTATEMENT, SECOND, JUDGMENTS § 41(1)(d). The RESTATEMENT correctly says that some public officials may in some circumstances have authority to represent the interests of absent parties. But, like the citation to the Arkansas Constitution, this rule would apply only if the argument were completed by citation to the specific law that authorized the representation. Here there is none. Moreover, the rule in § 41 is subject the exceptions of § 42, which include cases where notice is required, as would certainly be the case with the defendants' damages claims. See *infra* at p. 22.

Plaintiffs also cite two public-rights doctrine precedents on page 30 of their Brief. These are inapposite because the defendants' PPA damages claims are private rights, not public rights.

Attorney General.)¹³ The defendants are aware of no legal theory that would permit a party who has no standing to assert a claim on behalf of absent parties in a federal lawsuit; all precedent is to the contrary. *E.g.*, *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974). Moreover, even if the standing hurdle could be cleared, there would be a basic question of due process, because a claim for damages of an absent litigant may not be compromised in the absence of notice that satisfies the rudiments of due process, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), and the opportunity to opt out of the case and avoid the adjudication, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813-14 (1985).

For all of these reasons, the district court was correct to dismiss the complaint with prejudice. The plaintiffs' premise that the result of *Prudential I* bound the defendants with respect to their damages claims is wholly unsupported by any persuasive precedent and would create grave constitutional issues under Article III and the due process clauses of the United States Constitution.

III. THE *PRUDENTIAL I* INJUNCTION WAS DISSOLVED ON AUGUST 2, 2005 AND CAN HAVE NO CURRENT EFFECT ON THE RIGHTS OR OBLIGATIONS OF THE DEFENDANTS.

Another linchpin of the plaintiffs' legal theory is that *Prudential I* is a "still-operative injunction that by its terms bars the State of Arkansas and all its citizens

¹³ In fact, Judge Fox of the state court has limited the damages claims in *Blue Cross II* to the time before this amendment took effect. App. 371-72.

from enforcing the AWP act before August 2, 2005.” Brief at 19. This startling assertion is incorrect in view of the fact that the injunction has been dissolved.

In this Court’s opinion, dated June 29, 2005, upon which the district court issued its Order in *Prudential II*, this Court held “that the Arkansas PPA is saved from preemption under ERISA § 514 except with regard to self-funded ERISA plans. We also hold that ERISA § 502 completely preempts the civil penalties provision of the Arkansas PPA, [ARK. CODE ANN. § 23-99-207](#), with respect to any cause of action that could have been brought under ERISA. Therefore, we affirm the district court’s **dissolution** of the *Prudential I* injunction except for the following: (1) we reverse the district court’s dissolution of the *Prudential I* injunction with regard to self-funded ERISA plans, and (2) we reverse the district court’s dissolution of the *Prudential I* injunction with regard to any cause of action brought under the Arkansas PPA’s civil penalties provision that could have been brought under ERISA § 502.” *Prudential II*, 413 F.3d at 914-15 (emphasis added).¹⁴ Nowhere in this Court’s opinion are the words “prospectively” or “lift” used as plaintiffs argue. Further, nowhere in the district court’s subsequent order does Judge Moody use the word “prospective.”

A dissolved injunction has no legal effect after dissolution, as this Court ruled in *Twin City Const. Co. of Fargo v. Turtle Mountain Band of Chippewa*

¹⁴ As previously noted, and as is undisputed, this case does not concern ERISA self-funded plans in any way.

Indians, 911 F.2d 137 (8th Cir. 1990). In that case, there had been a long-running legal dispute concerning jurisdiction of an Indian tribal court over a construction dispute. The federal court had issued an injunction prohibiting the parties from instituting any proceeding in the tribal court. However, once the tribal laws were amended to permit the exercise of jurisdiction over the claim at issue, the parties returned to the federal court for permission to institute the action. The district court refused to dissolve the injunction, and instead “lifted” it “prospectively,” as the plaintiffs describe the action here.

On appeal, this Court found that the district court had abused its discretion and should have dissolved the injunction entirely. In reaching this conclusion, this Court explained the consequence of dissolving the injunction as follows:

Accordingly, the judgment of the district court is reversed and remanded with instructions for the district court to entirely dissolve the permanent injunction entered August 25, 1987, thereby allowing Parisien to proceed with his action now pending in tribal court. In directing that the action should proceed, we are not determining that the tribal court does have jurisdiction. We are simply directing that all issues of jurisdiction resulting from the pending action should now be considered under the amended tribal code in the appropriate forum or forums.

911 F. 2d at 139-40.

Turtle Mountain Band of Chippewas teaches that a dissolved injunction can have no effect after the date of dissolution. Dissolving an injunction means that the injunction ceases to exist for any legal purpose after the date of dissolution.

Accordingly, the plaintiffs are simply incorrect to describe the dissolved injunction in *Prudential I* as “still-operative.” That injunction is not still operative; it is dissolved. Plaintiffs’ 2007 complaint must be dismissed for this reason.

The dissolution of the injunction also defeats plaintiffs’ arguments of ancillary jurisdiction based on *Jenkins v. Kansas City Missouri School Dist.*, 516 F.3d 1074 (8th Cir. 2008), *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), and *Peacock v. Thomas*, 516 U.S. 349 (1996). In *Jenkins*, the Court’s school-desegregation orders had not been dissolved, and the federal courts retained jurisdiction to enforce a remedial order requiring capital improvement bonds to protect the remedy from interference by the State of Missouri. In *Kokkonen*, the Court rejected a federal lawsuit over breach of a settlement agreement that had not been incorporated into a decree. Even though the original case that led to the settlement had been a federal-question lawsuit, the breach of the settlement was a separate case that required its own basis for federal jurisdiction. In *Peacock*, the plaintiffs tried to use a federal judgment as a basis for creating liability against a new party who had not been in the first case, and the Court required that the subsequent case have its own grounding in federal jurisdiction.

Plaintiffs erroneously rely on these three cases and several others. *Kokkonen* shows that a dismissed federal case cannot support ancillary federal jurisdiction in a subsequent case unless the subsequent case involves a direct violation of the

Court's order or judgment in the first case. Here, the injunction in *Prudential I* has been dissolved (with respect to the non-self-funded-plan issues in this case). Like the dismissed lawsuit in *Kokkonen*, the dissolved injunction cannot supply federal jurisdiction over this subsequent case. These defendants address federal jurisdiction more thoroughly in the final point of this brief.

In addition to the basic fact that the injunction was dissolved, the reason for its dissolution adds another reason why the plaintiffs' legal theory is incorrect. The *Prudential I* injunction was dissolved because the decision was overruled by higher authority, the United States Supreme Court, in *Miller*. This Court recognized precisely this fact in its opinion in *Prudential II*. One of the arguments on appeal from the order dissolving the *Prudential I* injunction was that there "was no change in this Court's binding precedent." [413 F.3d 897, 904](#) (citations omitted). This Court rejected the point, reasoning that "this argument fails because we believe that the *Miller* Court did overrule our binding precedent." *Id.* This Court recognized that the law of the United States, as announced by the Supreme Court, is contrary to the reasoning that produced the *Prudential I* injunction. Therefore any assessment of the rights of the three defendants in this case must be made according to the prevailing law of the United States, and not the discredited rationale of *Prudential I*.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY THE ADJUDICATION IN BLUE CROSS I.

Judge Moody misconstrued the *res judicata* and collateral estoppel arguments and rejected them in error. On cross-appeal, this Court should reverse and dismiss the complaint because plaintiffs' claims are barred.

A *res judicata* defense is properly made by motion to dismiss when the defense appears on the face of the complaint, judicial notice establishes the defense, and there are no disputed facts. See, for example, [Andrews v. Daw, 201 F.3d 521, 524 n.1 \(4th Cir. 2000\)](#). Although *res judicata* generally is an affirmative defense to be pleaded in an answer, "when all relevant facts are shown by the court's own records, of which the court takes notice, the defense may be upheld on a Rule 12 (b) (6) motion without requiring an answer." [Day v. Moscow, 955 F.2d 807, 811 \(2d Cir.\), cert. denied, 506 U.S. 821 \(1992\)](#). See also [Scott v. Kuhlmann, 746 F.2d 1377, 1378 \(9th Cir. 1984\)](#) (*res judicata* defense was evident from the pleadings in the pending case and the record of the prior case in the court of appeals).

The Supreme Court has described the basic rule of *res judicata* as follows:

The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." The judgment puts an end to the cause of action, which cannot again be brought into litigation between the

parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948) (citation omitted). See also the similar statements in *Allen v. McCurry*, 449 U.S. 90, 94 (1980), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79 (1974).

The doctrine of *res judicata* historically contains two components, which are collateral estoppel, now described as “issue preclusion” in the RESTATEMENT (SECOND) OF JUDGMENTS, and *res judicata*, now called “claim preclusion” in the RESTATEMENT. Both of these rules apply here.

“Issue preclusion bars relitigation of an issue if the same issue was involved in both actions; the issue was actually litigated in the first action after a full and fair opportunity for litigation; the issue was actually decided in the first action on the merits; the disposition was sufficiently final; and resolution of the issue was necessary to the first action.” *John Morrell & Co. v. Local 304A Food & Comm. Workers*, 913 F.2d 544, 562 n. 16 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991). The RESTATEMENT (SECOND) OF JUDGMENTS states the general rule of issue preclusion as follows:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

RESTATEMENT, SECOND, JUDGMENTS § 27.

An issue is actually litigated and determined when the issues are submitted by the parties to a judge and the judge enters a decision and final judgment on the issue, as Judge Holmes did in *Blue Cross I*. See generally, RESTATEMENT, SECOND, JUDGMENTS § 27, cmt. d. In *Blue Cross I*, the plaintiffs raised the question whether the permanent injunction in *Prudential* had the effect of barring damages claims by St. Vincent, Little Rock Cardiology and Southwest Regional Medical Center under the PPA. App. 53-54. Judge Holmes considered that claim and determined the issues by ruling against the plaintiffs. Appellees' Add. at 4-6.

Judge Holmes wrote: "The parties have now filed cross-motions for judgment on the pleadings. The medical care providers have moved for judgment on the pleadings as to all of the claims of Blue Cross and US Able. The medical care providers have also moved for judgment on the pleadings on their counterclaims at least insofar as the counterclaims seek a determination that they are entitled to damages pursuant to [ARK. CODE ANN. § 23-99-207](#). Blue Cross and US Able have moved for partial judgment on the pleadings in which they argue that the damages claims in the counterclaims are barred by the injunction that was enforced in the *Prudential* case from 1998 until 2005 and by Act 960 of 2005." Appellees' Add. at 3-4 (footnote omitted).

Not only did Judge Holmes reject the issue presented by Blue Cross and US Able for decision, but he also rendered his determination in a full and final

judgment specifically rejecting the claims of the plaintiffs. “All claims asserted by [plaintiffs] are dismissed with prejudice except their claim that the [PPA] does not apply to self-funded plans, and as to that claim the complaint is dismissed without prejudice.” Appellees’ Add. at 11. The rejection of the issue submitted by the plaintiffs was necessary to the entry of the final judgment.

The plaintiffs confused the issue in the district court by arguing as if the motion was based on the dismissal without prejudice of the counterclaims in *Blue Cross I* rather than the dismissal with prejudice of the plaintiffs’ claims. See App at 412-13; 418-21. Judge Moody erroneously accepted the plaintiffs’ bait and switch. See Aplt’s Add. at 5-6. Notwithstanding this error, the defendants request that this Court compare the claims in *Blue Cross I* to the claims here, and then review the dismissal with prejudice of the plaintiffs’ claims in *Blue Cross I*. This review will show quite clearly that the plaintiffs relitigate *Prudential I* issues here that they lost in *Blue Cross I*.

The rules of issue preclusion prohibit relitigation of the issues decided in *Blue Cross I*. If there were any doubt or argument concerning what issues are precluded, then the doctrine of claim preclusion would unquestionably apply to preclude any claim for a remedy other than or in addition to the specific remedy sought in *Blue Cross I*. The RESTATEMENT defines the “claim” for purposes of preclusion as follows:

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

RESTATEMENT, SECOND, JUDGMENTS § 24 (1). The RESTATEMENT goes further to exemplify this general rule by stating specifically that a claim is extinguished “even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action.” RESTATEMENT, SECOND, JUDGMENTS § 25.

No matter how the plaintiffs seek to parse the matter, they sued in *Blue Cross I* to bar the assertion of damages actions by these defendants. App. 61-62. The plaintiffs' claim was dismissed with prejudice, and now the plaintiffs make another run at the barred claim. It makes no difference that they sought a declaration in *Blue Cross I* and an injunction here. By operation of the rules of issue preclusion and claim preclusion, plaintiffs must abide by the adverse determination of their claim in *Blue Cross I* and cannot relitigate that claim here. This Court should affirm the dismissal of the plaintiffs' complaint with prejudice on this ground.

V. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT WITH PREJUDICE UNDER THE ANTI-INJUNCTION ACT.

The plaintiffs are currently defending damages claims under the PPA in *Blue Cross II* in the Circuit Court of Pulaski County, Arkansas. As the plaintiffs admit in their answer, App. at 132, the *Blue Cross II* claims are the same as the counterclaims that these defendants asserted in *Blue Cross I*. Plaintiffs concede that this lawsuit is in “response” to *Blue Cross II*. Brief at 9. Plaintiffs seek an order from a federal court enjoining the prosecution of a state court lawsuit, *Blue Cross II*. Judge Moody was correct to exercise the restraint required by the Anti-Injunction Act, [28 U.S.C. § 2283](#).

The Anti-Injunction Act is “an absolute prohibition against enjoining state court proceedings” unless a statutory exception applies. [Canady v. Allstate Ins. Co.](#), 282 F.3d 1005, 1013-14 (8th Cir. 2002), quoting [Atlantic Coast Line RR v. Locomotive Eng’rs](#), 398 U.S. 281, 286-87 (1970). The only potential exception, for “relitigation” of previously resolved federal claims, exists to protect federal judgments. [NBA v. Minnesota Prof. Basketball Ltd. P’ship](#), 56 F.3d 866, 871 (8th Cir. 1995). This exception rests on the concepts of *res judicata* and collateral estoppel.

The *Blue Cross I* counterclaims now pending as the damages claims in *Blue Cross II* have not been decided by any federal court. Judge Moody did not hear

them in *Prudential I*, and Judge Holmes specifically refused to entertain them in *Blue Cross I*. App. at 75-77. Thus the “relitigation” exception to the Anti-Injunction Act cannot apply to the state claims pending in *Blue Cross II*, as Judge Moody correctly held. The statute therefore bars the federal courts from awarding the relief requested in this case.

This result is consistent with the *res judicata* and collateral estoppel bar in the previous argument. *Plaintiffs’ claims* for relief in this case are identical to those in *Blue Cross I* — plaintiffs claimed that *Prudential I* prevented the assertion of the damages claims now pending in *Blue Cross II*. Judge Holmes dismissed those claims on the merits, and they are barred. These barred claims of the plaintiffs are distinct from the defendants’ pending damages actions in *Blue Cross II*, and the plaintiffs remain free to defend in *Blue Cross II* on claims and issues that were not barred by the dismissal in *Blue Cross I* — as they have done.

VI. THERE IS NO FEDERAL SUBJECT-MATTER JURISDICTION.

These defendants also cross appeal because the plaintiffs cannot establish and do not adequately allege federal subject-matter jurisdiction. The complaint below asserted federal subject-matter jurisdiction based on “continuing jurisdiction to enforce the Federal Judgment issued in the *Prudential* case.” App. 10 at ¶ 10. Although the plaintiffs also allege in that paragraph that jurisdiction in *Prudential I* arose under the ERISA and federal-question statute, that allegation simply

describes the subject-matter jurisdiction that existed in *Prudential I*, and it does not assert or establish subject-matter jurisdiction in this case on federal question or any other grounds.

Assuming that the Court could have jurisdiction to enforce the judgment issued in *Prudential I*, as the plaintiffs allege, that judgment no longer exists. The only judgment that was entered in that case was a permanent injunction, and, as the plaintiffs affirmatively plead, App. at 8, that injunction was dissolved on February 12, 2004 (except as to self-funded plans, which are outside this case). Nothing remains of the judgment that was entered in *Prudential I* that would permit it to be enforced against any party or entity as to non-ERISA plans in 2007. For this reason, the plaintiffs have no foundation on which to base federal subject-matter jurisdiction in this case.

Appellants rely on *Jenkins v. Kansas City Missouri School Dist.*, 516 F.3d 1074 (8th Cir. 2008), for the point that a federal court retains “ancillary jurisdiction to ‘manage its proceedings, vindicate its authority, and effectuate its decrees.’” Brief at 15. Although this is true, *Jenkins* is easily distinguished from the appeal at hand and does not support federal jurisdiction in this case.

In *Jenkins*, the district court had imposed capital improvement bonds as a desegregation remedy in a school case. The court-ordered bonds will not be fully retired until about 2015. The district court declared the school district to be unitary

and released it from court supervision, and then the state enacted laws that imperiled the school district's ability to repay the court-ordered bonds. The district court intervened to protect the bonds as a part of the desegregation remedy. The bonds were a part of the federal desegregation decree that remained in effect after unitary status, and the court's decrees had never been dissolved.

By contrast, the *Prudential I* judgment in the form of a permanent injunction no longer exists. It has been dissolved in all material respects since August 2, 2005. It does not supply a basis for jurisdiction over these claims filed in 2007. Because of this fundamental difference, *Jenkins* simply does not apply here to provide a basis for the court to assert jurisdiction and enforce its prior judgment. *Kokkonen* and *Peacock*, cases cited by the plaintiffs, reinforce this fundamental distinction and demonstrate that there is no federal jurisdiction in this case. *Kokkonen* involved enforcement of a settlement agreement that was the basis for dismissing a previous federal action. The settlement agreement was not incorporated into the federal court's judgment, and it therefore provided no basis for federal jurisdiction in a case to enforce the agreement. As the Court ruled, "the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement." 511 U.S. at 380. Thus the suit for enforcement of the settlement agreement required its own basis for federal jurisdiction. *Id.* at 381-82.

In *Peacock*, a federal litigant obtained a final judgment under ERISA against a party and then filed a second federal lawsuit to pierce the corporate veil between the judgment debtor and a third party. Citing *Kokkonen*, the Court held that the second case required federal jurisdiction. “In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.” [516 U.S. at 355](#) (citations omitted).

These cases establish that federal jurisdiction is required in a second, subsequent lawsuit when final judgment has been entered in the first case. In *Jenkins*, by contrast, the subsequent proceeding was to enforce the extant federal judgment and remedies. In this case, not a single party was a party to *Prudential I*. Judge Moody did not retain jurisdiction over non-ERISA claims when he dissolved the injunction in *Prudential I*. For all jurisdictional purposes relevant to the non-ERISA issues in this case, the dissolved injunction provides no more basis for federal jurisdiction here than did the final judgments in *Kokkonen* and *Peacock*.

The plaintiffs alleged that the district court may restrain the action of the defendants under the All Writs Act, [28 U.S.C. § 1651](#). App. at 9, ¶ 4. However, it is well settled that the All Writs Act is not an independent grant of subject-matter jurisdiction to a federal court. The All Writs Act does not create subject-matter

jurisdiction in itself. *Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). If there is no other basis for federal subject-matter jurisdiction, the All Writs Act does not fill the void. *Burr & Forman v. Blair*, 470 F.3d 1019 (11th Cir. 2006).

Thus there is no federal subject-matter jurisdiction to support the complaint. This Court should affirm the judgment of dismissal because there is no federal jurisdiction.

CONCLUSION

This Court should affirm the judgment below on the points argued and because Judge Moody correctly dismissed the case under the Anti-Injunction Act. On the cross appeal, this Court should affirm on the grounds that there is no federal subject-matter jurisdiction in this action or, in the alternative, that the dismissal on the merits of the plaintiffs' identical claims in *Blue Cross I* bars this lawsuit under *res judicata* and collateral estoppel.

Respectfully submitted,

Thomas B. Staley (#75123)
William T. Marshall (#81110)
ROBINSON, STALEY MARSHALL
& DUKE
400 W. Capitol Avenue
Little Rock, AR 72201-3415
Telephone: (501) 374-3818
*Counsel for Separate Defendant Little Rock
HMA, Inc., d/b/a Southwest Regional
Medical Center*

and

Niki Cung (#96153)
Erin Thompson (#2005250)
KUTAK ROCK, LLP
214 W. Dickson Street
Fayetteville, AR 72701
Telephone: (479) 973-4200
*Counsel for St. Vincent Infirmary
Medical Center*

and

WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, AR 72201
Telephone: (501) 372-0800

By: /s/ Jess Askew III

Jess Askew III (#86005)
Janet L. Pulliam (#79223)
Benjamin D. Brenner (#2004172)
Stephen A. Hester (#2002031)
*Counsel for Little Rock Cardiology
Clinic, P.A.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), the undersigned certifies that this brief complies with the applicable type-volume limitations and that, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 9,113 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word 2003) used to prepare this brief. I further certify that the computer disk submitted with this brief has been scanned for viruses and is virus-free.

/s/ Jess Askew III

CERTIFICATE OF SERVICE

On May 6, 2008, two copies of the foregoing brief, along with a computer disk containing the brief, were served on the following by U.S. mail:

Chet Roberts
Senior Counsel
Arkansas Blue Cross and Blue Shield,
A Mutual Insurance Company
320 West Capitol, Suite 211
P. O. Box 2181
Little Rock, AR 72201

Gordon S. Rather, Jr.
Troy A. Price
Michelle M. Kaemmerling
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, AR 72201-3699

*Attorneys for Arkansas Blue Cross and
Blue Shield and US Able Corporation*

/s/ Jess Askew III