IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MONTANA HEALTH CO-OP,	)	
	)	
Plaintiff,	)	**No. 16-1427C**
	)	
v.	)	
	)	**Judge Victor J. Wolski**
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 claims for risk corridors payments under section 1342 of the Affordable Care Act ("ACA"), 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 plaintiff, Montana Health CO-OP ("Montana"), 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 is sound and provides an adequate basis on which to grant the United States' motion to dismiss in this case. As a practical matter, however, 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, should this Court decline to dismiss the Complaint for lack of jurisdiction, the Court should dismiss the complaint because section 1342 does not obligate the United States to use taxpayer funds to make risk corridors payments, as explained in our briefs and at oral argument. *See Land of Lincoln Mutual Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016). Alternatively, the Court may dismiss the Complaint in accordance with *BCBSNC* because additional risk corridors payments are not presently due.

I. Final Risk Corridors Payments Are Not Presently Due

As explained in our Motion to Dismiss, Docket 17, at 8, 17-18, 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 the 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.

Judge Griggsby then considered HHS's three-year payment framework. *Id.* at *15-*16. As the Court 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 "based on" the Medicare Part D risk corridors program; 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 Judge Griggsby 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 failed 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, at 20-28, final risk corridors payments are not presently due under HHS's three-year payment framework. Because Montana seeks payments that are not presently due, the Court lacks jurisdiction over the Complaint. And because Montana will likely receive additional payments under HHS's three-year payment framework, Montana's 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 over insurers' claims, but treated the question whether payments are presently due as a ripeness issue. *See Health Republic Ins. Co. 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," and the court lacks jurisdiction. *Mitchell*, 463 U.S. at 217.

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

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 for failure to state a claim under Rule 12(b)(6). As explained in our Motion to Dismiss, at 31-43, section 1342 does not obligate the United States to make risk corridors payments to insurers in excess of collections. *See also* United States' Reply in Support of Its Motion to Dismiss, Docket No. 21, at 14-23; United States' Supplemental Brief Regarding *Moda Health Plan, Inc. v. United States*, Docket No. 25, at 13-17.

The text and structure of section 1342 demonstrate that the risk corridors program is self-funded: Congress directed HHS to "establish and administer a program of risk corridors," 42 U.S.C. § 18062(a), and then specified that HHS must provide "under the program" for "payments in" and "payments out," 42 U.S.C. § 18062(b). In contrast to dozens of other provisions in the ACA as well as the risk corridors program under Medicare Part D, Congress did not appropriate funds, authorize appropriations, or otherwise indicate that payments under section 1342 were an obligation of the United States. *See Land of Lincoln*, 129 Fed Cl. at 104-07.[1] And when Congress came to appropriate funds for risk corridors payments for the years in which payments could actually be made, it appropriated only collections and expressly restricted the use of other funds. *See* Pub. L. No. 113-235, div. G, title II, § 227, 128 Stat. 2130, 2491 (2014); Pub. L. No. 114-113, div. H, title II, § 225, 129 Stat. 2242, 2624 (2015); Pub. L. No. 115-31, div. H, title II, § 223, __ Stat. ___, ___ (May 5, 2017). The purpose of this restriction was to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9307-1, H9838 (daily ed. Dec. 11, 2014).

In short, Montana's claims fail because Congress did not create a freestanding payment obligation when it enacted section 1342, and Congress, in appropriating funds for any risk corridors payments to be made, has "directly spoken" to limit the extent of the United States' liability to the aggregate amount of collections from profitable insurers. *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). This case therefore differs from those situations where courts have found the United States liable. For example, in *Collins v. United States*, Congress passed a statute "for the relief of" a retired Army

[1] Judges Sweeney and Wheeler also recognized that Congress did not appropriate funds for risk corridors payments in the ACA. *Health Republic*, 129 Fed. Cl. at 762; *Moda*, 130 Fed. Cl. at 442.

officer, authorizing the President to reinstate and retire him at the rank of major. 15 Ct. Cl. 22, 23 (1879). Once the President acted to reinstate and retire the plaintiff, the court held the United States was liable for retirement pay from the date of retirement because, the Court concluded, Congress "intended to confer upon him an immediate benefit." *Id.* at 34. While Congress did not specifically appropriate funds for that officer's retirement pay, the court explained it was not required to consider the impact of the Appropriations Clause because, at that time, "the constitutional prohibition" applied "to the judgment as it did to the claim upon which it is founded." *Id.* at 36.

Similarly, the United States may be liable in damages for breach where it has intended to create a valid fiduciary duty, *United States v. Mitchell*, 463 U.S. 206 (1983), or intended to create contractual obligations, *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc). The question at all times remains whether Congress, when enacting a statute, intended to create a judicially enforceable obligation. Moreover, where Congress has created a payment obligation, it is free to modify that obligation in subsequent appropriations acts. *Highland Falls*, 48 F.3d at 1170. "The whole question depends on the intention of congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883); *Fisher v. United States*, 15 Ct. Cl. 323, 328 (1879) ("In seeking to ascertain the meaning of a statute, it is the will of the legislature which must be determined; and the latest will of the latest legislature must control all previous enactments[.]").[2] As explained, Congress did not create a payment obligation when it enacted section 1342.

[2] In *Fisher*, the Court of Claims entered a *pro forma* judgment for the plaintiff to facilitate Supreme Court review and that Court likewise held, "[t]he later act must therefore prevail." *United States v. Fisher*, 109 U.S. 143, 146 (1883).

Because HHS has reasonably implemented the statute providing for payment over the course of the three-year temporary risk corridors program, Montana is not entitled to additional risk corridors payments, if any, until the completion of the final payment cycle in 2018. Because final payment, if any, will likely come due before an appeal in this case is concluded, the Court should not delay in determining the scope of any payment obligations under section 1342, but rather, should resolve that issue now. The Complaint should be dismissed.

II. Montana Has No Contractual Right To Risk Corridors Payments

Judge Griggsby also dismissed the identical implied-in-fact contract claim that Montana 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 Montana 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 (same); *see also* United States' Supplemental Brief Regarding *Moda Health Plan, Inc. v. United States*, Docket No. 25, at 21-23 (discussing errors in *Moda*'s implied contract finding).[3] Finally, Judge Griggsby, like Judge Lettow, *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 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 II, the implied-in-fact contract claim, fails as a matter of law and should be dismissed.

CONCLUSION

The Court should dismiss Montana's Complaint, deny Montana's motion for partial summary judgment, and enter judgment for the United States.

[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" "[i]n return for insurers' participation"); *see generally* United States' Supplemental Brief Regarding *Moda Health Plan, Inc. v. United States*, Docket No. 25, at 17-20 (discussing errors in *Moda*'s implied contract finding).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2017, I electronically filed the foregoing *United States' Supplemental Brief Regarding Blue Cross and Blue Shield of North Carolina. v. United States* with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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