

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

<b>PREMERA BLUE CROSS, <i>et al.</i>,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>No. 17-1155C</b>
	)	
<b>v.</b>	)	
	)	<b>Judge Griggsby</b>
<b>THE UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**JOINT STATUS REPORT**

Pursuant to the Court’s July 11, 2019 Order (Dkt. 22), the parties submit this Joint Status Report thirty days following the Supreme Court’s recent decision in *Maine Community Health Options v. United States*, No. 18-1023 (U.S. April 27, 2020).

**Plaintiff’s Position**

Plaintiff’s original complaint was filed nearly three years ago, along with similar (or nearly identical) complaints by dozens of similarly-situated qualified health plan issuers, seeking recovery from the government for unpaid amounts under Section 1342 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18062. The United States Supreme Court (“Supreme Court”) agreed to hear an appeal in *Maine Community Health Options*, along with three additional consolidated risk corridors cases: *Moda Health Plan, Inc. v. United States* (No. 17-1994), *Blue Cross and Blue Shield of North Carolina v. United States* (No. 18-1028) and *Land of Lincoln Mutual Health Insurance Co. v. United States* (No. 18-1038). On April 27, 2020, the Supreme Court ruled in favor of the health plan issuers and concluded that issuers have both the right to risk corridors payments pursuant to Section 1342 of the ACA and a damages remedy in this court for unpaid amounts. *See Maine Community Health Options v. United States*, No. 18-1023, 2020 WL 1978706 (U.S. April 27, 2020).

In the thirty days since the Supreme Court’s ruling, the government has not identified any further legal or factual issues for resolution in these proceedings, or in any of the other similar pending risk corridor litigations. Yet the government requests another thirty days to: (1) continue “to review the Supreme Court’s opinion” and consider how it impacts pending risk corridors litigations; (2) consider “whether it would be appropriate to raise defenses not previously considered and whether to answer and counterclaim” (3) determine whether any risk corridors plaintiffs “have outstanding debts owed to [the Department of Health and Human Services] under other ACA programs”; (4) determine “the precise amount of risk corridors payments paid to and remaining for each health insurance issuer”; and (5) ensure that it can resolve the claims of all health plan issuers with outstanding risk corridors receivables “in a similar manner.” As set forth herein, the reasons articulated by the government do not justify further delay. Nonetheless, Premera does not oppose the requested extension, although it respectfully requests a lift of the stay in these proceedings and that the government be ordered to take specific actions to prepare for expeditious resolution, as set forth below.

As an initial matter, the government does not require another thirty days to review and consider how the Supreme Court’s decision in *Maine Community Health Options* “impacts” this case. The Supreme Court’s decision is clear and dispositive. As held by the Supreme Court: (1) the ACA risk corridors statute created a government obligation to pay health plan issuers the full amount set forth in the statutory formula; (2) the “shall pay” mandate of Section 1342 is a legally binding obligation that is not contingent on or limited by the availability of appropriations or other funds; (3) Congress did not impliedly repeal the statutory payment obligations through later-enacted appropriations riders; and (4) this Court has jurisdiction under the Tucker Act to award monetary damages against the government pursuant to the “money-mandating” nature of

the risk corridors statute. *Maine Cnty.*, 2020 WL 1978706, at \*7-8, 10-17. Premera's statutory claim (Count I) in these proceedings is identical to those claims decided by the Supreme Court in favor of the appellee-health plans. Accordingly, the government is liable to pay Premera the full risk corridors receivable owed.

For similar reasons, the government does not need an additional 30 days to assess whether it has any unnamed defenses or counterclaims that it has never raised in any one of the risk corridors litigations since they were filed over four years ago. Indeed, this matter and other risk corridors litigations have been stayed because the government and the court expected a Supreme Court decision in favor of health plans to engender an efficient resolution of all similar statutory risk corridors claims. *See e.g. HPHC Ins. Co. v. United States*, No. 17-87C, ECF No. 19 (ordering a stay over objection because the court's decision and pending appeal in *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C, raises "substantially identical legal and factual issues regarding whether the United States is obligated to pay certain sums for alleged violation of the ACA . . ."); *Sendero Health Plans Inc. v. United States*, No. 17-2048, Joint Status Report and Request to Continue Stay of Proceedings, ECF No. 8 ("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 created by section 1342 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18062.") The Supreme Court has now clearly held that health plan issuers are entitled to unpaid risk corridors receivables under the money-mandating statutory language of Section 1342. Further delay to attempt to conjure claims or defenses that have not heretofore been alleged in any of the 64 similar litigations is not warranted.

Delay is similarly not justified by the government’s purported need to assess whether risk corridors plaintiffs (or health plan issuers that have yet to file lawsuits) may owe debts to HHS under some *other* ACA program. Premera has paid all outstanding risk corridors charge amounts, and there is no justified reason to require additional delay to confirm this fact. In addition, any debts owed under some unrelated program – or owed by another health plan issuer – have no relevance to the statutory claim at issue in these proceedings, which is now subject to dispositive and binding Supreme Court precedent. The government is also not entitled to demand the court to adjudicate any and all debts that health plan issuers may potentially owe under some unrelated program as part of this litigation. Rather, HHS has its own administrative collection and enforcement remedies that do not require oversight by this Court. Thus, the mere potential for other debts owed by other health plan issuers and/or under separate programs is not a basis for further delay.

The government also does not require further delay to re-confirm the damages amounts. Risk corridors receivable amounts are predicated on the government’s own previously-published and publicly available annual bulletins. Premera recently sought and obtained the government’s agreement to formally amend its pleading to revise its damages allegations. Premera then filed its First Amended Complaint on May 20, 2020 to reflect the updated damages amount owed to Premera for all three plan years. (Dkt. No. 23.) The government does not explain why re-Confirming these previously published amounts or its own payment history warrants sixty days of delay. Any purported delay on this basis is not justified.

Finally, the government is not entitled to additional delay to confirm that it can resolve the claims of all risk corridors plaintiffs “in a similar manner.” Premera’s right to timely recovery is not predicated on the circumstances of other plaintiffs or litigations. The only

remaining steps in this litigation are to (1) confirm the amounts owed to Premera (based on publicly-available information and the government's own payments) and (2) stipulate to judgment. The government can decide to apply a similar two-step process to resolve all similar outstanding risk corridors litigations – or not. Either way, further delay to Premera is not appropriate or justified.

In sum, Premera is entitled to the entry of judgment in its favor because there are no further factual or legal issues left to be resolved in these proceedings following the Supreme Court's decision and because the outstanding damage amounts are easily confirmed.

Nonetheless, as a show of good faith, Premera will agree to an additional thirty-days for the submission of another joint status report, but Premera respectfully requests that this Court:

- (1) lift the stay in these proceedings; and
- (2) order the parties to prepare for an expeditious resolution of this case by utilizing the thirty days to
  - i. Confirm whether the government agrees with the amended risk corridor receivable alleged in Premera's First Amended Complaint or, if it does not agree, articulate the amount that it believes Premera is owed.
  - ii. If the parties reach consensus as to the amount owed, then the parties shall file a motion for consent judgment within the same thirty-day period.
  - iii. If the parties are unable to stipulate to an agreed-upon risk corridors damages amount, they must file a joint status report explaining the discrepancy within the same thirty-day period.
  - iv. To the extent the parties are not able to reach a consensus and stipulate to judgment, the government shall also be required to answer or otherwise plead to Premera's First Amended Complaint within fourteen days following the expiration of the thirty-day timeline.

Premera's request is justified by both the Supreme Court's recent ruling resolving identical statutory claims and Premera's entitlement to an efficient and fair resolution of its claims that have been pending for nearly three years.

## **The United States' Position**

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 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, we note that since the time that most complaints were filed, the Department of Health and Human Services (“HHS”) has made additional pro rata distribution of risk corridors collections to many of the plaintiffs before this Court. 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 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 30 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 30-day period.

Dated: May 27, 2020

Respectfully submitted,

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