IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. F/K/A HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY D/B/A HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., AND HIGHMARK SELECT RESOURCES INC.,	:	Case No. 16-587C
Plaintiffs,	:	Judge Wolski
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' SUPPLEMENTAL BRIEF REGARDING *BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA V. UNITED STATES*

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ARGUMENT

On April 18, 2017, Judge Griggsby, addressing a virtually identical complaint to the Complaint before the Court in this case, issued an opinion in *Blue Cross and Blue Shield of North Carolina v. United States* ("*BCBSNC*"), No. 16-651C, -- Fed. Cl. --, 2017 WL 1382976, that dismissed the complaint. Judge Griggsby concluded that the Court possessed jurisdiction over the statutory count and agreed that the Department of Health and Human Services' ("HHS") three-year payment methodology is reasonable and entitled to deference. As a result, additional risk corridors payments are not presently due, and insurers like plaintiffs, First Priority Life Insurance Company, Inc., *et al.* ("Highmark"), cannot state a claim on which relief can be granted. Judge Griggsby also dismissed the contract and takings claims for failure to state a claim. While the United States respectfully disagrees with the jurisdictional determination in *BCBSNC*, Judge Griggsby's reasoning on the merits question was sound and should be followed in this case. Should this Court decline to dismiss the Complaint for lack of jurisdiction, the Court should dismiss all counts for failure to state a claim, in accordance with *BCBSNC*, and *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81 (2016).

I. Final Risk Corridors Payments Are Not Presently Due

As explained in our Motion to Dismiss, at 15-23, neither section 1342 nor its implementing regulations specify a due date for final risk corridors payments. Judge Griggsby agreed. *BCBSNC*, 2017 WL 1382976, at *14. Judge Griggsby noted that a "plain reading" of section 1342 demonstrates that Congress did not address the timing of risk corridors payments. *Id.* Thus, the "statute is silent" and "ambiguous" with respect to timing. *Id.* at *15. Recognizing Congress's delegation to HHS to promulgate regulations to implement the risk corridors program, *id.* (quoting 42 U.S.C. § 18041), Judge Griggsby considered risk corridors regulation

45 C.F.R. § 153.510 and concluded that a "plain reading" of the regulation also "makes clear that HHS did not establish an annual deadline" for risk corridors payments. *BCBSNC*, 2017 WL 1382976, at *15.

The Court then considered HHS's three-year payment framework. *Id.* at *15-*16. As Judge Griggsby noted, under the framework, HHS makes pro-rata payments (if collections are insufficient to make full payments) and then makes up the shortfall in subsequent years. *Id.* at *16. Judge Griggsby concluded:

> Given Congress's express and broad delegation of authority to HHS to implement the Risk Corridors Program, HHS's policy regarding the timing of the Risk Corridors Program Payments is reasonable and consistent with Section 1342. 42 U.S.C §§ 18041, 18062. The policy affords HHS the full three years of this temporary program to make up any shortfall in the Risk Corridors Program Payments as funds become available. Given the absence of a statutory deadline for making the Risk Corridors Program Payments to issuers—and the temporary nature of the Risk Corridors Program—HHS's policy is sound and consistent with Section 1342.

BCBSNC, 2017 WL 1382976, at *16 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *accord Land of Lincoln*, 129 Fed. Cl. at 107-08. Like Judge Lettow, Judge Griggsby rejected arguments that HHS must make full, annual risk corridors payments because (1) allegedly anything less would undermine the purpose of section 1342; (2) the ACA's risk corridors program is to be "based on" the Medicare Part D risk corridors programs; or (3) HHS calculates risk corridors payments and charges annually. *BCBSNC*, 2017 WL 1382976, at *17; *see also Land of Lincoln*, 129 Fed. Cl. at 107 (discussing purpose), 105 (Medicare Part D), 104 (annual calculation).

In light of the statute, regulations, and the three-year payment framework, Judge Griggsby correctly concluded that "HHS has no obligation under Section 1342 or its implementing regulations to pay the full amount of [an insurer's] Risk Corridors Program

Payments until, at a minimum, the agency completes its calculations for payments due for the final year of the Risk Corridors Program. *BCBSNC*, 2017 WL 1382976, at *16. As the Court recognized, that deadline "will not occur until December 2017 or January 2018." *Id.* Because HHS, under its three-year framework, has no obligation to make full, annual risk corridors payments—if such an obligation under section 1342 exists at all—risk corridors payments "are not 'presently due.'" *Id.* at *17. Having determined that the complaint fails to state a claim, Judge Griggsby dismissed it without "reach[ing] the question of whether the government may, ultimately, limit . . . payments to the amount of collections under the program." *Id.* at *21.

A. Because risk corridors payments are not presently due, the Court lacks jurisdiction under the Tucker Act

Judge Griggsby concluded, and as explained in the United States' Motion to Dismiss, Docket No. 8, at 15-23, final risk corridors payments are not presently due under HHS's three-year payment framework. Because Highmark seeks payments that are not presently due, the Court lacks jurisdiction over the Complaint. And because under this payment framework Highmark will likely receive additional payments, its claims are not ripe. Judge Griggsby, like Judge Lettow, concluded that Tucker Act jurisdiction over statutory claims requires only a money-mandating statute, not "a right to actual, presently due money damages." *BCBSNC*, 2017 WL 1382976, at *12 (citing *Land of Lincoln*, 129 Fed. Cl. at 97-98). Judge Sweeney and Judge Wheeler also concluded that the Court has jurisdiction of insurers' claims, but treated the question whether payments are presently due as a ripeness issue. *See Health Republic Insurance Company v. United States*, 129 Fed. Cl. 757, 771-74 (2017); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 450-55 (2017). Judge Bruggink has noted that the reasoning of Judges Sweeney and Wheeler on jurisdiction and ripeness differed from Judge Lettow's analysis in *Land of Lincoln*, and he also concluded that the Court possesses jurisdiction. *Maine Cmty.*

Health Options v. United States, No. 16-967C (Fed. Cl. Mar. 9, 2017) (order denying motion to dismiss under RCFC 12(b)(1) and requesting supplemental briefing).

The United States respectfully disagrees with these analyses. The Court has jurisdiction over a claim founded on a statute or regulation only where "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 217 (1983) (quotation omitted). Without a breach of a presently owed obligation, there can be no injury and, by definition, no "damages sustained." *See Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) ("The term 'money damages' . . . normally refers to a sum of money used as compensatory relief . . . for a suffered loss"). Thus, "presently due" is a jurisdictional requirement for Tucker Act jurisdiction, not a ripeness question.

Moreover, the *Mitchell* test is a question of statutory interpretation, not a pleading standard. It is the court—not the plaintiff—that interprets the substantive law to determine whether the plaintiff has a money-mandating source of compensation. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (*en banc*) ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction[.]"). When interpreting a statute that is ambiguous regarding the specific process by which it is to be implemented, courts must defer to an agency's reasonable implementation of that statute. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544-45 (1978) (absent compelling circumstances, courts should not "dictat[e] to the agency the methods, procedures, and time dimension" of their tasks because such review "clearly runs the risk of propelling the court into the domain which Congress has set aside exclusively for the administrative agency") (citation and punctuation omitted); *Exxon*

Corp. v. Phillips Petroleum Co., 265 F.3d 1249, 1253 (Fed. Cir. 2001) (in "recognition of the agency's familiarity with the problems associated with the agency's mission," judicial "deference is owed to the agency's choice of its procedures to implement its assignment"). Thus, if, under the agency's reasonable implementation of the statute, payments are not presently due, then the statute is not "fairly interpreted as mandating compensation," *Mitchell*, 463 U.S. at 217, and the court lacks jurisdiction.

Here, Highmark seeks a money judgment for payments that are not presently due. The Court, therefore, lacks jurisdiction over Highmark's Complaint.[1]

B. The Court should, in the alternative, dismiss Count I on the merits

The United States, as it did in *BCBSNC*, seeks dismissal of the Complaint for lack of jurisdiction under Rule 12(b)(1) and, in the alternative, dismissal of Counts II-V for failure to state a claim under Rule 12(b)(6). In *BCBSNC*, the United States also sought dismissal of Count I for failure to state a claim under Rule 12(b)(6) because section 1342 does not obligate the United States to make risk corridors payments in excess of risk corridors collections. As we asserted in our reply brief in this case, Docket No. 17 at 3 n.3, if the Court concludes that it has jurisdiction over Count I and also concludes that HHS's three-year payment framework is reasonable, then Count I should be dismissed for failure to state a claim because Highmark is not entitled to additional payments.

It is well settled that this Court may convert a motion to dismiss for lack of jurisdiction into a motion to dismiss for failure to state a claim. *See Roberson v. United States*, 115 Fed. Cl.

[1] Judge Griggsby, along with Judges Lettow and Sweeney, concluded that the Court did not have jurisdiction over the plaintiff's claim for declaratory relief because declaratory relief "is not incident of or collateral to a money judgment regarding" a claim for benefit year 2014 risk corridors payments. *BCBSNC*, 2017 WL 1382976, at *20; *see also Land of Lincoln*, 129 Fed. Cl. at 99; *Health Republic*, 129 Fed. Cl. at 779-80; Motion to Dismiss, at 40.

234, 240-41 (2014) ("In its discretion, the court may convert defendant's motion into a RCFC 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted."); *Peninsula Group Capital Corp. v. United States*, 93 Fed. Cl. 720, 727 (2010) (citing *Oswalt v. United States*, 41 Fed. Appx. 471, 472 (Fed. Cir. 2002) (unpublished)); *accord Baker v. Director, U.S. Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990) (*sua sponte* dismissal under Rule 12(b)(6) "is practical and fully consistent with plaintiffs' rights and the efficient use of judicial resources"). Here, the question of the timing of risk corridors payments has been fully briefed and argued by the parties. *See*, *e.g.*, Plaintiffs' Opposition to Motion to Dismiss, Docket No. 12, at 21-22; Plaintiffs' Sur-Reply to Motion to Dismiss, Docket No. 21, at 4-5; Transcript of Hearing at 70-72; Plaintiffs' Supplemental Brief Addressing *Moda Health Plan, Inc. v. United States*, Docket No. 33, at 2-3. Accordingly, should the Court determine that it possesses jurisdiction over Count I, the Court should dismiss Count I for failure to state a claim because the payments Highmark seeks are not presently due. *BCBSNC*, 2017 WL 1382976, at *17.[2]

II. Highmark Has No Contractual Right To Risk Corridors Payments

A. The QHP Agreement is wholly unrelated to the risk corridors program

As in this case, the plaintiff in *BCBSNC* alleged that the QHP Agreements governing issuers' access to the "CMS Data Services Hub Web Services" also contractually obligated HHS to make full, annual risk corridor payments. Judge Griggsby rejected this claim and dismissed

[2] Judge Griggsby's reasoning is undoubtedly correct and provides a sound basis for dismissing the Complaint. The United States recognizes that, as a practical matter, the timing issue may resolve itself prior to the disposition of an appeal in this case, and in any event, will likely be resolved by early 2018. For the sake of judicial efficiency, in those cases where the full scope of the United States' obligations under section 1342 are before the Court as, for example, in *Montana Health Co-Op*, No. 16-1427C,the Court should dismiss the complaint because section 1342 does not obligate the United States to use taxpayer funds to make risk corridors payments. *See generally* United States' Supplemental Brief Regarding *Moda Health Plan, Inc. v. United States*, Docket No. 32.

the express contract count for failure to state a claim, concluding that "the contractual provisions . . . relie[d] upon to show that HHS is contractually obligated to make full, annual Risk Corridors Program Payments cannot be reasonably read to create such an obligation." *BCBSNC*, 2017 WL 1382976, at *17. For example, regarding the QHP Agreement's provision that HHS would "undertake all reasonable efforts to implement systems and processes that will support QHP[] functions" and, in the event of system failure, "work with QHP[s] in good faith to mitigate any harm caused by such failure," Judge Griggsby determined that "this provision plainly does not require that HHS make the Risk Corridors Program Payments." *Id.*

Judge Griggsby also addressed section V.g. of the QHP Agreement, which provides that the Agreement is governed by federal law. As explained in our Motion to Dismiss, at 28-29, as a matter of law such governing law clauses do not incorporate the substantive provisions of the governing law into the contract. *See Land of Lincoln*, 129 Fed. Cl. at 109-10. Judge Griggsby noted that this provision "similarly fails to address, or to require full, annual Risk Corridors Program Payments." *BCBSNC*, 2017 WL 1382976, at *17. Judge Griggsby further reasoned that, to the extent section V.g. could be read to incorporate section 1342 and its incorporating regulations, the statute and the regulations do not require full, annual risk corridors payments. *Id.* Thus, insurers such as Highmark have no contractual right under the QHP Agreements to additional risk corridors payments.

B. No implied-in-fact contract for risk corridors payments exists

Judge Griggsby also dismissed the identical implied-in-fact contract claim that Highmark asserts here. *BCBSNC*, 2017 WL 1382976, at *18-*19. Noting the long-standing presumption "that statutes are not intended to create any vested contractual rights," *id.* at *18 (citing *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011)), Judge Griggsby first looked to "the text

of Section 1342" and then to "the circumstances surrounding the passage of Section 1342" to discern any "intent to bind the government contractually," *BCBSNC*, 2017 WL 1382976, at *18 (citing *Brooks v. Dunlop Mfg., Inc.*, 702 F.3d 624, 631 (Fed. Cir. 2012)).

With respect to the text of section 1342, "[n]either Section 1342 nor its implementing regulations contain language that creates a contractual obligation with respect to the Risk Corridors Program Payments." *BCBSNC*, 2017 WL 1382976, at *18. Turning to "the circumstances surrounding the enactment of the ACA," Judge Griggsby noted that the plaintiff, like Highmark here, identified nothing "that would manifest an intent upon the part of Congress to contractually bind the government." *Id.* Judge Griggsby rejected the plaintiff's attempts to cast the same conduct and statements alleged here as manifesting an intent to contract. *Id*. at *19. In addition, Judge Griggsby distinguished *New York Airways v. United States*, noting that Congress had recognized the existence of a contractual obligation in that case and that the payments at issue there were in compensation for the provision of services to the government, unlike payments under the risk corridors program. *Id.* at *19 n.8 (discussing *N.Y. Airways v. United States*, 369 F.2d 743, 751-52 (Ct. Cl. 1966)); *Moda*, 130 Fed. Cl. at 463-64; *see also* United States' Supplemental Brief Regarding *Moda Health Plan, Inc. v. United States*, Docket No. 32, at 21-23 (discussing errors in *Moda*'s implied contract finding).[3] Finally, Judge Griggsby, like Judge Lettow in *Land of Lincoln*, 129 Fed. Cl. at 113, reasoned that because neither section 1342 nor its implementing regulations required HHS to make full, annual risk

[3] By focusing on the text and circumstances surrounding enactment of section 1342 in accordance with Federal Circuit precedent and prior decisions of this Court, Judge Griggsby implicitly rejected the novel rule Judge Wheeler announced in *Moda*. *See Moda*, 130 Fed. Cl. at 463-64 (disagreeing with *ARRA Energy*, failing to distinguish *N.Y. Airways*, and finding intent to contract because section 1342 "created an incentive program" in which the government "promised" to pay "specific sums" "in return for insurers' participation"); *see generally* United States' Supplemental Brief Regarding *Moda Health Plan, Inc. v. United States*, Docket No. 32, at 21-23 (discussing errors in *Moda*'s implied contract finding)

corridors payments, insurers cannot demonstrate a breach of any alleged implied contract based on either the statute or the regulations. *BCBSNC*, 2017 WL 1382976, at *19. In short, Count III, the implied-in-fact contract claim, fails as a matter of law and should be dismissed.

C. Without an express or implied contract to make risk corridors payments, insurers cannot state an implied covenant claim

Again, the complaints in this case and *BCBSNC* are substantively identical, and the plaintiff in that case asserted the same implied covenant of good faith and fair dealing claim Highmark asserts here. Because Judge Griggsby concluded that the plaintiff could not allege "plausible express or implied-in-fact contract claims," the Court also dismissed the implied covenant of good faith and fair dealing claim. *Id.* Judge Griggsby reasoned that "the absence of either an express or implied contractual obligation upon the part of HHS to make Risk Corridors Program Payments in full, upon an annual basis, precludes [an insurer] from establishing any right under an implied covenant of good faith and fair dealing." *Id.* So it is here: Count IV should be dismissed.

D. Highmark has no property interest in risk corridors payments

As we explained in our Motion to Dismiss, at 39-40, absent a contractual right to risk corridors payments, Highmark has no protected property interest in risk corridors payments under section 1342, and, in any event, under HHS's three-year payment framework, Highmark has no vested right to additional payments before the end of the final payment cycle. Judge Griggsby agreed. *BCBSNC*, 2017 WL 1382976, at *20. Absent any "cognizable contractual, statutory, or regulatory right to receive full, annual Risk Corridors Program Payments," Highmark's Takings claim—Count V—should be dismissed. *Id.*

CONCLUSION

The Complaint should be dismissed for lack of jurisdiction or in the alternative because Highmark fails to present a justiciable claim or claims on which relief can be granted.

Dated: May 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, a copy of the foregoing, *The United States' Supplemental Brief Regarding Blue Cross and Blue Shield of North Carolina. v. United States*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

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