

2017-1224

In the

United States Court of Appeals for the Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

**Appeal from the United States Court of Federal Claims,
Case No. 16-744C (Lettow, J.)**

**MOTION FOR LEAVE OF *AMICI CURIAE* HIGHMARK INC.,
HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., BLUE
CROSS AND BLUE SHIELD OF NORTH CAROLINA, BLUE CROSS OF
IDAHO HEALTH SERVICE, INC., AND BLUE CROSS AND
BLUE SHIELD OF KANSAS CITY, TO FILE BRIEF IN SUPPORT OF
PLAINTIFF-APPELLANT'S MOTION TO SUBMIT RELATED APPEALS
TO THE SAME PANEL FOR ARGUMENT AND DECISION**

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* certifies the following:

1. The full name of every party or *amicus* represented by me is:

Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

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

N/A

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

Reed Smith LLP: Lawrence S. Sher, Colin E. Wrabley, Kyle R. Bahr, Conor M. Shaffer, Daniel I. Booker, Dan J. Hofmeister, Jr.

/s/ *Lawrence S. Sher*

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT
OF PLAINTIFF-APPELLANT'S MOTION TO SUBMIT RELATED
APPEALS TO THE SAME PANEL FOR ARGUMENT AND DECISION**

Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City (*Amici*) respectfully move this Court for leave to file the attached proposed brief as *amici curiae* in support of Plaintiff-Appellant Land of Lincoln Mutual Health Insurance Company (Lincoln) motion to submit related appeals to the same panel for argument and decision (ECF No. 117).

Amici's proposed brief, which specifically responds to the government's claims about *Amici* and the nature and scope of this appeal, will assist the Court's consideration of Lincoln's motion; a virtually identical motion in the appeal sought to be joined—*Moda Health Plan, Inc. v. United States*, Case No. 17-1994 (Fed. Cir.); and the government's related motion to stay its appeal in *Moda*, *id.*, ECF No. 8.

Lincoln consents to this motion. The government does not consent to this motion.

**REASONS TO ALLOW *AMICI'S* BRIEF IN SUPPORT
OF LINCOLN'S JOINDER MOTION**

On consent of the parties, *Amici* previously filed an *amicus* brief on the merits in this appeal in support of Lincoln and reversal of the decision below. ECF

No. 63. As set forth in that brief and in the attached proposed *amicus* brief, *Amici* described their interest in this appeal, which implicates legal issues present in their own similar lawsuits pending against the government in the U.S. Court of Federal Claims (COFC). *Id.* at 1-4; Prop. Br. of *Amici Curiae* (attached) at 1-3. In their attached proposed *amicus* brief, *Amici* likewise describe their related interest in a proper resolution of Lincoln's and Moda's joinder motions and the government's stay motion in *Moda*. *See* Prop. Br. of *Amici Curiae* (attached) at 3-4.

In addition to *Amici*'s stated interest in this appeal and the pending motions, *Amici* are uniquely well-positioned to address certain erroneous assertions by the government in its opposition to the joinder motions—assertions the government repeats in its stay motion in *Moda*. Specifically, one of the government's principal arguments is that a delay in the disposition of this appeal would be inconsistent with the expectations of the COFC judges assigned to other pending risk corridors cases and the plaintiff-insurers that filed them, and that a stay in the *Moda* appeal would be consistent with those expectations. *See* Prop. Br. of *Amici Curiae* (attached) at 5. The government's conjecture, however, is wrong. *Id.* at 5-6.

Indeed, *Amici* are parties to multiple different risk corridors cases at varying stages of proceeding—including one that is stayed pending the outcome in this appeal. *Id.* Yet, each of them supports the joinder of the *Moda* appeal with this one. Contrary to the government's assertions, the joinder will enable the Court to

provide more comprehensive guidance on the key legal issues that cut across all of the pending risk corridors cases. *Id.* at 4, 7-8.

As *Amici* previously demonstrated in their merits *amicus* brief, unlike the proceedings and decision below in *Moda*, the trial-court proceedings in this case were improperly confined to an “administrative record” that did not exist. *See Amici* Br. (ECF No. 63) at 9-12. As a result, the trial court’s ruling was erroneously based on legal standards—those set forth by the Administrative Procedure Act—that the court lacked jurisdiction to apply in this Tucker Act litigation. *Id.* at 6-17. Those threshold errors make this case an inadequate vehicle for resolving the underlying legal issues presented by Lincoln’s statutory and contractual claims for relief. At the very least, the anomalous record below makes the joinder of the *Moda* appeal a highly beneficial step to facilitate an appropriate resolution.

Specifically, given the truncated record Judge Lettow considered, and the highly deferential-to-the-government legal standards he applied, an affirmance in this appeal alone may have limited precedential effect in pending risk corridors cases. *See Amici* Br. (ECF No. 63) at 27-28. The *Moda* appeal, by contrast, involves trial-court rulings of law at summary judgment based on a full factual record, thus enabling this Court to consider the underlying legal issues free from

the impediments present in this appeal. *See generally Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017).

Mere consideration of the *Moda* ruling in this appeal is no substitute for joinder of the appeals in the two cases. The government has aimed a significant amount of its merits briefing at the *Moda* ruling, yet now seeks to foreclose Moda's counsel from providing its own perspective on it. *See* ECF No. 107 at 28-40, 50-51. The better result—to develop a full appreciation of the relevant issues—is to bring Moda's counsel into this case, and consider both appeals in their entirety.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae* in support of Lincoln's joinder motion.

Dated: May 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed the foregoing motion with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ *Lawrence S. Sher*

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SAME PANEL FOR ARGUMENT AND DECISION**

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City (*Amici*) respectfully submit this brief in support of the motion of Plaintiff-Appellant Land of Lincoln Mutual Health Insurance Company (Lincoln) to Submit Related Appeals to the Same Panel for Argument and Decision (ECF No. 117). *Amici's* brief will assist the Court's consideration of Lincoln's motion and specifically responds to claims made about *Amici* in the government's opposition to the motion.

As the parties' and *Amici's* prior submissions to the Court describe, this appeal relates to the "risk corridors" provisions of the Affordable Care Act of 2010 (ACA) aimed at inducing health care insurers to participate in the ACA exchanges and issue policies for previously uninsured Americans. Those provisions state that during the first three years of the program, the government will compensate insurers who participate in the "risk corridors" program for losses beyond a statutorily prescribed amount. Based on this promise by the government, *Amici*

¹ No counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See Fed. R. App. P. 29(a)(4)(E).* As noted in *Amici's* accompanying motion for leave, Lincoln has consented to the filing of this brief; the government does not consent. *See Fed. R. App. P. 29(a)(2); Fed. Cir. R. 29(c).*

and numerous other insurers entered into agreements with the government to become “Qualified Health Plans” under the ACA. But the government since has refused to honor its promise to Lincoln, *Amici*, and other participating insurers, and make the required risk corridors payments, which it acknowledges are owed in full.

Lincoln brought suit under ACA § 1342, 42 U.S.C. § 18062, and the Tucker Act, 28 U.S.C. § 1491(a), to recover its risk corridors payments. In November 2016, the U.S. Court of Federal Claims (COFC) (Lettow, J.) issued an order dismissing that claim (and Lincoln’s related non-statutory claims). Later, in February 2017, in the case of *Moda Health Plan, Inc. v. United States*, No. 16-649C (Fed. Cl.), COFC Judge Wheeler reached a different conclusion, finding that (i) “the Government has unlawfully withheld risk corridors payments from Moda” and (ii) for its breach of statutory and contractual obligations, the government “is therefore liable for Moda’s full risk corridors payments under the ACA.”² On May 5, 2017, the government appealed Judge Wheeler’s ruling to this Court.

Shortly after the government filed its appeal in *Moda*, Moda and Lincoln moved this Court to hold a joint oral argument before the same panel, and for that panel to decide both cases. The government has opposed the motions and moved

² See *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 441 (2017). Following this ruling, the government stipulated to a monetary award, and Judge Wheeler entered a final judgment against the government. See Case No. 16-649C (Fed. Cl.), ECF Nos. 24, 26.

to stay its own appeal in *Moda*, arguing, *inter alia*, that (i) “this Court’s decision in” *Lincoln* “will control the resolution of *Moda* and the twenty-one other risk-corridors cases” (ECF No. 123 at 2) and (ii) “a delay of this appeal would be inconsistent with the expectations of the trial courts and parties in those cases” (*id.* at 4);³ *see also Moda Health Plan, Inc. v. United States*, Case No. 17-1994 (Fed. Cir.), Gov’t Mot. to Stay Appeal (ECF No. 8) at 6, 8 (same).

Amici have a strong interest in the proper resolution of *Lincoln*’s (and *Moda*’s) joinder motions and the government’s stay motion in *Moda*, and in ensuring the Court has before it a full and accurate recitation of the relevant facts. On consent of the parties, *Amici* already have filed an *amicus* brief on the merits in support of *Lincoln* and reversal of the decision below. ECF No. 63. As noted in that brief, *Amici* have a direct and substantial interest in *Lincoln*’s appeal of the ruling below because they, too, have filed suit against the government, seeking nearly \$1 billion dollars in unpaid risk corridors payments. *Id.* at 3. In one of those cases, *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Fed. Cl.), COFC Judge Griggsby recently granted the government’s motion to dismiss and entered a final judgment, ECF Nos. 34, 35, and *Amicus Blue Cross and Blue Shield of North Carolina* (BCBSNC) intends to appeal that ruling.

³ The government has filed a virtually identical opposition in *Moda*. Case No. 17-1994 (Fed. Cir.), ECF No. 9.

As shown below, the government's claim in its opposition to Lincoln's motion that "a delay of this appeal would be inconsistent with the expectations of the trial courts and parties in those cases" (ECF No. 123 at 4) is conjectural at best and, indeed, unfounded—*Amici* support joinder of this appeal and *Moda* despite any resulting delay in disposition. Additionally, given the significant procedural differences between *Moda* and *Lincoln*, *Amici* believes that joinder of the two appeals for argument and decision purposes will better enable the Court to reach a comprehensive resolution of the core legal issues raised in the risk corridors cases—including those of *Amici*. *Amici* respectfully request that the Court grant Lincoln's joinder motion and, concomitantly, deny the government's motion to stay its appeal in *Moda*.

REASONS TO GRANT LINCOLN'S JOINDER MOTION

The importance of the issues raised in this appeal is underscored by the government's opposition to Lincoln's joinder motion. The government acknowledges the numerous pending risk corridors lawsuits and the significant monetary impacts they pose. Resolution of issues of this magnitude benefit from the broadest possible perspectives, including on relevant fact patterns, legal arguments, and practical and policy considerations. The government's attempt to close off a broader perspective here and preclude consideration of its own appeal in *Moda* now—even as the government's attack on Judge Wheeler's ruling in that

very case is a centerpiece of the merits brief the government filed last month in this appeal (ECF No. 107 at 28-40, 50-51)—is, simply put, antithetical to sound decisionmaking and fundamentally unfair.

In its opposition to Lincoln’s and Moda’s joinder motions, and its own motion to stay in *Moda*, the government makes several claims concerning *Amici*, the risk corridors cases pending in the lower court, the decision below in this case, and the scope of this appeal that need to be addressed so that the joinder issue can be fairly evaluated. *Amici* hereby responds to those claims.

First, the government contends that “a delay of this appeal would be inconsistent with the expectations of the trial courts and parties” in the other risk corridors cases pending in the COFC, a number of which have been stayed pending the outcome in this appeal. ECF No. 123 at 4; *see also Moda Health Plan*, Case No. 17-1994 (Fed. Cir.), Gov’t Mot. to Stay (ECF No. 8) at 8 (same); *id.*, Reply in Support of Gov’t Mot. to Stay (ECF No. 12) at 5-6 (same). The government is wrong.

Amici and their pending COFC cases are representative of the range of pending risk corridors cases. In its case, *Amicus Blue Cross of Idaho* (BCI) consented to the government’s motion to stay pending the outcome of this appeal, before the *Moda* appeal was filed. BCI nonetheless unequivocally supports the relief Lincoln seeks in its motion, even if that delays the Court’s resolution of this

appeal. The other *Amici*—the Highmark entities, BCBSNC, and Blue Cross and Blue Shield of Kansas City (BCBSKC)—are at varying stages of their own active risk corridors lawsuits, *see* Case No. 16-651C (Fed. Cl.), ECF No. 35 (judgment issued in *BCBSNC*); Case No. 17-1224 (Fed Cir.), ECF No. 123 at 4 n.2 (noting briefing completed in *Highmark* and government’s motion to dismiss in *BCBSKC* due May 23), and each of them likewise unequivocally supports the relief Lincoln seeks despite any delay in this Court’s ultimate disposition of the consolidated appeals. And, while some COFC judges have stayed risk corridors cases pending a ruling on the merits here, *see* ECF No. 123 at 4 n.2, as the government itself acknowledges, the majority of judges assigned to such cases have moved forward, *id.*, and one recently issued a final judgment in *Amicus* BCBSNC’s action. In short, the government’s unsupported conjecture about the “expectations of the trial courts and parties” in risk corridors cases is just that—and it is wrong.⁴

Second, and equally erroneously, the government says “[i]t is undisputed that this Court’s decision in this case will control the resolution of *Moda* and the twenty-one other risk-corridors cases.” ECF No. 123 at 2; *see also id.* at 5 (same); *Moda Health Plan*, Case No. 17-1994 (Fed. Cir.), Gov’t Mot. to Stay (ECF No. 8)

⁴ Notably, other than the possible delay of a decision on the merits in this appeal—an appeal already substantially slowed by the government’s own opposition to Lincoln’s motion to expedite and its successful request for a 42-day extension—the government does not claim that it will be prejudiced by joining its appeal in *Moda* with this case. Nor could it.

at 6 (same); *id.*, Reply in Support of Gov’t Mot. to Stay (ECF No. 12) at 1, 2. As *Amici* demonstrated in their brief in support of Lincoln on the merits, however, in the proceedings below, Judge Lettow committed threshold jurisdictional and procedural errors that compel reversal before the merits of the underlying legal issues may even be considered on their merits. *Amici* Br. (ECF No. 63) at 6-17; *see also Amicus* Br. of Health Republic Ins. Co. (ECF No. 69) at 4, 8-18.

Third, even if the Court reaches the merits of the underlying legal issues in *Lincoln* and affirms Judge Lettow’s flawed ruling, its decision could have limited precedential value for other risk corridors cases due to the incomplete record before Judge Lettow. *Amici* Br. (ECF No. 63) at 27-28; *see also Moda Health Plan*, Case No. 17-1994 (Fed. Cir.), Moda’s Reply in Support of Mot. to Submit Related Appeals to the Same Panel for Argument and Decision (ECF No. 10) at 3 (“*Lincoln* is not the appropriate vehicle for resolution of Risk Corridor issues” because Judge Lettow based his ruling on an “administrative record [] pursuant to RCFC 52.1 procedures typically followed only in administrative appeals, not Tucker Act cases” like this one).

Indeed, it is the very procedural and record-based distinctions between this appeal and the government’s in *Moda* that further underscore why the *Moda* appeal should be joined with this one. Because Judge Wheeler in *Moda* rendered his ruling on the central legal issues based on a summary judgment record under

RCFC 56, *see Moda Health Plan*, 130 Fed. Cl. at 454-55, joining the government's appeal of that ruling with Lincoln's here will enable the Court to reach a more comprehensive disposition of the controlling legal issues, and thus provide optimal guidance for the trial court in the other pending risk corridors cases.

CONCLUSION

Amici respectfully request that Lincoln's joinder motion be granted and that the government's motion to stay in *Moda* be denied.

Dated: May 18, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), I certify that this *amicus* brief in support of Plaintiff-Appellant's joinder motion is proportionately spaced and contains less than half of the pages permitted for the joinder motion under the former Fed. R. App. P. 27(d)(2) (March 2016), which is applicable to this appeal (docketed between April 1, 2016 and November 30, 2016; see <http://www.cafc.uscourts.gov/rules-of-practice/notices>).

/s/ *Lawrence S. Sher*

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ *Lawrence S. Sher*