

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NANCY G. ATKINS, in her capacity	:	
as Liquidator of Kentucky Health	:	No. 17-906C
Cooperative, Inc.,	:	
	:	Judge Kaplan
Plaintiff,	:	
	:	
v.	:	
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

**THE UNITED STATES' MOTION TO STAY PROCEEDINGS OR
IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME**

The United States respectfully moves the Court to stay this action pending the outcome of the *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994, cases now before the Federal Circuit. On May 30, 2017, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* “are considered companion cases and will be assigned to the same merits panel.” *See Land of Lincoln*, Docket No. 140 (May 30, 2017), attached as Exhibit A.

The United States seeks a stay of the proceedings in this case so that the Federal Circuit has the opportunity to issue its decision on the same legal issues raised in the Complaint of Nancy G. Atkins, in her capacity as Liquidator of Kentucky Health Cooperative, Inc. (the “Liquidator”). A temporary, carefully-monitored stay pending disposition of the appeals already before the Federal Circuit, which will likely result in binding precedent that will dispose of all issues in this case, will conserve judicial resources and streamline consideration of any issues that might remain to be decided here.

In the alternative, should the Court deny a stay, the United States requests that this Court enlarge the deadline for the United States to respond to the Liquidator's motion for summary judgment, Docket No. 7, by an additional 120 days, until December 20, 2017.

The Liquidator opposes a stay and an extension of 120 days for the United States to respond to her motion for summary judgment, but consent to an extension of 30 days.

BACKGROUND

On July 6, 2017, the Liquidator filed this action seeking approximately \$142 million in money damages under the risk corridors program created by section 1342 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18062, and for breach of contract. Docket No. 1. On July 26, 2017, the Liquidator filed a motion for summary judgment. Docket No. 7. The United States' response to the motion is currently due on August 28, 2017.

A. Other Risk Corridors Cases

This is the latest of 28 cases filed in the last 17 months in this Court seeking relief under identical and related theories to those asserted by the Liquidator. *See Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.); *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (Lettow, J.); *Maine Cnty. Health Options v. United States*, No. 16-967C (Bruggink, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.); *BCBSM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.); *Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C (Lettow, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.); *Alliant Health Plans, Inc. v. United States*, No. 16-

1491C (Braden, J.); *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C (Griggsby, J.); *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C (Smith, J.); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.); *HPHC Ins. Co. v. United States*, No. 17-87C (Griggsby, J.); *Medica Health Plans v. United States*, No. 17-94C (Horn, J.); *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C (Braden, J.); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.); *Blue Cross and Blue Shield of Alabama v. United States*, No. 17-347C (Campbell-Smith, J.); *BlueCross BlueShield of Tennessee, Inc. v. United States*, No. 17-348C (Horn, J.); *Sanford Health Plan v. United States*, No. 17-357C (Bruggink, J.); *Raymond Farmer v. United States*, No. 17-363C (Campbell-Smith, J.); *Health Alliance Med. Plans, Inc. v. United States*, No. 17-653C (Campbell-Smith, J.); *EmblemHealth, Inc. v. United States*, No. 17-703C (Wheeler, J.); *Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, J.); *Doug Ommen v. United States*, No. 17-957C (Lettow, J.).¹ These cases implicate a total of \$8.3 billion for the 2014 and 2015 benefit years.

Five cases have reached judgment. The Court entered the first decision in these cases in *Land of Lincoln*, in favor of the United States. 129 Fed. Cl. 81 (2016). *Land of Lincoln* appealed and the appeal is now fully briefed before the Federal Circuit. In *Moda*, the Court entered judgment in favor of the plaintiff, 130 Fed. Cl. 436 (2017), and the United States appealed. The United States filed its opening brief on July 10, 2017. *Moda*'s response is due August 21, 2017, and the United States' reply brief is due by September 5, 2017. As noted above, on May 30, 2017, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* will be treated as companion cases and will be argued before and decided by the same panel.

¹ The Liquidator's counsel also represents the plaintiffs in *Maine Community Health Options*, *Montana Health CO-OP*, *Health Net*, *HPHC*, *Sanford Health Plan*, and *Health Alliance Medical Plans*.

In the third case to reach judgment in the Court, *Blue Cross and Blue Shield of North Carolina*, the Court dismissed the complaint on the ground that the government's implementation of the program is reasonable and consistent with the ACA. 131 Fed. Cl. 457 (2017). On June 9, 2017, Blue Cross and Blue Shield of North Carolina filed a notice of appeal. In the fourth case to reach judgment, the Court granted the United States' motion to dismiss the complaint in *Maine Community Health Options*; Maine Community Health Options docketed its appeal on August 2, 2017. In *Molina*, the fifth case, the Court entered judgment in favor of the plaintiff.

B. Most Cases Have Been Either Temporarily Stayed Pending Appellate Review in the Federal Circuit or Are Fully Briefed Already

In light of the pending Federal Circuit appeals in *Land of Lincoln* and *Moda*, the Court has entered stays in 17 cases: *Health Republic*, *New Mexico Health Connections*, *Minuteman Health*, *BCBSM*, *Alliant Health Plans*, *Blue Cross of Idaho Health Service*, *Blue Cross and Blue Shield of South Carolina*, *Neighborhood Health Plan*, *Medica Health Plans*, *Blue Cross and Blue Shield of Alabama*, *BlueCross BlueShield of Tennessee*, *Sanford Health Plan*, *Farmer*, *Blue Cross and Blue Shield of Kansas City*, *HPHC*, *Health Alliance Medical Plans*, and *EmblemHealth*. Although the majority of the stay requests were consensual, the Court granted stays over the plaintiffs' objections in *Health Republic*, Docket No. 62 (attached as Exhibit B); *Farmer*, Docket No. 9 (attached as Exhibit C); *HPHC*, Docket No. 19 (attached as Exhibit D); and *Health Alliance*, Docket No. 14 (attached as Exhibit E). A motion to stay has been filed and is under review in *Health Net*.

In addition, dispositive motions have been fully briefed and are pending a decision in two other cases: *First Priority* and *Molina*.² The only other cases remaining are the recently-filed *Ommen* and *Common Ground Health Cooperative* cases, and the United States intends to seek a stay in those cases as well.

ARGUMENT

A. A Stay Is Proper and Will Conserve Substantial Resources

“It is well established that every trial court has the power to stay its proceedings, which is ‘incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’” *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citing *Landis*, 299 U.S. at 254). “Moreover, when and how to stay proceedings is within the sound discretion of the trial court.” *Id.* (citation and internal punctuation omitted). The Supreme Court has highlighted the conservation of judicial resources as an important reason for a trial court to stay proceedings in any matter pending before it, particularly where the appellate court may resolve issues before the trial court. *Landis*, 299 U.S. at 254-55; *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010) (“The orderly course of justice and judicial economy is served when granting a stay simplifies the ‘issues, proof, and questions of law which could be expected to result from a stay.’”) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Indeed, the Supreme Court also recognized that in cases of great complexity and significance, like the risk corridors issues in this case, “the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be

² Judge Wolski has ordered the parties to submit supplemental briefing on the *Maine Community Health Options* and *Molina* opinions in *Montana* and *First Priority* by August 21, 2017.

promoted,” especially where, as here, a decision by the Federal Circuit would “settle” and “simplify” the issues presented. *Landis*, 299 U.S. at 256.

Because the legal issues presented in this case mirror the issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, the further development of those companion cases on appeal will be instructive and likely dispositive. A stay therefore will conserve judicial resources and the resources of both parties by reducing the amount of briefing of issues already pending before the Federal Circuit.

If this Court were to deny our request for a stay and the parties were to brief the issues in this case, the case would nevertheless need to be briefed anew following the Federal Circuit’s disposition of *Land of Lincoln* and *Moda*. In contrast, a stay in this case will allow the parties, if necessary, to address the Federal Circuit’s ruling with targeted briefing in a more efficient manner.

Moreover, if this Court requires the United States to respond to the Liquidator’s motion for summary judgment as scheduled (August 28, 2017), briefing in this case will occur almost simultaneously with briefing before the Federal Circuit in *Moda*, where the United States’ opening brief was filed July 10, 2017, *Moda*’s brief is due August 21, and the United States’ reply brief is due September 5, 2017. Such a scenario would have this Court considering our response *at the same time* the Federal Circuit is considering the very same legal issues. Briefing here would be an indisputable waste of resources, given the simultaneity of the Federal Circuit’s review of the very issues the parties would brief to this Court. All of that needless waste of the Court’s and parties’ resources is avoided by a stay. *See Sanford Health Plan*, Docket No. 8, at 2 (recognizing that “denying a stay would serve to merely consume additional resources for all parties while shedding little additional light”).

B. The United States Does Not Seek an Indefinite Stay

As recognized by several judges of this Court, the United States is not seeking an indefinite stay. *Farmer*, Docket No. 9, at 3 (“[T]he Court disagrees with plaintiffs’ characterization of defendant’s stay request as indefinite in nature. The end point of the stay can be specifically defined as the date on which the Federal Circuit issues its decisions in the *Land of Lincoln* and *Moda Health* cases, which have been submitted for common review. The fact that the court cannot predict the exact date on which the Federal Circuit will issue its opinions does not mean the term of the stay is undefined.”); *Health Republic*, Docket No. 62, at 2 (“A stay of proceedings would not be indefinite, because given the status of briefing in the appeals before the Federal Circuit, one or more decisions in those appeals may issue by early next year.”). Rather, the United States seeks a stay only until the Federal Circuit decides *Land of Lincoln* and *Moda*. This is a measured stay, not an indefinite one. As Judge Campbell-Smith found, “[t]he fact that the court cannot predict the exact date on which the Federal Circuit will issue its opinions does not mean the term of the stay is undefined.” *Farmer*, Docket No. 9, at 3.

The alternative of requiring the parties to brief this case while the Federal Circuit considers the same issues needlessly expends “time and effort for [this Court], for counsel, and for litigants.” *Landis*, 299 U.S. at 254. The stay requested here is moderate, and as addressed below, causes no harm to the Liquidator.

C. A Stay Will Not Prevent the Liquidator from Having Her Claim Heard or Delay Potential Recovery

The Liquidator cannot provide any legitimate justification for moving forward in this case now while the appeals in *Land of Lincoln* and *Moda* are nearing resolution. A stay will not delay any potential recovery for the Liquidator should she ultimately prevail. As noted above, the Federal Circuit assigned the *Land of Lincoln* and *Moda* appeals to the same panel, and that

panel will address the same legal issues now before this Court. Thus, even if the Liquidator prevails on her claim in this Court, the Liquidator will not recover until the appeals in those risk corridors cases, as well as any appeal of its own case, have concluded.

Staying this case until the Federal Circuit decides *Land of Lincoln* and *Moda* will not alter the Liquidator's ability to obtain a timely decision or potential recovery – it will only drastically reduce the resources expended by the Court and the parties in reaching that resolution.

CONCLUSION

For these reasons, the United States respectfully requests that the Court stay this case pending further developments in the companion appeals of *Land of Lincoln* and *Moda*.

In the alternative, the United States requests an extension, up to and including December 20, 2017, to respond to the Liquidator's motion for summary judgment.

Dated: August 7, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
CHARLES E. CANTER
FRANCES M. MCLAUGHLIN
L. MISHA PREHEIM
MARC S. SACKS
PHILLIP M. SELIGMAN
United States Department of Justice
Civil Division, Commercial Litigation Branch
Telephone: (202) 307-0493
Facsimile: (202) 307-0494
Terrance.A.Mebane@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2017, a copy of the foregoing, *The United States' Motion to Stay Proceedings, Or In The Alternative, For An Extension of Time*, 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.

/s/ Terrance A. Mebane

TERRANCE A. MEBANE
United States Department of Justice