2017-1224

United States Court of Appeals for the Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, an Illinois Non-Profit Mutual Insurance Corporation,

Plaintiff – Appellant,

v.

UNITED STATES,

Defendant – Appellee.

Appeal from the United States Court of Federal Claims in Case No. 1:16-Cv-00744-CFL, Judge Charles F. Lettow

BRIEF OF *AMICUS CURIAE* HEALTH REPUBLIC INSURANCE COMPANY IN SUPPORT OF PLAINTIFF-APPELLANT

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February 7, 2017

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* Health Republic Insurance Company certifies the following:

1. The full name of every party or *amicus* represented by one or more of the undersigned counsel is:

   Health Republic Insurance Company;

   Alliance of Community Health Plans.

2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by one or more of the undersigned counsel is:

   Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus* represented by one or more of the undersigned counsel are:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by one or more of the undersigned counsel in the trial court or agency or are expected to appear in this court are:

Stephen A. Swedlow of Quinn Emanuel Urquhart & Sullivan, LLP

February 7, 2017

/s/ *Stephen A. Swedlow*

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INTEREST OF AMICUS CURIAE[1]

Health Republic Insurance Company ("Health Republic") filed the first lawsuit in the nation related to the failure of the United States of America (the "Government") to make full payments under the risk corridor program of the Patient Protection and Affordable Care Act ("ACA"). Health Republic is now the lead plaintiff in a certified class action asserting a Tucker Act claim for failure to make risk corridor payments—a claim that is virtually identical to the one Land of Lincoln asserts here. Accordingly, Health Republic's interest in this case is based on the fact that its interests, as well as the interests of the class it represents, may be affected by the outcome of this appeal. On behalf of itself and the certified class, Health Republic respectfully submits this brief to urge the Court to reverse the dismissal of Land of Lincoln's claims in this action.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus* Health Republic Insurance Company represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

INTRODUCTION

Health Republic is a nonprofit corporation organized under the laws of the State of Oregon that began providing health insurance to thousands of people on Oregon's state-based health exchange, established pursuant to the ACA, in January 2014. Health Republic provided health insurance to its insureds until October 2015, when it learned the Government would pay only a fraction of the payments owed to Health Republic under the what is known as the ACA's "risk corridors program." Due to this shortfall, Health Republic has been forced to wind down its operations and did not offer any health insurance in 2016.

In February 2016, Health Republic filed its lawsuit related to the Government's failure to make full risk corridors payments. Health Republic did so on behalf of itself and all other similarly situated health insurers that offered qualified health plans under the ACA for the 2014 and 2015 benefit years (the "QHP Issuer Class"). Judge Sweeney of the Court of Federal Claims certified the QHP Issuer Class in January 2017. Even more relevant to the current appeal, Judge Sweeney denied the Government's motion to dismiss Health Republic's case on January

10, 2017, finding (among other things) that Section 1342 of the ACA unambiguously requires annual risk corridor payments and that, even if the statute is ambiguous, the Department of Health and Human Services' ("HHS") recent change in position regarding the timing for risk corridor payments is owed no deference because HHS originally interpreted the statute as requiring annual payments. *See Health Republic Ins. Co. v. United States*, --- Fed. Cl. ---, 2017 WL 83818 (Fed. Cl. Jan. 10, 2017).

In *Land of Lincoln*, a later-filed risk corridors case asserting similar claims as Health Republic, Judge Lettow of the Court of Federal Claims reached the opposite conclusion as Judge Sweeney on all points. Based on an administrative record the parties created out of whole cloth—even though these cases are not based on administrative proceedings—Judge Lettow concluded that (a) the ACA is ambiguous as to the timing of risk corridor payments, and (b) due to this supposed ambiguity, he owed HHS's "three-year payment framework" deference under the *Chevron* doctrine. In making these findings, Judge Lettow consulted items outside of the made-for-litigation administrative record

and ignored or downplayed a multitude of items within the record the parties provided.

Land of Lincoln has already explained in its opening brief why Judge Lettow's substantive rulings on the evidence are incorrect. Although Health Republic believes the lower court should be reversed on the merits as set forth in Land of Lincoln's opening brief, Health Republic respectfully submits this *amicus* brief to explain why the lower court also erred by ruling on a limited administrative record without the benefit of discovery. The lower court's reliance on a limited administrative record caused it to err in how it conducted its *Chevron* analysis, as well as the conclusions it reached from that analysis. And if the Court were to affirm and issue an overly broad ruling that does not recognize the lower court's unique, improper use of an administrative record—a procedure no Judge in any other risk corridors litigation has employed—Health Republic, the QHP Issuer Class it represents, and individual QHP issuers that have brought suit would be severely prejudiced.

BACKGROUND

In its opening brief, Plaintiff-Appellant Land of Lincoln set forth an extensive discussion of the ACA's 3R premium stabilization programs, which includes the risk corridors program, as well as the history of the subsequent implementing regulations and HHS's statements regarding the Government's obligation to pay full, annual risk corridor amounts. Health Republic will not restate that history here and instead focuses this section on facts uniquely relevant to this *amicus*.

A. The Health Republic Lawsuit

In February 2016, Health Republic filed the first lawsuit in the nation alleging a Tucker Act claim against the United State of America for failure to pay amounts owed under the ACA's risk corridor program. The Government moved to dismiss the claim on jurisdictional grounds, arguing that Health Republic's claim was not ripe because amounts payable under the risk corridor program were not owed annually and therefore not yet due. The Government also argued that HHS had discretion to establish a "three-year payment framework" for risk corridor amounts, with full amounts due at some point after the 2016

benefit year. In January 2017, the court denied the Government's motion and held that the ACA unambiguously required annual risk corridor payments and that, even if the statute were ambiguous on this point, HHS's interpretations of the ACA showed that both the Government and QHP issuers owe annual payments under the program. Based on these findings, the Court ruled that it had subject matter jurisdiction over Health Republic's and that those claims are ripe. *See generally Health Republic Ins. Co. v. United States*, --- Fed. Cl. ---, 2017 WL 83818 (Jan. 10, 2017).

Also in January 2017, the court granted Health Republic's motion for class certification and certified a class consisting of QHP issuers to which the Government owed payments under the risk corridor program for the 2014 and 2015 benefit years.

B. The Land of Lincoln Lawsuit

Plaintiff Land of Lincoln filed suit four months after Health Republic, in June 2016, and asserted a similar Tucker Act claim, as well as contractual and quasi-contractual claims and a Fifth Amendment Takings claim. At an August 2016 hearing, Land of Lincoln sought to expedite consideration of the merits of its claims and requested that the

Government provide an "administrative record" that the parties would use in their cross-motions for judgment. Aug. 12, 2016 Hr'g Tr. (ECF No. 14) at 8. The Government's attorney stated at the hearing that, "[t]o our knowledge, I don't know that there is an administrative record. This isn't an APA case." *Id.* at 21. Nevertheless, the Court ordered that the Government create an administrative record and file it by September 9, 2016. *Id.* at 32; Aug. 12, 2016 Scheduling Order (ECF No. 12).

The parties filed cross-motions for judgment on the administrative record in September 2016.[2] On November 11, 2016, based on the administrative record before it, the court granted the Government's motion and entered judgment against Land of Lincoln.

[2] The Government captioned its motion as a Motion to Dismiss and Motion for Judgment on the Administrative Record on Count I.

ARGUMENT

I. The Lower Court Erred in Deciding This Case Without Discovery and Upon an Administrative Record That Did Not Exist

A. There Was No Administrative Record, and This Is Not a Case About Administrative Proceedings

"When proceedings before an agency are relevant to a decision in a case," the Court of Federal Claims may decide the case on a motion for judgment on the administrative record. RCFC 52.1. *See also Meyer v. United States*, 127 Fed. Cl. 372, 381 (2016) ("In a case dependent upon an administrative record, a party may move for judgment upon that record pursuant to RCFC 52.1(c)."). When a party makes a motion for judgment on the administrative record, the agency certifies the administrative record of the proceedings held before it and files a copy with the court. RCFC 52.1(a). This procedure permits "parties to seek the equivalent of an expedited trial on a 'paper record, allowing fact-finding by the trial court.'" *Elec. On-Ramp, Inc. v. United States*, 104 Fed. Cl. 151, 158 (2012) (quoting *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005)). A court entertaining a motion for judgment on the administrative record is ordinarily confined to the record developed before the agency, and the parties have only a

"limited" ability to supplement the record. *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009).

The lower court in *Land of Lincoln* erred in deciding the case on cross-motions on the administrative record because there were no prior "proceedings before an agency." RCFC 52.1(a). Neither HHS nor CMS held administrative proceedings with *Land of Lincoln* or any other QHP issuer; indeed, the Government's counsel admitted that, "To our knowledge, I don't know that there is an administrative record." Aug. 12, 2016 Hr'g Tr. (ECF No. 14) at 21. The case should not have been decided on an administrative record for the simple reason that no administrative proceedings existed and, thus, no administrative record existed either.

Adjudication based on an administrative record is generally limited to proceedings under the Administrative Procedure Act ("APA") or proceedings that invoke the legal standards of the APA. For instance, a review of the reported decisions from the Court of Federal Claims for the past year reveals that *Land of Lincoln* is the only case resolved through a motion for judgment on the administrative record that involved something other than (1) disappointed contract bidders or (2)

military personnel challenging the decision of a military review board. *See, e.g.*, *Progressive Indus., Inc. v. United States*, 129 Fed. Cl. 457 (2016) (bid protest claim); *Evans v. United States*, 129 Fed. Cl. 126 (2016) (challenge to final decision by Army Board of Corrections of Military Records concerning discharge condition). Litigating based on an administrative record is appropriate in government contract bidder and military review board cases because the standards of review set forth in the Administrative Procedure Act apply. *See* 28 U.S.C § 1491(b)(4) (jurisdictional grant to Court of Federal Claims to hear bid protest cases requires application of APA standard of review); *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1350 (Fed. Cir. 2004) (appropriate standard of review in bid protest cases is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5. U.S.C. § 706(2)(a)); *Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009) ("judicial review of decisions of military correction boards is conducted under the APA").

In cases where the APA applies, "[t]he purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to convert the 'arbitrary and capricious' standard into

effectively de novo review." *Axiom Res. Mgmt.*, 564 F.3d at 1380 (internal quotation marks and citation omitted). In other words, limiting courts to the administrative record ensures that the court applies the APA standard of review.

Here, however, there were no "proceedings before an agency," RCFC 52.1, no reason to apply an APA standard of review, and no reason to decide the case on a limited, made-for-litigation-only administrative record. The court's decision to resolve the case under RCFC 52.1 was therefore incorrect as a matter of procedure and prevented the court from considering evidence showing why *Chevron* deference does not apply to HHS's recent creation of the "three-year payment framework" for the risk corridor program.

B. The Law Required Discovery on the Government's *Chevron* Deference Arguments

Chevron deference applies only when the statute at issue is ambiguous. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). As Land of Lincoln establishes in its opening brief, the lower court erred in applying *Chevron* deference at all because Section 1342 of the ACA, which establishes the risk corridors program, unambiguously requires the Government to make full risk

corridor payments to QHP issuers pursuant to the statutory formula. Op. Br. at 47. The lower court's opinion, which concluded the statute *is* ambiguous regarding the timing for risk corridor payments, should be reversed for this reason alone.

Still, even if the lower court were correct that the statute is ambiguous, it should not have deferred to HHS's recent interpretation of the statute without considering additional evidence beyond the "administrative record." This is true for all the reasons stated in Land of Lincoln's opening brief (at 42-53), including that there was no reasoned explanation for HHS's departure from its original position that risk corridor payments would be made in full, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), and because *Chevron* deference is not appropriate when an interpretation destabilizes the health insurance regime at the heart of the ACA, *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). But in addition to these reasons, the lower court erred in applying *Chevron* deference without permitting any discovery into the reliance interests generated by HHS's prior interpretations of the risk corridors program and the damage

caused to Land of Lincoln, Health Republic, and other QHP issuers when HHS reversed itself without explanation.

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). And an agency may change its existing policies as long as it provides a "reasoned explanation for the change." *Id.* Further, "[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered *serious reliance interests* that must be taken into account.'" *Id.* (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (emphasis added). When an agency's prior interpretation engenders "serious reliance interests" and those interests are not addressed when the agency adopts a contrary position without explanation, "[i]t follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute." *Encino Motorcars*, 136 S. Ct. at 2127; *accord F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating "[i]t would be arbitrary and capricious" to ignore the fact that an agency's "prior policy has engendered serious reliance interests").

Whether and to what extent an agency's prior interpretation of a statute "engendered serious reliance interests" is therefore a key factual inquiry—not constrained to any sort of manufactured "administrative record"—that can determine whether an agency's interpretation is entitled to deference or not. But the administrative record the lower court considered here omitted any evidence regarding the "serious reliance interests" created by the HHS's original interpretation of the risk corridors program. There are no facts in the administrative record regarding the extent to which Land of Lincoln and other QHP issuers relied on HHS's prior statement that "the risk corridors program is not statutorily required to be budget neutral" and that HHS "*will remit* payments as required under Section 1342" "[*r*]*egardless of the balance of payment receipts*." 78 Fed. Reg. 15410, 15473 (Mar. 11, 2013) (emphasis added). Not only was there nothing in the administrative record regarding these reliance interests, but the lower court's opinion does not discuss or even acknowledge the importance of reliance interests in deciding whether to apply *Chevron* deference in the first place. *See generally* Appx1-36.

The lower court's use of an administrative record, without the benefit of any discovery, thus meant that there was no discovery into several areas that would be relevant to whether HHS's original interpretation created serious reliance interests and eliminated any basis for *Chevron* deference. For example, there was no discovery into the health insurance companies' (1) communications with HHS regarding HHS's original interpretation of the risk corridor program; (2) QHP issuers' internal planning documents and communications indicating reliance on the HHS's statements that risk corridor payments would be made in full; (3) HHS's internal documents regarding the reasons for HHS's contradictory and changing interpretations; or (4) the substantial harm to the entire QHP Issuer Class flowing from HHS's changed position.

The administrative record also omitted several of HHS's public statements that the risk corridor program was meant to share risk among QHP issuers and the Government, which is contrary to the position the Government has taken in this litigation. The Government has dismissed as absurd the idea that, through the risk corridor program, it agreed to be "the uncapped insurer of the insurance

industry itself." The United States' Motion to Dismiss and Motion for Judgment on the Administrative Record on Count I (Sept. 23, 2016) (ECF No. 22) at 24. But not only does the plain language of both the ACA and the implementing regulations require the Government to share this risk, HHS publicly acknowledged this during the time that prospective QHP issuers were deciding whether to participate in the healthcare exchanges.

In March 2012, for instance, CMS gave a presentation explaining the risk corridors program was a means to "[p]rotect[] against inaccurate rate-setting by sharing risk (gains *and losses*) on allowable costs *between HHS* and qualified health plans to help ensure stable health insurance premiums." CMS, "Reinsurance, Risk Corridors, and Risk Adjustment Final Rule," at 11 (Mar. 2012), *available at* https://www.cms.gov/cciio/resources/files/downloads/3rs-final-rule.pdf (emphases added). A year later, CMS again said that "[t]he temporary risk corridors program provides for the sharing *between a QHP issuer and the Federal government* of profits *and losses* resulting from inaccurate rate-setting during the early years of Exchanges." CMS, "HHS Notice of Benefit and Payment Parameters for 2014," at 18-19

(Mar. 2013), *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/payment-notice-3-11-2013.pdf (emphases added). HHS's repeated admissions that the Government shared in the "profits and losses" only make sense if HHS interpreted the risk corridor program as requiring full payment, regardless of amounts received under the program. And its repeated admissions contradict its current position that QHP issuers alone bore the risk while the Government stood only to benefit if the program resulted in more funds paid in than paid out.

In its own, first-filed case, Health Republic intends to introduce these statements and others, as well as evidence showing the QHP Issuer Class relied on them—evidence that was omitted from the "administrative record" in this case and is directly relevant to whether *Chevron* deference is owed to HHS's about face in its approach to the risk corridor program. To the extent the lower court failed to consider these issues because it used a limited administrative record, it erred and should reconsider the issue on remand only after Land of Lincoln and the Government have an opportunity to engage in discovery and submit evidence on the topic.

As a final point, even if the Court of Appeals determines that the lower court did not err in using this procedure, Health Republic respectfully requests that this Court's opinion acknowledge the unique procedural posture of the *Land of Lincoln* matter and that *Chevron* deference may not apply if the record had included evidence regarding the substantial reliance interests of the QHP Issuer Class that Health Republic intends to introduce in its own case, which implicates the interests of hundreds of QHP issuers throughout the nation.

CONCLUSION

For all these reasons, the Court should vacate the judgment for the Government.

Dated: February 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B), this brief contains 3,279 words. This certificate was prepared in reliance on the word count of the word-processing system used to prepare this brief.

The undersigned further certifies that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2014 in 14-point Century Schoolbook font.

Dated: February 7, 2017

/s/ *Stephen A. Swedlow*
Stephen A. Swedlow

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2017:

1. I presented the Brief Of Amicus Curiae Health Republic Insurance Company In Support Of Plaintiff-Appellant to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record, which constitutes service pursuant to Fed. R. App. P. 25(c)(2), Fed. Cir. R. 25(a), and the Court's Administrative Order regarding Electronic Case Filing 6(A).

/s/ *Stephen A. Swedlow*
Stephen A. Swedlow