IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DOUG OMMEN, in his capacity as Liquidator of CoOportunity Health, Inc., and DAN WATKINS, in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc.,	)	
Plaintiffs,	)	
	)	Case No.: 1:17-cv-957C
v.	)	Judge Charles F. Lettow
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

JOINT STATUS REPORT

On September 5, 2017, the Court stayed this case pending the Federal Circuit's decisions in *Land of Lincoln Mutual Health Insurance Company v. United States,* No. 17-1224, and *Moda Health Plan, Inc. v. United States,* No. 17-1994. Dkt. 12. On June 14, 2018, the Federal Circuit decided *Land of Lincoln*, 892 F.3d 1184 (Fed. Cir. 2018), and *Moda*, 892 F.3d 1311 (Fed. Cir. 2018), in favor of the defendant. The time for the insurers to file a petition for rehearing en banc or a petition for certiorari, if any, has not passed. The Court extended the time for the parties to file this Joint Status Report to July 24, 2018. Dkt. 17. The parties have conferred regarding the progression of this case and agree on some matters, but not others.

Plaintiffs desire to go forward with this case and defendant does not object in light of its view of the favorable impact of the Federal Circuit's rulings on the government's interests. Part IV of this report reflects the parties' agreement on how this case would proceed. As set forth in Parts II and III, however, the parties disagree on their description of the Federal Circuit's rulings. They disagree also as to the significance of how other cases in this court, the federal district

courts, and the state liquidation court bear on next steps in this case. In Part III, defendant reports its views on the implications for the efficient use of this Court's resources occasioned by these other cases. In Part II, plaintiffs report their views on why proceeding now with the case is warranted.

I. Background

Plaintiffs are liquidators of CoOportunity Health, Inc. (hereinafter Liquidators), a former Patient Protection and Affordable Care Act (ACA) issuer of Qualified Health Plans (QHPs), that participated in the Iowa and Nebraska ACA exchanges before being ordered into liquidation by an Iowa state court in February 2015. As previously summarized by this Court, this case "alleges claims based on the government's failure to pay all amounts said to be due under the risk corridor provisions [of the ACA], 42 U.S.C. § 18062. The Liquidators have also alleged claims based on [the Secretary of the Department of Health and Human Services' (Secretary or HHS)] HHS's allegedly improper setoff of funds and HHS's alleged use of an arbitrary risk adjustment formula. *See* Compl. at 34-41, 43." Dkt. 12 at 2.

II. The Plaintiff-Liquidators' Report

A. The Federal Circuit's Decisions in *Land of Lincoln* and *Moda*

In a split decision (Circuit Judge Newman dissenting), the Federal Circuit reversed the judgment in the insurer's favor in *Moda* and affirmed the judgment in favor of the United States in *Land of Lincoln*. The Federal Circuit held that the risk corridors statute "obligated the government to pay the full amount of risk corridors payments according to the formula it set forth," but later enacted appropriations riders "affected a suspension of that obligation." *Moda Health Plan, Inc. v. U.S.*, 892 F.3d 1311, 1320 (Fed. Cir. 2018). In so ruling, the Federal Circuit expressly *rejected* the government's argument that the risk corridors statute "carries no

obligation to make payments at the full amount" because "Section 1342 is unambiguously mandatory." *Id.* The court also rejected the insurers' claims for additional payments under the risk corridors program based upon implied contract and takings theories. *Id.*at 1329 (discussing implied contract claim);-; *Land of Lincoln Mut'l Health Ins. Co. v. U.S.*, 892 F.3d 1184 (2018) (discussing takings claim).

While there is some similarity between the Liquidators' claims and those in *Moda* and *Land of Lincoln*, there are important distinctions. Like the carriers in *Moda* and *Land of Lincoln*, the Liquidators' Count I and V assert claims for payment of risk corridors pursuant to § 1342(b)(1) of the ACA and its implementing regulations and a takings claim. However, unlike the carriers in *Moda* and *Land of Lincoln*, CoOportunity has received *nothing* in Risk Corridor payments for 2014 and 2015; whereas Moda, Land of Lincoln, and virtually *all other* carriers received at least a *pro rata* payment based on collections into the program.

Unlike Moda, the Liquidators' Count II asserts claims for payment of risk corridors pursuant to *express* contracts: that is, the Loan Agreement between CoOportunity and defendant QHP Agreement between CoOportunity and the federal government. Moda did not assert an express contract claim, and Land of Lincoln's express contract claim was limited to the QHP agreement, which the Federal Circuit did not address in its opinion. Thus, even if there is continued appeal in *Moda* or *Land of Lincoln*, the rulings in those cases are not dispositive of the Liquidators' distinct contract claims.

Another important distinction is the Liquidators' claims against defendant for illegal self-help. Those claims are asserted in Count III, which asserts a claim for payment of funds improperly held and/or set off by the government in violation of state and federal law, and Count IV, which asserts claims for breach of express contracts (the Loan Agreement and QHP

Agreement) and federal law by wrongful setoff. The holding in *Moda* that the full risk corridors amounts are an "obligation" of defendant that has simply been "suspended" due to an appropriation restriction requires judgment in favor of the Liquidators. In addition, the Liquidators particularly challenge HHS's reduction of payments unquestionably owed CoOportunity in order to collect risk adjustment charges.

The Liquidators also challenge HHS's self-help in collecting risk adjustment charges. Earlier this year, a District Court in New Mexico ruled that HHS's formula for calculating risk adjustment charges was arbitrary and capricious in part. The Court set aside and vacated use of the formula for plan years 2014-2018 and remanded the issue back to HHS to be corrected. *New Mexico Health Connections v. United States,* No. 16-0878, 2018 WL 1136901 at *37 (D. N.M. Feb. 28, 2018). Referencing the litigation specifically, CMS has taken the position that it cannot pay any of the amounts due under plan year 2017. "Billions in risk adjustment payments and collections are now on hold," said CMS administrator Seema Verma in a press release.[1] The Liquidators contend that all setoff against amounts claimed to be owed under the now-vacated risk adjustment formulas are plainly improper and believe that issue can be productively litigated without waiting for the risk corridors appeals to play out.

Yet another distinction is the Liquidators' risk adjustment claims asserted in Count VI. The Liquidators challenge not only HHS's methodology for the risk adjustment program during 2014 and 2015, but also HHS's insistence, despite CoOportunity's request, that CoOportunity be included in the program for 2015 even though CoOportunity's operated only two months during 2015 during the months leading up to the anticipated liquidation. While other carriers have

[1] https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2018-Press-releases-items/2018-07-07.html.

challenged the risk adjustment methodology, with mixed holdings to date,[2] CoOportunity's claim focused on HHS's decision that CoOportunity must participate in risk adjustment for 2015 despite operating only two months of that year is distinct from other carriers.

Defendant confirms a number of times it has no opposition to this case proceeding, yet many portions of defendant's report imply this Court should continue the stay. For example, the government raises in its report that the Liquidators have sold a partial interest in their claims against the federal government in exchange for a lump sum payment of $19 million, with claims proceeds to be split between the Estate and the purchaser. That transaction is irrelevant to this proceeding and, in any event, CoOportunity's policyholder creditors are *still* owed over $40 million.

Although defendant formally has no opposition to lifting the stay at this time, it repeatedly suggests to the Court that a continued stay would also be prudent. These continued attempts to further delay a decision in this case are precisely the concerns the Liquidators raised with this Court when asserting that the government's stay request was indefinite in nature:

> The result is predictable. If the Federal Circuit decides *Land of Lincoln* and *Moda* in favor of the insurers, the Government will not simply concede the effect of the decision and agree that a stay imposed by this Court should be lifted. To the contrary, true to its strategy of delaying resolution of this case at every stage for the last 18 months, the Government will file a status report claiming the stay should be continued while it seeks panel rehearing or rehearing en banc. And if such rehearing is granted, the Government will urge a further continuation of the stay. If the Government fails at this step, given the amount of funds at issue, it would likely argue that the stay should continue while it decides whether to petition the Supreme Court for *certiorari*. And when it does petition for *certiorari*, it will claim the stay should be extended until the Supreme Court rules. So on, and so on, until a stay that the Government currently presents as modest and manageable amounts to a two or three year delay while the

[2] In *Minuteman v. United States*, the court rejected the challenge to HHS's risk adjustment rules. *See* 291 F. Supp. 3d 174 (D. Mass. 2018). In *New Mexico Health Connections v. United States*, the Court determined the methodology was arbitrary and capricious and remanded the case for further proceedings before HHS. *See* No. 16-0878, 2018 WL 1136901 at *37 (D. N.M. Feb. 28, 2018).

> Government exhausts every possible means of overturning an adverse Federal Circuit ruling.

Doc. 7 at 10. Tellingly, a stay through any *certiorari* proceedings is exactly what defendant suggests to the Court in this filing. In ruling on this issue, this Court stated: "The court considers that a stay pending decision by the court of appeals in *Land of Lincoln* and *Moda Health* would not be indefinite but would have a specific end point." Doc. 12 at 4. That specific end point has arrived, and this case should proceed without further delay.

B. Next Steps

As set forth above, this case involves a number of legal issues, with some overlap and some distinctions from other carriers' claims. All of the distinct issues we have raised in this case should be resolved, while the similar issues raised in other proceedings work their way through the appeal process. It is unfair and prejudicial to suggest the Liquidators' claims should be stayed simply because there is *some* overlap to legal issues that are subject to ongoing proceedings. That would have a direct and detrimental impact on resolution of creditor claims against the CoOportunity estate.

In addition, it is likely that defendant will respond to the claims with a motion to dismiss, including for the "jurisdictional fatalities" it suggests in its report relating to the risk adjustment claim. (Defendant made a contradictory argument to the Iowa District Court in a companion case, arguing the Liquidators' *exclusive* remedy for the risk adjustment claims was a claim before this Court.) If it is ultimately determined that the risk adjustment claim must be pursued in District Court, we need to resolve that earlier rather than years down the line.

Assuming the Liquidators overcome what appears to be a likely jurisdictional challenge as to the risk adjustment claims, the parties would still need to resolve the administrative record and file dispositive motions, including on issues distinct from those involved in any other case.

III. Defendant's Report

Under the process set forth at Part IV, defendant does not object to proceeding with this case on account of the Federal Circuit's decisions in *Land of Lincoln* and *Moda*, which, in defendant's view, dictate judgment in its favor on all risk corridors-based theories in this case.

Notwithstanding this favorable circumstance for the defendant, the Court should be apprised of developments in this court, the federal district courts, and the state liquidation court in deciding appropriate next steps.

A. The Federal Circuit's Decisions in *Land of Lincoln* and *Moda*

As numerous judges of this Court have recognized, the issues involved in *Land of Lincoln* and *Moda* are nearly identical or substantially similar to those involved in the 50 or so other cases before this court, such as this one, in which health insurance companies claim that they are entitled to additional payments under the risk corridors program, ACA § 1342; 42 U.S.C. § 18062. In all, insurers seek to recover approximately $12.3 billion.

The Federal Circuit reversed the judgment in the insurer's favor in *Moda* and affirmed the judgment in favor of the United States in *Land of Lincoln*. The Federal Circuit rejected the insurers' claims for additional payments under the risk corridors program based upon statutory, contract, and takings theories. *Moda*, 892 F.3d 1311; *Land of Lincoln*, 892 F.3d 1184.

The Federal Circuit's holdings warrant judgment for the United States in the many risk corridors cases before this court, including the counts in this Complaint premised on entitlement to additional risk corridors payments. Notwithstanding this, for, *inter alia*, reasons of efficiency, we have consented to other plaintiffs' requests for continuation of the stays through when the Federal Circuit issues the mandates in *Land of Lincoln* and *Moda* and those decisions become final and unappealable. Judges of this court have continued stays in over 35 cases. In other

cases asserting similar offset claims, we have also consented to continued stays and/or extensions of time. *See, e.g.*, *HealthyCt v. United States*, No. 17-cv-1233, Dkt. 9; *Vullo v. United States*, No. 17-1185C, Dkt. 12. Presently, this is the only case where a plaintiff desires disposition now notwithstanding the likelihood of contemporaneous judicial review in *Moda* and *Land of Lincoln*.

B. Interim District Court and State Court Developments Impacting this Case

In addition to the Federal Circuit's *Moda* and *Land of Lincoln* decisions, defendant seeks to ensure the Court is informed of developments in federal district courts and the Iowa state court overseeing CoOportunity's liquidation that bear on this case and may be useful to the Court in deciding appropriate next steps.

1. District Court Actions

For the most part, the Liquidators' APA claim mirrors those brought in two district courts by insurers who were also assessed charges under the risk adjustment program for benefit years 2014 and 2015. Dkt. 1, Compl. ¶¶ 147-157. In *Minuteman v. United States*, the court rejected each challenge to HHS's risk adjustment rules and entered judgment in favor of the government. *See* 291 F. Supp. 3d 174 (D. Mass. 2018). *New Mexico Health Connections v. United States*, in turn, entered only partial summary judgment for the government. *See* No. 16-0878, 2018 WL 1136901 at *37 (D.N.M. Feb. 28, 2018). Diverging in part from the reasoning in *Minuteman*, *New Mexico Health Connections* accepted one of the insurer's APA challenges and vacated HHS's use of the statewide average premium in the rules that established the risk adjustment methodology. *Id.* (concluding that the agency had not provided an adequate explanation regarding budget neutrality and setting aside and vacating the agency action as to using a

statewide average premium for the 2014, 2015, 2016, 2017, and 2018 rules and remanding the case to the agency for further proceedings).

Consequently, although we disagree with *New Mexico Health Connections*, the risk adjustment methodology in the rules the Liquidators challenge for the 2014 and 2015 benefit years have already been vacated (pending further proceedings). The government's motion for reconsideration in *New Mexico Health Connections* is briefed and awaiting decision. Jurisdictional fatalities of Count VI aside, the present ruling in *New Mexico Health Connections* means that the Liquidators cannot presently state a claim in this Court since risk adjustment activities within a state that are conducted by the Secretary are to be determined by federal rules promulgated by the Secretary. 42 U.S.C. § 18041(c); 42 U.S.C. § 18063(b). Under that ruling there currently is no operative risk adjustment methodology to apply for the 2014 and 2015 benefit years.[3]

2. State Court Liquidation Proceedings

State court liquidation proceedings also inform next steps in this case. Given the many uncertainties raised by the similarities of the Liquidators' APA claim to the risk adjustment litigation in district courts and risk corridors appeals in the Federal Circuit at this time, and the length of time the Liquidators presumed it would take for these matters to be resolved, the Liquidators endeavored to sell CoOportunity's interests in this case to private investors in

[3] *See, e.g.*, HHS's July 7, 2018 Press Release titled "United States District Court Ruling Puts Risk Adjustment On Hold" available at https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases-items/2018-07-07.html, and a 2018 bulletin at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Implications-of-the-Decision-by-United-States-District-Court-for-the-District-of-New-Mexico-on-the-Risk-Adjustment-and-Related-Programs.pdf

exchange for, *inter alia*, a lump sum payment immediately payable to CoOportunity's creditors. Specifically, in justifying the sale to the state court, the Liquidators cited the uncertainty in the law cast on their risk adjustment claim on account of the diverging opinions in *Minuteman* and *New Mexico Health Connections* and on their risk corridors claims on account of, *inter alia*, the Federal Circuit's then-forthcoming decisions in *Land of Lincoln* and *Moda*. Attachment A, State Court Motion pages 4-6, ¶¶ 5-9. The "years" it would take for these cases to be resolved was an additional justification for the sale's terms, which provided for a lump sum payment immediately payable to CoOportunity's creditors. The State court approved the sale on June 5, 2018.

C. Next Steps

As the Court previously observed, "any decision on the setoff and risk adjustment issues would not lead to a separately stated judgment that could be entered under Rule 54(b) of the Rules of the Court of Federal Claims, but instead any judgment would have to await decision on the risk corridor issues." Dkt. 12 at 4. We would be remiss if we did not acknowledge that the same reasons the Court entered the initial stay in this case continue to apply now.

IV. Agreed Upon Process for Next Steps

Although it is within the Court's discretion to continue the stay, the Liquidators desire to proceed with the case, and defendant does not object. The Liquidators are currently evaluating potential amendments to their Complaint. Pursuant to RCFC 15(a)(2), defendant consents to plaintiffs' potential amendment, which the parties agree will be filed on or before August 27, 2018, on condition that defendant's responsive pleading to any amended complaint (or to the present Complaint in the absence of an amendment) be scheduled for 60 days thereafter or October 26, 2018, whichever is later. If plaintiff does not amend its complaint and the case

proceeds on the present Complaint, defendant advises the Court that it is likely to move to dismiss pursuant to RCFC 12(b)(1) & (6).

Dated: July 24, 2018

Respectfully submitted,

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