IN THE UNITED STATES COURT OF FEDERAL CLAIMS

QCC INSURANCE COMPANY, KEYSTONE HEALTH PLAN EAST, INC., AMERIHEALTH INSURANCE COMPANY OF NEW JERSEY, & AMERIHEALTH HMO, INC.,	)	**No. 17-1312C**
Plaintiffs,	)	**Judge Mary Ellen Coster Williams**
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

JOINT STATUS REPORT

Pursuant to the Court's Order dated May 12, 2020 (ECF No. 17), Plaintiffs QCC Insurance Company, Keystone Health Plan East, Inc., AmeriHealth Insurance Company of New Jersey, and AmeriHealth HMO, Inc., and Defendant the United States of America respectfully submit this Joint Status Report.

BACKGROUND

Plaintiffs seeks money damages pursuant to the Tucker Act for the U.S. Department of Health and Human Services' ("HHS's") failure to make certain risk corridor payments to Plaintiffs for the 2014, 2015, and 2016 benefit years as required by Section 1342 of the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA"). The case was stayed pending the decision of the Supreme Court of the United States in certain appeals of other cases involving HHS risk corridor payment obligations. On April 27, 2020, the Supreme Court issued its decision in those appeals. *Maine Community Health Options v. United States*, No. 18-1023, 590 U.S. __ (2020). This Court's May 12, 2020 order lifted the stay in this case, allowed Plaintiffs to file an amended complaint updating their alleged damages, relieved

Defendant of its obligation to answer or otherwise respond to the amended complaint pending further order of the Court, and ordered the parties to submit a joint status report on or before May 29, 2020.

PLAINTIFFS' POSITION

Quantum. Defendant already knows the amount of the risk corridor payments that are owed to Plaintiffs for the 2014, 2015, and 2016 benefit years under Section 1342 of the ACA because HHS itself determined the amount of those payments and publically announced them in 2015, 2016, and 2017. First Amended Complaint, ¶¶ 11, 13, 14. Defendant also knows the amount of risk corridor payments that HHS made to Plaintiffs for the 2014 benefit year because HHS itself determined those amounts. (HHS did not make any risk corridor payments to Plaintiffs for the 2015 or 2016 benefit years). Defendant can therefore disclose to Plaintiffs at this time whether it intends to dispute the amount of risk corridor payments that were made to Plaintiffs and the remaining payments that are owed if liability to Plaintiffs is established. Plaintiffs therefore requests the Court to enter an Order directing Defendant to advise counsel for Plaintiffs on or before June 8, 2020, whether Defendant disputes the amount of Section 1342 risk corridor payments that are owed or have been made to Plaintiffs for 2014, 2015, or 2016.

Offsets. Counsel for Defendant has advised counsel for Plaintiffs that Defendant is assessing whether some health insurers that participated in the ACA-created Marketplaces have debt obligations to HHS under other ACA programs related to the Marketplaces that Defendant might assert as an offset against any damages to be awarded those insurers for HHS's failure to make the risk corridor payments required by Section 1342. Plaintiffs do not believe that they have any debt obligations to HHS under any ACA programs other than those that HHS may identify and address in the ordinary course of business and administering the Marketplaces.

And Plaintiffs believes that any such offsets have no applicability to Plaintiffs' recovery of risk corridor monies due from the Judgment Fund. Therefore, Plaintiffs do not believe that any basis or need for a potential offset exists in this case. In any event, Defendant, through HHS, already has all the information that it needs to determine whether any offsets exist relative to Plaintiffs' ongoing participation in the Marketplace and already has a mechanism to address any such offsets. Plaintiffs therefore requests the Court to direct counsel for Defendant to advise counsel for Plaintiffs on or before June 8, 2020, whether a potential offset exists against the damages sought by Plaintiffs in this case and why such offsets should be addressed through the risk corridor case and not in the ordinary course of the operation of the Marketplace.

Liability. Plaintiffs believes that the Supreme Court's decision in *Maine Community Health Options* disposes of all issues regarding Defendant's liability to Plaintiffs for damages resulting from HHS's failure to make the risk corridor payments to Plaintiffs required by Section 1342. Defendant asserts that it is continuing to review the Supreme Court's decision in order determine whether it has defenses to liability not previously considered. Plaintiffs believe that Defendant has already had ample time to complete its review of the Supreme Court's opinion, which was issued on April 27, more than one month ago. However, Plaintiffs are willing to agree that Defendant may have an additional 14 days, or until June 12, 2020, to complete its review of the Supreme Court's decision. Plaintiffs note that this extension would give Defendant more than 45 days from the Supreme Court's opinion, and more than two and a half years since Plaintiffs filed their initial complaint, to complete its liability review. Plaintiffs therefore request the Court to direct counsel for Defendant to advise counsel for Plaintiffs on or before June 12, 2020, whether Defendant will stipulate to a judgment of liability

to pay damages for HHS's failure to make the risk corridor payments to Plaintiffs required by Section 1342 of the ACA, or explain why it is not willing to so stipulate.

Further Joint Status Report. Plaintiffs requests the Court to direct the parties to submit a further Joint Status Report on or before June 15, 2020, that sets forth the parties' position(s) regarding the most fair and efficient process for resolving any outstanding issues in this case.

DEFENDANT'S POSITION

Since the Supreme Court issued its decision on April 27, 2020, in *Maine Community Health Options v. United States*, No. 18-1023, 590 U.S. --- (2020), the United States has been reviewing that decision and assessing the next steps in all the risk corridors cases affected by that decision. This review and assessment, both internally at the Department of Justice, and in consultation with the Department of Health and Human Services ("HHS"), is ongoing. We ask the Court to permit the United States 30 additional days to adopt a proposed process for the efficient and appropriate resolution of this, and every other risk corridors case before the Court.

As the Court is likely aware, risk corridors was a nationwide program involving every single health insurance issuer participating on a Patient Protection and Affordable Care Act ("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.

The United States has been considering and addressing many complicated, and often interrelated, issues such as the exact amounts paid to issuers under the risk corridors program and any amounts potentially owed to the United States by issuers under other ACA programs. The United States has also been conducting essential due diligence on whether it would be

appropriate to raise defenses not previously considered and whether to answer and counterclaim.

In determining the precise amount of risk corridors payments paid to and remaining for each health insurance issuer before this Court, HHS 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. We have compiled a master list of all named plaintiffs in the risk corridors cases and provided that list to HHS to enable the agency to identify and verify issuers who participated on an Exchange in 2014, 2015 and/or 2016 and determine the current amount of risk corridors payments owed to each. HHS must finish its 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.

Similarly, HHS needs additional time to review and assess those plaintiffs that 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 assess liability. 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.

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 any 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 29, 2020

Respectfully Submitted:

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