IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,	:	Judge Griggsby
Plaintiff,	:	Case No. 16-651C
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF

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Fundamentally, this case—and the other 21 cases brought under section 1342—is about congressional intent and Congress's constitutional control of the purse. Statements by HHS, appeals to the general purpose of the risk corridors program, and the business decisions of various issuers to either leave the Exchanges or, like BCBSNC, remain and increase premiums are irrelevant to the question before this Court. That question is simply whether section 1342 entitles issuers to full risk corridors payments without regard to collections. Unless the Court concludes that Congress intended full, annual payments, BCBSNC's claims fail as a matter of law and must be dismissed.

Congress's intent is clear. Section 1342 does not appropriate funds to make risk corridors payments. For fiscal years 2015, 2016, and 2017, the only times when benefit year 2014 and 2015 risk corridors payments could have been due to date, Congress appropriated only risk corridors collections as a source of funding for payments and expressly prohibited the use of other funds. Under the laws enacted by Congress and governing case law, issuers are entitled only to their pro rata share of collections and the United States is not liable for any shortfall.

BCBSNC's supplemental brief, Docket No. 29, on its opening page confirms Plaintiff's agreement that the case turns on Congress's intent. BCBSNC is right to emphasize the statute, but it misunderstands the standard applicable to the United States' motion to dismiss under RCFC 12(b)(6), it misreads Judge Lettow's *Land of Lincoln* opinion, and it ignores the appropriations issue that is dispositive here. Finally, BCBSNC errs in relying upon Judge Wheeler's opinion in *Moda* because that decision's conclusions contradict the very laws upon which they purport to rely.

I. Because section 1342 does not entitle BCBSNC to risk corridors payments in excess of its pro rata share of collections, its claims fail as a matter of law

In considering a motion pursuant to Rule 12(b)(6), although the Court must accept as true BCBSNC's factual allegations, the Court need not accept BCBSNC's legal conclusions, including whether section 1342 requires full payment annually or full payment without regard to collections. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). Rather, "[a] complaint must be dismissed under Rule 12(b)(6) when the facts asserted do not give rise to a legal remedy." *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (citing *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). Accordingly, here, the Court must determine, as a question of law, whether section 1342 entitles BCBSNC to the full, annual payments it seeks. If section 1342 does not, then Count I must be dismissed, and Counts II-V, which equally depend on such an entitlement under section 1342, must also be dismissed.

As Judge Lettow determined, section 1342 "does not obligate HHS to make annual payments or authorize the use of any appropriated funds." *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 107 (2016). Judge Lettow based that conclusion on his careful consideration that (1) "payments in" are the "only statutory source of funding for the risk-corridors program," *id.* at 104; (2) Congress relied on the CBO's scoring, which omitted the risk corridors program, when enacting the ACA, *id.*; (3) Congress appropriated or authorized appropriations for other ACA programs but not for risk corridors, *id.* at 104-05; and (4) Congress omitted specific appropriations and obligating language from section 1342 that it had included in the Medicare Part D risk corridors program, *id.* at 105-06. Judge Lettow's interpretation of section 1342 did not depend upon the standard applicable to RCFC 52.1. Only *after* he determined that section 1342 "does not obligate HHS to make annual payments or authorize the use of any appropriated funds,"

did Judge Lettow then turn to the question whether HHS's budget-neutral implementation of section 1342 was reasonable. *See Land of Lincoln*, 129 Fed. Cl. at 106-08. In considering the statute and in evaluating the reasonableness of HHS's implementation, Judge Lettow considered materials that are already before this Court and that can properly be considered in a motion to dismiss under RCFC 12(b)(6). *See id.* at 103-08.[1]

Judge Wheeler, on the other hand, concluded with minimal analysis that the "shall pay" language of section 1342(b)(1)—standing alone—obligated the Secretary of HHS to make payments in accordance with the statutory formula because "no language . . . in Section 1342 . . . makes 'payments out' . . . contingent on 'payments in.'" *Moda Health Plan, Inc. v. United States*, No. 16-649C, -- Fed Cl. --, 2017 WL 527588, at *15 (Feb. 9, 2017). But Judge Wheeler failed to read section 1342(b)'s provision that "the Secretary shall pay" in context with the statute as a whole. Congress's principal directive in section 1342 to the Secretary was not simply to "pay" issuers, but instead to "establish and administer a program of risk corridors" under which QHPs "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums" and that would be "based on" a similar program under Medicare Part D. 42 U.S.C. § 18062(a). The Secretary did establish and administer such a program, as directed by Congress. 45 C.F.R. § 153.510. Subsection (b) required that the "Secretary shall provide" that, "under the program established under subsection (a)," if costs are sufficiently high relative to premiums in a given year, then the Secretary "shall pay" the plan and if costs are sufficiently low relative to premiums, then the plan "shall pay" HHS, 42 U.S.C.

[1] BCBSNC characterizes the administrative record filed in *Land of Lincoln* as "limited." Pl. Supp. Br. at 3. Though only a small portion of the record—all of which is before the Court here—was relevant to Judge Lettow's analysis, the administrative record itself was 13,382 pages long. The plaintiff did not seek to supplement the administrative record.

§ 10862(b). "Payments in" are the only source of funds specified in section 1342. And nowhere within the four corners of section 1342 is there any appropriation or any authorization for an appropriation for risk corridors payments.

II. Congress has never appropriated funds for risk corridors payments other than collections

As set forth in the United States' briefs, BCBSNC's claim, along with Judge Wheeler's analysis in *Moda*, founders on fundamental principles of appropriations law and Congress's power of the purse. *See* U.S. Const. art. I, § 9, cl. 7. Congress exercises that power by providing "budget authority," which grants federal agencies authority to incur financial obligations that are binding on the United States. *See* 2 U.S.C. § 622(2)(A) (defining types of budget authority). "Agencies may incur obligations only after Congress grants budget authority." GAO–16–464SP, *Principles of Fed. Appropriations Law* (Ch. 2) 2-55 (4th ed. 2016) (*GAO Redbook*), available at http://www.gao.gov/assets/680/675709.pdf. A claimant seeking to enforce a money-mandating statute or regulation generally "must identify not just a command to make [payment] but an appropriation of . . . money that . . . may [be] use[d] for that purpose." *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005).

The Federal Circuit has repeatedly recognized that statutory language providing that an agency "shall pay" amounts calculated under a statutory formula (or words to that effect) does not, standing alone, create an obligation on the part of the government to provide for full payment. *See Prairie County, Montana v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015); *Greenlee County v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Star-Glo Associates, LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005); *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). The threshold inquiry in such cases (including this one) is whether Congress obligated the government to make full payment without

regard to appropriations, and, as with all statutory questions, the touchstone of that inquiry is congressional intent. *See Prairie County*, 782 F.3d at 690 ("Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability for [Payment in Lieu of Taxes Act (PILT)] payments, or whether PILT imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress.").

As Judge Wheeler acknowledged, "Congress did not specifically appropriate funds for the risk corridors program in the ACA." *Moda*, 2017 WL 527588, at *3. Just as crucially, as Judge Lettow recognized in *Land of Lincoln*, section 1342 does not authorize the use of any appropriated funds. 129 Fed. Cl. at 107. As noted in the United States' Reply, Docket No. 18, at 13 & n.9, Congress, in dozens of places in the ACA, either provided for appropriations for new programs or authorized appropriations for those programs. Congress did neither here. Without its own appropriation or other budget authority, section 1342 could not require any "payments out." And without an authorization of appropriations, in contrast to many other provisions of the ACA, section 1342 contains no indication that Congress intended risk corridors payments to be funded out of appropriations from the general fund of the Treasury, as opposed to just risk corridors collections, or "Payments In," as provided in the statute.

Nothing in the text of section 1342 obligated the United States to make up a shortfall in collections with funds from the general fund of the Treasury. In contrast to the program on which it is based, Congress omitted from section 1342 the obligating language it had included for the risk corridors program under Medicare Part D. The provision that governs the Medicare Part D risk corridors program specifically states:

> This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section.

42 U.S.C. § 1395w-115(a)(2). As Judge Lettow recognized, "[w]hen Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate." *Land of Lincoln*, 129 Fed. Cl. at 105 (quoting *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002)). This Medicare Part D language is the kind of language the Federal Circuit identified in *Prairie County* as establishing a government obligation to pay. *See* 782 F.3d at 691. By omitting such language from section 1342, Congress deliberately reserved its power over the purse to determine how risk corridors payments would be funded.

Judge Wheeler, however, misread the Medicare Part D statute. The *Moda* opinion mistakenly states that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay' specific amounts to insurers." *Moda*, 2017 WL 527588, at*15. That is incorrect. The Medicare Part D risk corridors program actually provides that "the Secretary shall increase the total payments . . . under this section." 42 U.S.C. § 1395w-115(e)(2)(B). Thus, 42 U.S.C. § 1395w-115(a)'s provision "constitut[ing] budget authority" and "represent[ing an] obligation of the Secretary" is not merely "a further payment directive," as Judge Wheeler believed, *Moda*, 2017 WL 527588, at *15, because the statute already includes an explicit direction to pay. Rather—and in contrast to section 1342—subsection (a) of the statute establishes an obligation by the government to make payments under Part D without regard to appropriations.

The omission of risk corridors from the CBO's scoring of the ACA confirms Congress's intent. Judge Wheeler, however, relying on post-enactment statements by the CBO, speculated that "the CBO may never have believed the risk corridors program to be budget neutral," but this speculation misunderstands the significance of the CBO's March 2010 cost estimate. In the ACA

itself, in a provision entitled "Sense of the Senate Promoting Fiscal Responsibility," Congress indicated, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the federal deficit between 2010 and 2019." ACA § 1563(a). The CBO's projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010. And it was predicated on the understanding that risk corridors payments would not increase the deficit. Judge Lettow explained that "the CBO's March 2010 estimate is the only pertinent report because that is what Congress relied upon in passing the Act." *Land of Lincoln*, 129 Fed. Cl. at 105 n.22. At the same time, he noted that the CBO's post-enactment statements were inconsistent. *Id.* Indeed, in *Sharp v. United States*, the Federal Circuit declined to rely on a post-enactment CBO cost estimate because "Congress never ratified the CBO's interpretation, which was completed more than two weeks after Congress took final action on the bill." 580 F.3d 1234, 1239 (Fed. Cir. 2009).

Congress did not appropriate funds for risk corridors payments until fiscal year 2015 at the earliest, and, when it did, it appropriated only risk corridors collections. *See* Motion to Dismiss, Docket No. 10, at 11-12 (citing Pub. L. No. 113-235, div. G, title II, § 227, 128 Stat. 2491 (2014); Pub. L. No. 114-113, div. H, title II, § 225, 129 Stat. 2624 (2015)). Congress's purpose in restricting available funds to collections was to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9307-01, H9838, 2014 WL 7005990 (Dec. 11, 2014); *see also* S. Rep. 114-74, at 12 (2015) ("The Committee continues bill language requiring the administration to operate the Risk Corridor program in a budget neutral manner).[2] In short, when the time came to appropriate funds

[2] One of BCBSNC's own citations recognizes that Congress intended to limit funding for risk corridors payments to collections. Pl. Supp. Br. at 9 n.7 (quoting Sabrina Corlette, *et al.*, *Why Are Many CO-OPs Failing?*, The Commonwealth Fund, Dec. 2015, *available at*

for the risk corridors program, Congress reaffirmed its intent that the program would be self-funded, and restricted the funds available for risk corridors payments, leaving HHS with no choice but to pro-rate payments in the event of a shortfall. *See Highland Falls*, 48 F.3d at 1170-71 (concluding that, notwithstanding statutory provision that school districts "shall be entitled" to amounts calculated under a statutory formula, subsequent earmarked appropriations evinced congressional intent that school districts were entitled to only a pro rata share of the amounts calculated under the statutory formula).

Judge Wheeler concluded that the 2014 Program management appropriation was "available for [risk corridors] payments," but that HHS "chose not to use the Program Management appropriation for 2014 risk corridors payments." *Moda*, 2017 WL 527588, at *16. The express terms of the appropriation, however, state that the lump sum amount expires at the end of the fiscal year. *See* Pub. L. No. 113-76, div. H, title V, § 502, 128 Stat. 5, 408 (2014) ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."). Risk corridors payments are calculated based on the ratio of a full calendar year's target amount and allowable costs. Thus, risk corridors payments could not be calculated and could not have become an agency obligation under any reading of section 1342 prior to calendar year 2015, after the 2014 Program Management appropriation expired. Accordingly, contrary to Judge Wheeler's conclusion, HHS could not have "chosen" to use the 2014 Program Management appropriation to make risk corridors payments.

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http://www.commonwealthfund.org/~/media/files/publications/fund-report/2015/dec/1847_corlette_why_are_many_coops_failing.pdf ("Congress changed the program to make it budget neutral.")).

III. Congressional intent to limit risk corridors payments to collections controls

"[P]ayments of money from the Federal Treasury are limited to those authorized by statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990). Because congressional intent as manifested in section 1342 and the appropriations laws governs BCBSNC's rights, its general policy considerations, alleged reliance on HHS's statements, and contentions regarding issuer participation on the Exchanges are immaterial. The United States addressed the policy considerations and HHS's statements in its supplemental brief, Docket No. 28, at 1-4. BCBSNC's new contentions regarding the alleged consequences the pro rata payments mandated by the shortfall in collections, while immaterial, lack merit.

First, BCBSNC contends that "Had insurers known that the Government would not pay the full risk corridors payments due annually, then insurers certainly would not have agreed to set their ACA premiums as low as they did because they would have had to factor in uncertainty in receiving the full, annual risk corridors payments." Pl. Supp. Br. at 7. But this suggests that issuers such as BCBSNC deliberately *underpriced* their premiums, counting on the risk corridors program to soften the losses. The purpose of the risk corridors program, however, was to stabilize premiums and provide an incentive for issuers to *accurately* set premiums.

Second, BCBSNC asserts that "[o]nly full and annual risk corridors payments fulfill the intended purpose in th[e] integrated design [of the 3R's programs]." *Id.* But annual, pro rata risk corridors payments do not disrupt either the risk adjustment or the reinsurance programs. Rather, risk adjustment and reinsurance payments are factored into the risk corridors formula, but not vice versa. *See* 42 U.S.C. § 18062(c)(1)(B).

Third, BCBSNC contends that without "full, annual risk corridors payments, the Government has caused co-ops to collapse, insurers to leave the ACA Marketplace, and remaining

insurers to raise premiums." Pl. Supp. Br. at 8. The contention that risk corridors payments—rather than under-capitalization, unsustainable costs, or other factors—have caused CO-OPs to fail or issuers to leave the Exchanges is unsupported (and would not provide a basis for recovery of risk corridors payments in any event). As for raising premiums, BCBSNC has raised its premiums considerably. *See* Karen Garlock, *NC Blue Cross Announces Rate Increase Of 24.3 Percent For ACA Marketplace Plans*, The Charlotte Observer, Oct. 17, 2016, *available at* http://www.charlotteobserver.com/living/health-family/karen-garloch/article108764207.html. But it provides no explanation why pro rata payments in 2015 and 2016 required it to raise premiums for benefit year 2017, when the risk corridors program has concluded.

Conclusion

The Complaint should be dismissed.

Dated: March 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, a copy of the foregoing, *The United States' Supplemental Response Brief*, was served on Lawrence S. Sher, Counsel for Plaintiff, via the Court's ECF system.

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