IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH ALLIANCE MEDICAL PLANS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18-334C
	)	Judge Campbell-Smith
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MOTION TO STAY PROCEEDINGS AND ALTERNATIVE MOTION FOR AN ENLARGEMENT OF TIME TO RESPOND TO THE COMPLAINT

Defendant, the United States, respectfully requests to stay proceedings in this case pending a decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224, and/or *Moda Health Plan, Inc. v. United States*, No. 17-1994. In the alternative, we respectfully request a 60-day enlargement of time, until July 3, 2018, to respond to the complaint. Our response is currently due May 4, 2018. We have not received any prior enlargements of time for this purpose. We have consulted with counsel for plaintiff, Health Alliance Medical Plans, Inc. (Health Alliance), who indicated that plaintiff opposes our request for a stay, but does not oppose our alternative request for an enlargement of time.

INTRODUCTION

This suit involves insurance subsidies authorized by the Patient Protection and Affordable Care Act (ACA or Act) called cost-sharing reduction (CSR) payments. ACA § 1402, codified at 42 U.S.C. § 18071 (requiring insurers to reduce cost-sharing for qualifying insureds, and directing the Government to compensate insurers for those reductions). Health Alliance alleges that insurers are entitled to CSR payments from the Government even though Congress

did not appropriate funding for those payments. ECF No. 1 (Compl.). Similar legal issues are squarely before the Federal Circuit in the *Land of Lincoln* and *Moda* risk corridors appeals.

We respectfully request that this Court stay proceedings in this case pending the Federal Circuit's decision in *Land of Lincoln* and/or *Moda*, where oral arguments were heard on January 10, 2018. This Court has previously entered such a stay in several other CSR matters, where, as here, the insurers allege that they are entitled to cost-sharing reduction payments despite a lack of appropriations by Congress. *See* Aug. 11, 2017 Order, *Common Ground Healthcare Cooperative v. United States* (Fed. Cl. 17-877C) (Judge Sweeney) (staying merits proceedings in *Common Ground* pending the Federal Circuit's decision in *Land of Lincoln* and/or *Moda*); Nov. 30, 2017 Order (continuing the stay after Common Ground amended its complaint to add a CSR count); Feb. 7, 2018 Order, *Maine Community Health Options v. United States* (Fed. Cl. 17-2057) (*Maine CHO III*) (Judge Sweeney) (granting stay over plaintiff's opposition and noting that "the court believes that the analysis set forth in the Federal Circuit's decisions in *Land of Lincoln* and/or *Moda Health Plan* may provide guidance that would benefit its resolution of the Affordable Care Act cases on its docket."); Mar. 5, 2018 Order, *Local Initiative Health Authority v. United States* (Fed. Cl. 17-1542) (Judge Wheeler) (granting opposed motion for stay and observing that "[a]fter reviewing the parties' arguments and given the substantial overlap and relatedness of issues between this case and the cases currently on appeal, the Court GRANTS the Government's motion to stay."); Mar. 7, 2018 Order, *Community Health Choice, Inc. v. United States* (Fed. Cl. 18-05) (Judge Sweeney) (granting unopposed motion to stay pending Federal Circuit rulings in *Land of Lincoln* and/or *Moda*); Apr. 12, 2018 Order, *Molina Healthcare of California, Inc. v. United States* (Fed. Cl. 18-333) (Judge Wheeler) (granting partially-opposed motion to stay pending Federal Circuit rulings in *Land of Lincoln* and/or *Moda*); *but see* Mar. 27,

2018 Order, *Montana Health CO-OP v. United States* (Fed. Cl. 18-143) (Judge Kaplan) (denying opposed motion for stay but granting alternative request for an enlargement of time to answer the complaint); Mar. 28, 2018 Order, *Sanford Health Plan v. United States* (Fed. Cl. 18-136) (Senior Judge Firestone) (same).[1]

A stay of proceedings is equally warranted here. There is little doubt that the Federal Circuit's decisions in the risk corridors appeals will provide guidance in the CSR cases. Indeed, the legal contentions made in Health Alliance's complaint mirror the arguments that Land of Lincoln and Moda have made to the Federal Circuit in the pending risk corridors appeals. There, as here, insurers contend that they are entitled to specified payments from the Government regardless of whether Congress appropriated funding for those payments. And in those other cases, as here, insurers contend that provisions of the ACA created implied-in-fact contracts between the Government and insurers even though the relevant statutory provisions do not use the language of contract. Ultimately, proceeding without the benefit of the Federal Circuit's guidance will only delay the ultimate resolution of this case, because new briefing will be required after the Federal Circuit issues an opinion in the risk corridors cases. Accordingly, this Court should stay proceedings in this case pending the Federal Circuit's disposition of *Land of Lincoln* and/or *Moda*.

BACKGROUND

As the Court is aware, the appeals in *Land of Lincoln* and *Moda* involve the risk corridors program authorized by Section 1342 of the ACA. They are the two lead cases of dozens of Tucker Act suits filed by insurers claiming that they are entitled to additional risk corridors

[1] In addition to CSR claims, several of these cases also include risk corridors claims under the ACA. However, the judges who have granted stays in those mixed cases have explained that the rationale for a stay applies to both CSR and risk corridors claims.

payments from the Judgment Fund. Two other risk corridors appeals are fully briefed. *See Maine Community Health Options* (*Maine CHO*) *v. United States*, No. 17-2395 (Fed. Cir.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 17-2154 (Fed. Cir.). Recently, the Federal Circuit assigned these two cases to the same merits panel that heard the *Land of Lincoln* and *Moda* appeals, and further removed them from the May argument calendar. *See* Mar. 28, 2018 Order, *Blue Cross and Blue Shield of North Carolina v. United States* (No. 17-2154).

For several years, the Government made CSR payments to issuers from an existing appropriation known as the Section 1324 appropriation. In 2016, however, a district court ruled that the text of the ACA does not allow the Government to make CSR payments to issuers from the Section 1324 appropriation. *See U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).[2]

In October 2017, while the appeal in *House of Representatives* was pending, the Government concluded that the district court's interpretation was correct and announced that it would cease making CSR payments. *See California v. Trump*, 267 F. Supp. 3d 1119, 1121 (N.D. Cal. 2017) (describing this background). California and other States brought suit and sought a preliminary injunction to enjoin the cessation of CSR payments. Denying that motion, Judge Chhabria concluded that the States were not likely to succeed on the merits and also failed to show irreparable harm sufficient to warrant an injunction.

[2] The district court stayed its injunction pending appeal. The parties to the *House of Representatives* litigation have since reached a conditional settlement, which, once completed, would result in dismissal of the appeal. *See* Joint Motion for Remand, No. 16-5202 (D.C. Cir. Jan. 19, 2018); Supplement in Support of Joint Motion for Remand, No. 16-5202 (D.C. Cir. Apr. 11, 2018).

Nine insurers—including Health Alliance—have since filed Tucker Act suits in this Court, alleging that they are entitled to CSR payments from the Judgment Fund regardless of whether Congress appropriated funds for such payments. As detailed above, the Court has granted the Government's motions to stay in five CSR cases, while it has denied our motion in two cases.[3]

ARGUMENT

I. Standard Of Review For Issuing A Stay Of Proceedings

"It is well established that every trial court has the power to stay its proceedings, which is 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). "Moreover, when and how to stay proceedings is within the sound discretion of the trial court." *Id.* (citation and internal punctuation omitted). The Supreme Court has highlighted the conservation of judicial resources as an important reason for a trial court to stay proceedings in any matter pending before it, particularly where the appellate court may resolve issues before the trial court. *Landis*, 299 U.S. at 254-55; *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010) ("The orderly course of justice and judicial economy is served when granting a stay simplifies the 'issues, proof, and questions of law which could be expected to result from a stay.'") (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Indeed, the Supreme Court also recognized that in cases of great complexity and significance, like the CSR issues in this case, "the individual may be required to submit to delay not immoderate in

[3] In the ninth CSR case, *Blue Cross & Blue Shield of Vermont v. United States* (Fed. Cl. 18-373) (Judge Horn), we anticipate filing a similar motion for stay and alternative motion for an enlargement of time.

extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *See Landis*, 299 U.S. at 256.

II. This Court Should Stay Proceedings Pending The Federal Circuit's Decisions In *Land of Lincoln* and/or *Moda*

The standard for issuing a stay of proceedings is easily met in this case, most importantly because the legal contentions Health Alliance raises in its complaint mirror the arguments that insurers have made in the Federal Circuit, strongly indicating that the Federal Circuit's decisions will be, at the very least, instructive. In the risk corridors appeals, the insurers' central contention is that Congress's limitation on the funds available to the Department of Health and Human Services (HHS) to make risk corridors payments is irrelevant, because the insurers are seeking recovery against the United States from the Judgment Fund. For example, in its Federal Circuit brief, Maine CHO argued that "[b]ecause Congress only blocked *HHS's* ability to make [risk corridors program (RCP)] payments from certain funds, but did not bar any or all funds to pay the RCP debts *of the United States*, the [g]overnment's RCP obligations were not abrogated" and "liability can be exercised against the Judgment Fund." Opening Br. 23, *Maine CHO v. United States*, No. 17-2395 (Fed. Cir.). Judge Wheeler adopted that reasoning in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 462 (2017), ruling that "HHS's inability to access the CMS Program Management account for risk corridors payments means that insurers like Moda must receive risk corridors payments from the Judgment Fund."[4] This issue is now squarely before the Federal Circuit in *Moda*.

Health Alliance's complaint echoes the line of argument that was adopted by Judge Wheeler and is now before the Federal Circuit. In particular, Health Alliance contends that

[4] By contrast, Judge Bruggink explicitly rejected Judge Wheeler's reasoning and held

"[r]egardless of whether Congress appropriated sufficient funds to HHS to make the CSR payments, the Government's statutory obligation to make such payments, and Plaintiff's right to those payments, remains." Compl. ¶ 17. Health Alliance further claims that "Congress has never included any language in appropriations or other bills preventing HHS, CMS, or the Treasury from accessing certain funds or accounts to make CSR payments." *Id*. ¶ 37. In other words, Health Alliance invites this Court to adjudicate the very issue before the Federal Circuit in *Moda*.

The same is true of Health Alliance's implied-in-fact contract claim. *See generally* Compl. ¶¶ 50-59. Health Alliance contends that a contract for CSR payments may be implied from the language of Section 1402 of the ACA because the Government allegedly "induced Plaintiff to participate in the health care exchanges in part by including the CSR payments in Section 1402 of the ACA and its implementing regulations, by which the Government committed to make health insurers whole financially for the mandated cost-sharing reductions." *Id*. ¶ 57. This argument mirrors Judge Wheeler's reasoning in *Moda* that declared a contract could be implied from the language of Section 1342 because the availability of risk corridors payments created incentives for insurers to offer insurance coverage on the exchanges. *See Moda*, 133 Fed. Cl. at 462-64.[5] All of this is, again, squarely before the Federal Circuit.

Because the issues Health Alliance raises in this case are the same issues the parties have raised before the Federal Circuit in the risk corridors appeals, those decisions will provide

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that the existence of the Judgment Fund is "immaterial" because "[r]etreat to the Judgment Fund assumes a liability in the first instance." *Maine CHO v. United States*, 133 Fed. Cl. 1, 13 (2017) (citing *OPM v. Richmond*, 496 U.S. 414, 432 (1990)).

[5] By contrast, Judge Lettow and Judge Griggsby rejected the same implied-in-fact contract claim as contrary to precedents of the Supreme Court and Federal Circuit, which hold

important guidance in the CSR cases. Importantly, the Court has stayed both the risk corridors counts *and the CSR counts* in several mixed cases, pending the Federal Circuit's decisions. Additionally, in another CSR-only case, *Maine CHO III* (Fed. Cl. 17-2057), the Court has granted the Government's opposed motion for a stay.

III. In The Alternative, The Court Should Grant Our Motion For An Enlargement

Even if the Court determines not to stay this case pending the Federal Circuit's decisions, we respectfully request an enlargement of time to respond to the complaint. Although Health Alliance opposes our stay request, it does not oppose our alternative request for an enlargement of time. Moreover, although this case will be informed by the Federal Circuit's decisions in the risk corridor appeals, this case would represent one of the first times that the Government has responded to a complaint seeking to recover CSR payments, requiring us to engage in extensive consultation with the client agency, HHS, and within the Department of Justice. For this reason, we require an additional 60 days to respond to the complaint.

CONCLUSION

For these reasons, this Court should stay proceedings in this case pending the Federal Circuit's decisions in *Land of Lincoln* and/or *Moda*. In the alternative, we respectfully request that the Court extend our deadline to respond to Health Alliance's complaint by 60 days, until July 3, 2018.

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that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985) (quoted in *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012)). *See Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 110-13 (2016) (Lettow, J.); *Blue Cross & Blue Shield of North Carolina v. United States*, 131 Fed. Cl. 457, 478-79 (2017) (Griggsby, J.).

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/ Claudia Burke
CLAUDIA BURKE
Assistant Director

s/ Veronica N. Onyema
VERONICA N. ONYEMA
Trial Attorney
CHRISTOPHER J. CARNEY
Senior Litigation Counsel
ERIC E. LAUFGRABEN
Trial Attorney
U.S. Department of Justice
Civil Division, Commercial Litigation Branch
Telephone: (202) 514-8624
Facsimile: (202) 353-0536
Veronica.N.Onyema@usdoj.gov

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Attorneys for Defendant