2017-2154

In the

United States Court of Appeals for the Federal Circuit

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims,
Case No. 1:16-cv-00651 (Griggsby, J.)

MOTION TO ALLOW ORAL ARGUMENT

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MOTION TO ALLOW ORAL ARGUMENT

Appellant Blue Cross and Blue Shield of North Carolina (BCBSNC), pursuant to Federal Rules of Appellate Procedure 27 and 34(a)(1) and Federal Circuit Rule 27, respectfully moves the Court to allow oral argument in this appeal.

In support of this motion, counsel for BCBSNC represents as follows:

1. This is the third of four appeals pending in this Court from rulings made by the United States Court of Federal Claims in four of the nearly fifty separate cases filed by health insurance companies seeking outstanding payments owed by the United States Government under the Affordable Care Act's "risk corridors" statute, Section 1342, 42 U.S.C. § 18062, and related contracts. *See Maine Cmty. Health Options v. United States*, No. 17-2395; *Moda Health Plan, Inc. v. United States*, No. 17-1994; *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224.

2. In its suit, BCBSNC—asserting Tucker Act claims for violation of § 1342 and its implementing regulations; for breach of an implied-in-fact contract and a covenant of good faith and fair dealing implied therein; and for regulatory takings under the U.S. Constitution's Takings Clause—seeks damages in excess of

$147 million for outstanding payments due to it by the Government under the risk-corridors program for calendar year (CY) 2014.[1]

3. In April 2017, the trial court (Griggsby, J.) granted the Government's motion to dismiss all of BCBSNC's causes of action for failure to state a claim. *See Blue Cross and Blue Shield of North Carolina v. United States*, 131 Fed. Cl. 457 (2017). That ruling adds to the growing body of conflicting decisions issued by several other United States Court of Federal Claims judges in risk-corridors cases. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (denying the Government's motion to dismiss and granting plaintiff health plan's motion for summary judgment on its statutory and contractual claims); *Maine Cmty. Health Options v. United States*, 133 Fed. Cl. 13 (2017) (Bruggink, J.) (granting the Government's motion to dismiss plaintiff health plan's statutory claim), *appeal pending*, No. 17-2395 (Fed. Cir.); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017) (Wheeler, J.) (granting summary judgment in plaintiff health plan's favor), *appeal pending*, No. 17-1994 (Fed. Cir.); *Health Rep. Ins. Co. v. United States*, 129 Fed. Cl. 757 (2017)

[1] Based on data produced by the Government, the Government owes risk-corridors payments to BCBSNC for CY 2015 and CY 2016 in excess of $233 million. *See* Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016); Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year* (Nov. 13, 2017). BCBSNC intends to seek damages in this amount in future proceedings in the United States Court of Federal Claims.

(Sweeney, J.) (denying in principal part the Rule 12(b)(1) motion to dismiss plaintiff health plan's complaint); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016) (Lettow, J.) (granting judgment on administrative record in the Government's favor), *appeal pending*, No. 17-1224 (Fed. Cir.).

4. On January 10, 2018, this Court (Chief Judge Prost, Judge Newman, and Judge Moore) heard oral argument in the first two of the pending risk-corridors appeals—*Land of Lincoln* and *Moda*. The docket reflects that BCBSNC's appeal has been deemed related to *Land of Lincoln* and *Moda*, which could mean BCBSNC's appeal will be assigned to the same three-judge panel that recently heard argument in *Land of Lincoln* and *Moda*.

5. To be sure, two of the core legal issues presented in *Land of Lincoln* and *Moda*—whether ACA § 1342 imposes a mandatory obligation on the Government to make outstanding risk-corridors payments, and whether Congress's later-enacted appropriations riders impliedly vitiate that statutory obligation—are raised in BCBSNC's appeal here. Nevertheless, BCBSNC respectfully submits that the Court should hear oral argument in its appeal, as provided for under Federal Rule of Appellate Procedure 34.

6. Rule 34 states that "[a]ny party may file … a statement explaining why oral argument should … be permitted." Fed. R. App. P. 34(a)(1). It further directs that "[o]ral argument ***must*** be allowed in every case" unless a three-judge

panel "unanimously agrees that oral argument is unnecessary" because either "(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2) (emphasis added). None of these grounds for refusing oral argument is present here.

7. First, BCBSNC's appeal is anything but "frivolous," as the parties' briefing, the briefing and argument in *Land of Lincoln* and *Moda*, and the conflicting rulings of the United States Court of Federal Claims reveal.

8. Second, neither this Court nor the U.S. Supreme Court has "authoritatively decided" the "dispositive issue or issues" presented in BCBSNC's appeal concerning its statutory, contractual, and constitutional Takings-Clause rights to the outstanding risk-corridors payments the Government owes it.

9. Third, oral argument would "significantly aid[]" the Court's decisional process because it would give the parties and the Court a full opportunity to explore the differences between the record in this appeal and the records in *Land of Lincoln* and *Moda*. Unlike in *Moda*—which was decided at summary judgment—the court below in this case dismissed BCBSNC's claims under Rule 12(b)(6) on grounds that, as of the time of the court's April 2017 ruling, the Government did not yet owe any risk-corridors payments to BCBSNC.

That basis for the lower court's ruling is now moot, as the Government has acknowledged to this Court.[2] And unlike in *Land of Lincoln*—which was decided on the basis of a limited "administrative record"—the court below in this case was presented with a more extensive record containing a host of documents that are not in the *Land of Lincoln* "administrative record." *See* Doc. 63, Amicus Br. of Highmark Inc. *et al.*, *Land of Lincoln*, No. 17-1224, at 14-15 & n.3 (filed Feb. 7, 2017) (describing key documents omitted from the administrative record).

10. Oral argument also would "significantly aid[]" the Court's decisional process here because unlike in *Land of Lincoln* and *Moda*, the parties here substantively briefed the legal sufficiency of BCBSNC's constitutional regulatory takings claim.

11. Still further, BCBSNC's briefing develops and emphasizes certain arguments in support of its statutory and implied-in fact contract claims differently from the plaintiffs' briefing in *Land of Lincoln* and *Moda*. For example, in response to the Government's argument that Congress's appropriation riders impliedly repealed § 1342's money-mandating obligation, BCBSNC stressed in both its opening brief and its reply brief the legal significance of the facts that (i)

[2] *See, e.g.*, Doc. 20, United States' Br. at 16 (filed Nov. 1, 2017) ("We recognize … that the practical significance of this timing issue is likely to be overtaken by the passage of time while the litigation is pending. Accordingly, we focus in this brief on the legal issues that will control the disposition of the insurers' claims after this timing issue becomes moot.").

Congress repeatedly tried—after the riders were enacted—to repeal or amend § 1342 or expressly make risk-corridors a budget-neutral program, but failed to pass such legislation, and (ii) other provisions in the riders—unlike the specific rider provisions directed at risk-corridors—expressly and broadly barred the use of any and all monies to pay for certain programs. Doc. 15, BCBSNC Op. Br. at 13, 43-44 & n.16 (filed Aug. 21, 2017); Doc. 26, BCBSNC Reply Br. at 15, 16 (filed Nov. 29, 2017). BCBSNC also explained why, under settled Supreme Court precedent, the fact that § 1342, unlike other ACA provisions, does not contain a provision appropriating funds for the Government to use in making risk-corridors payments has no bearing—as a matter of statutory interpretation—on whether § 1342 should be construed to impose a mandatory full-payment obligation on the Government. Doc. 26, BCBSNC Reply Br. at 13-14.

12. Given these differences between the record and briefing in this case and the record and briefing in *Land of Lincoln* and *Moda*, oral argument here will provide the Court the most comprehensive view of the relevant legal issues and ensure a more fully-informed decision in these important risk-corridors cases.

13. Finally, oral argument is warranted given the recovery BCBSNC seeks—$147 million in unpaid risk-corridors payments for 2014 alone, and an additional $233 million of unpaid risk corridors payments for CYs 2015-2016 that BCBSNC intends to pursue.

14. BCBSNC has discussed this motion with the Government. The Government has informed BCBSNC that it objects to the motion and will file a response to it.

For all these reasons, and in the interests of fairness and full consideration of the issues presented in BCBSNC's appeal, BCBSNC respectfully requests that the Court allow oral argument in this appeal.

February 9, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this motion complies with the length limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,489 words according to the count of Microsoft Word, excluding parts of the motion exempted under Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(b).

February 9, 2018 s/ *Lawrence S. Sher*

CERTIFICATE OF SERVICE

I, Lawrence S. Sher, hereby certify that, on February 9, 2018, I electronically filed the foregoing Motion to Allow Argument with the Clerk of the Court by using the appellate CM/ECF system. I hereby certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Lawrence S. Sher*