

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OREGON'S HEALTH CO-OP, an)	
Oregon nonprofit corporation,)	
)	
Plaintiff,)	No. 18-94C
)	
v.)	
)	Judge Elaine D. Kaplan
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	

**JOINT STATUS REPORT AND DEFENDANT'S UNOPPOSED REQUEST
TO CONTINUE STAY OF PROCEEDINGS FOR 45 DAYS**

On February 2, 2018, 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 (Fed. Cir.), and *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.). Dkt. 7. On June 29, 2018, the Court continued the stay ordered that the parties file a joint status report within fifteen days of the date on which the judgments in *Land of Lincoln* and *Moda* become final and unappealable. Dkt. 9. Pursuant to the Court's Order of June 29, 2018, the parties file this Joint Status Report and Defendant's Unopposed Request to Continue Stay of Proceedings for 45 Days.

Status of Other Risk Corridors Cases

The Supreme Court granted certiorari in *Land of Lincoln* and *Moda*, and consolidated those cases with *Maine Community Health Options v. United States*, No. 18-1023 (U.S.). On April 27, 2020, the Supreme Court issued its decision in *Maine Community Health Options v. United States*, No. 18-1023, 590 U.S. --- (2020). The Supreme Court held that the risk corridors statute, section 1342 of the Patient Protection and Affordable Care Act ("ACA"), "created an obligation neither contingent on nor limited by the availability of appropriations or other funds." Slip Op. at 16. The Court also determined that the obligation was not affected by subsequently enacted legislation and

held that the “petitioners may seek to collect payment through a damages action in the Court of Federal Claims.” *Id.* at 30. Along with three other similar risk corridors cases, the Court reversed the judgments of the Federal Circuit and remanded the cases to that court for further proceedings consistent with the opinion.

The United States’ Position

The United States continues to review the Supreme Court’s opinion. That process of review requires that we confer with various components within the Department of Justice and the Department of Health and Human Services in order to discern a path forward. We ask the Court to permit the United States additional time to consider how the Supreme Court’s ruling impacts all of the cases in this Court in which a plaintiff seeks damages under section 1342, so that we may propose an efficient and appropriate process to reach a conclusion in this, and every other risk corridors case before the Court.

We also request additional time for review because risk corridors was a nationwide program involving every single health insurance issuer participating on an ACA Exchange during benefit years 2014, 2015, or 2016. Some of those issuers are represented in the more than 64 individual cases pending before this Court; others are represented in this Court through either of two class actions; and still other issuers have not commenced litigation. The United States believes it would be most appropriate and fair to resolve all issuers’ potential entitlement under section 1342 in a similar manner. In order to do so, the United States must consider and address a number of issues before these cases proceed.

To start, the Department of Health and Human Services (“HHS”) is now determining the precise amount of risk corridors payments paid to and remaining for each health insurance issuer before this Court, as well as to any issuer with a potential risk corridors claim. Agency staff

requires additional time to review the record of payments and charges and the history of distributions made, including distributions made after some risk corridors complaints were filed in this Court, to ensure they are complete and accurate. HHS must finish this review before the United States will be in a position to pursue a potential consensual resolution of an issuer's case, and that review is most efficiently done on a program-wide, rather than piecemeal (or ad hoc) basis.

To cite another consideration, some of the plaintiffs may have outstanding debts owed to HHS under other ACA programs. In order to determine which issuers have such debts pending, HHS must review its records across ACA programs and distill that information for consideration by government officials with authority to evaluate the issues. Those parties owing debts and the United States should then have an opportunity to confer to seek to resolve those issues, and, as necessary, to prepare and propose a procedure to dispose of outstanding matters. Finally, because the United States has not yet answered any of the plaintiffs' complaints, the United States needs to consider whether it would be appropriate to raise defenses not previously considered and whether to answer and counterclaim.

For all of these reasons, the United States requests that the Court allow the government 45 days within which to consider its position in these cases and to propose, jointly with the plaintiff to the extent possible, a course to govern proceedings moving forward. Within that time, the Court could allow plaintiff the opportunity to refine or update its claim for damages whether through formal amendment of its complaint or through less formal means. We also request that, in the interest of efficiency, the Court defer the government's obligation to respond to a complaint or an amended complaint upon consideration of the joint status report we propose be due at the end of the requested 45-day period.

Oregon Health CO-OP's Position

Oregon Health CO-OP's (OHC) position is that the Supreme Court decision resolves all disputed issues in this case and requires judgment in favor of OHC, in the amount requested by OHC in its Complaint, irrespective of any alleged debts owed by OHC to HHS. However, given the number of pending risk corridors cases and amount of funds at issue, OHP does not oppose giving the United States an additional 45 days to finalize its position with respect to the amount the United States owes OHC in risk corridors payments.

Dated: May 12, 2020

JOSEPH H. HUNT
Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Shane Huang
PHILLIP M. SELIGMAN
MARC S. SACKS
FRANCES M. MC LAUGHLIN
TERRANCE A. MEBANE
SHANE HUANG
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington D.C. 20044
Tel. (202) 616-0341
Fax (202) 514-9163
shane.huang@usdoj.gov

Attorneys for the United States

Respectfully submitted,

/s/ Caroline M. Brown
Caroline M. Brown
Philip J. Peisch
Brown & Peisch PLLC
1233 20th St. NW, Suite 505
Washington, DC 20036
(202) 499-4258
cbrown@brownandpeisch.com
ppeisch@brownandpeisch.com

Attorneys for Oregon's Health Co-op