

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MONTANA HEALTH CO-OP,)	
)	
Plaintiff,)	No. 17-1298C
)	
v.)	
)	Judge Victor J. Wolski
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	

**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 (“*Montana II*”), involving the identical parties and same issues as *Montana Health CO-OP v. United States*, No. 16-967C (“*Montana I*”), which is already fully-briefed before this Court, until *Montana I* has been finally decided. Alternatively, the United States requests a 60-day stay until January 15, 2018, to give the Court and the parties the opportunity to see if the Federal Circuit schedules argument in *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994. Should this Court deny a stay, the United States asks that this Court enlarge the deadline for the United States to respond to Montana Health CO-OP’s (“Montana”) motion for summary judgment by 90 days, until March 11, 2018.

On September 20, 2017, Montana filed *Montana II* seeking approximately \$34 million in money damages for benefit year 2016 of the risk corridors program, 42 U.S.C. § 18062, created by the Patient Protection and Affordable Care Act. Dkt. 1. On November 8, 2017, Montana moved for summary judgment. Dkt. 8. The United States response to that motion is currently due December 11, 2017.

Because *Montana II* raises the same legal issues as those already brought to this Court in *Montana I* and similar legal issues to those brought in 41 other risk corridors filed with the Court, and in order to avoid a needless waste of this Court's and the parties' resources, this Court should stay proceedings.

I. BACKGROUND

A. *Montana II* Raises the Same Legal Issues as *Montana I*

In *Montana I*, Montana previously brought suit for damages for benefit years 2014-15, asserting a statutory violation and breach of an implied-in-fact contract. *Montana I*, Dkt. 1. Montana moved for summary judgment, *Montana I*, Dkt. 5, and the United States moved to dismiss, *Montana I*, Dkt. 17. The parties fully briefed the motions and the Court held oral argument on February 9, 2017.

Following the argument, the Court ordered the parties to submit supplemental briefing addressing the Court's decision in *Moda Health Plan, Inc. v. United States*, No. 16-649C. *Montana I*, Dkt. 22. The parties submitted supplemental briefing on February 23, 2017.

Montana I, Dkt. 25, 26. On May 2, 2017, the Court ordered supplemental briefing for the parties to address the opinion in *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C. *Montana I*, Dkt. 27. The parties submitted supplemental briefing on May 12, 2017.

Montana I, Dkt. 28, 29. The Court subsequently ordered additional supplemental briefing, asking the parties to address decisions in *Maine Community Health Options v. United States*, 16-967C ("*Maine I*"), and *Molina Healthcare of California, Inc., et al. v. United States*, 17-97C.

Montana I, Dkt. 31. The parties submitted supplemental briefing on September 8, 2017.

Montana I, Dkt. 34, 35. *Montana I* remains pending before the Court.

As in *Montana I*, *Montana II* asserts a statutory violation and breach of an implied-in-fact contract. Dkt. 1. Montana explains: “This is the second action of this type brought by Montana Health against the Government. In its first action, . . . Montana Health is seeking the RCP payments the Government owes it for benefit years 2014 and 2015. This action seeks the RCP payment the Government owes Plaintiff for benefit year 2016.” Dkt. 1 at 1. Montana also filed a notice that *Montana II* is “directly related” to *Montana I*, and that both cases “involve the same parties and are based on the same or similar claims.” Dkt. 4 (citing RCFC 40.2(a)(2)(A)).

B. *Montana II* Is Similar to Other ACA Cases in This Court

As the Court is aware, the two *Montana* cases are in addition to 41 other cases filed in the last 21 months in this Court seeking relief under the risk corridors program. *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* (Wheeler, J.); *Blue Cross and Blue Shield of North Carolina* (Griggsby, J.); *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (Lettow, J.); *Maine I* (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.); *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., Inc. v. United States*, No. 17-87C (Griggsby, J.) (“*HPHC I*”); *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.) (“*Sanford I*”); *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.) (“*Health Alliance I*”). *EmblemHealth, Inc. v. United States*, No. 17-703C (Wheeler, J.); *Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, J.); *Nancy G. Atkins v. United States*, No. 17-906C (Kaplan, J.); *Doug Ommen v. United States*, No. 17-957C (Lettow, J.); *Wisconsin Physicians Service Ins. Corp. v. United States*, No. 17-1070C (Braden, J.); *HealthNow New York, Inc. v. United States*, No. 17-1090C (Hodges, J.); *Nancy G. Atkins v. United States*, No 17-1108C (Horn, J.); *Premera Blue Cross v. United States*, No. 17-1155C (Griggsby, J.); *Tom Glause v. United States*, No. 17-1157C (Braden, J.); *Maria T. Vullo v. United States*, No. 17-1185C (Wolski, J.); *HealthyCT, Inc. v. United States*, No. 17-1233C (Firestone, J.); *QCC Ins. Co. v. United States*, No. 17-1312C (Coster Williams, J.); *Harvard Pilgrim Health Care, Inc. v. United States*, No. 17-1350C (Griggsby, J.) (“*HPHC II*”); *Maine Cnty. Health Options v. United States*, No. 17-1387C (Bruggink, J.) (“*Maine II*”); *Sanford Health Plan v. United States*, No. 17-1432C (Bruggink, J.) (“*Sanford II*”); *Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542C (Wheeler, J.); *Humana, Inc. v. United States*, No. 17-1664C (Firestone, J.); and *Health Alliance Med. Plans, Inc. v. United States*, No. 17-1759C (Campbell-Smith, J.) (“*Health Alliance II*”). These cases collectively implicate more than \$12.3 billion.

Four cases have been decided and are on appeal to the Federal Circuit. The Court decided *Land of Lincoln* in favor of the United States, 129 Fed. Cl. 81 (2016), and *Land of Lincoln* appealed. In *Moda*, the Court entered judgment in favor of the plaintiff, 130 Fed. Cl.

436 (2017), and the United States appealed. 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. Both appeals are fully briefed.

The Court has entered judgment in the government's favor in two other cases: *Blue Cross and Blue Shield of North Carolina*, 131 Fed. Cl. 457 (2017), *appeal pending*, No. 17-2154 (Fed. Cir.); and *Maine I*, 133 Fed. Cl. 1 (2017), *appeal pending*, No. 17-2395 (Fed. Cir.).¹

C. Most Cases Have Been Either Temporarily Stayed Pending Appellate Review 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 30 cases: *Health Republic*, *New Mexico Health Connections*, *Minuteman Health*, *BCBSM*, *Alliant Health Plans*, *Blue Cross of Idaho Health Service*, *Neighborhood Health Plan*, *Medica Health Plans*, *Molina Healthcare of California, Inc.*, *Blue Cross and Blue Shield of Alabama*, *BlueCross BlueShield of Tennessee*, *Sanford I*, *Farmer*, *Blue Cross and Blue Shield of Kansas City*, *HPHC I*, *Health Net*,² *Health Alliance I*, *EmblemHealth*, *Common Ground Healthcare Cooperative*, *Ommen*, *Wisconsin Physicians Service Insurance Corp.*, *HealthNow*, *Premera*, *Glause*, *Vullo*, *HealthyCT*, *QCC*, *HPHC II*, *Maine II*, and *Sanford II*.

Montana's counsel has filed four other risk corridors benefit year 2016 cases that raise the same issues as previously-filed risk corridors benefit year 2014-15 cases: *HPHC II*, *Maine II*, *Sanford II*, and *Health Alliance II*. As noted directly above, *HPHC II*, *Maine II* and *Sanford*

¹ In *Molina*, the Court entered partial summary judgment in the plaintiffs' favor, 133 Fed. Cl. 14 (2017); further proceedings in *Molina* are stayed pending the *Land of Lincoln* and *Moda* appeals.

² In *Health Net*, this Court stayed the case for 60 days "to give the Court and the parties the opportunity to see if argument in *Land of Lincoln* and *Moda* will be scheduled in the near future." No. 16-1722C, Dkt. 17 (Oct. 23, 2017).

II have been stayed. Judge Griggsby stayed *HPHC II* *sua sponte* two days after the complaint was filed. No. 17-1350C, Dkt. 6. *Health Alliance II* was recently filed on November 9, 2017.

II. A STAY 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 v. North American Co.*, 299 U.S. 248, 254 (1936)). “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 promoted,” especially where, as here, a final decision in *Montana I*, or a Federal Circuit ruling in one or more of the risk corridors cases before it, would “settle” or “simplify” the issues presented. *See Landis*, 299 U.S. at 256.

Because the legal issues presented in this case are that same as those in *Montana I* and similar to the issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, a final

decision in *Montana I* or the further development of *Land of Lincoln* and *Moda* on appeal will be instructive and possibly dispositive. A stay therefore will conserve judicial resources and the resources of both parties by reducing the amount of briefing of issues already fully briefed before this Court and pending before the Federal Circuit.

A. Proceeding in *Montana II* While *Montana I* Remains Undecided Would Be a Waste of Resources

Montana I and *Montana II* have identical parties and the same legal issues. The main, if not the only, difference between the two cases is the risk corridors benefit year(s) at issue: for *Montana I*, 2014 and 2015; for *Montana II*, 2016. As described above, *Montana I* is fully briefed, including three rounds of supplemental briefing addressing risk corridors decisions issued by the Court. There can be no dispute that the issues in *Montana I* and *Montana II* overlap. Thus, there can be no legitimate grounds for proceeding in parallel with *Montana II* while *Montana I* remains pending.

Should the Court deny a stay and require the United States to reply to Montana's motion for summary judgment, the parties would then have to (as they did in *Montana I*, and may have to do again should the Federal Circuit rule on *Land of Lincoln* or *Moda*) file supplemental briefs following any decisions by the Federal Circuit and any decision in *Montana I*. In contrast, staying the case until *Montana I* has been finally decided will avoid that needless waste of resources.

B. The United States Does Not Seek an Indefinite Stay

As other risk corridors plaintiffs represented by Montana's counsel have done repeatedly before the Court, Montana will likely argue, relying upon *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997), that the Court should not enter an "indefinite" stay because the United States has not shown a "pressing need." See, e.g., *Health Net*, No. 16-1722C,

Dkt. 14 at 2-12.³ Other judges of the Court have rejected that argument, recognizing while the exact date the Federal Circuit will decide *Land of Lincoln* and *Moda* is unknown, the fact of a decision in the near future is definite. *See, e.g., Health Republic*, No. 16-259C, Dkt. 62; *Farmer*, No. 17-363C, Dkt. 9. That logic applies here: while the exact date that *Montana I* will be finally decided cannot be known, the fact that *Montana I* will ultimately be resolved, and thus dispose of or narrow the issues in *Montana II*, is definite.

C. A Stay Will Not Delay Any Potential Montana Recovery

Even if Montana ultimately prevails and wins a money judgment for risk corridors benefit year 2016, it almost certainly will not recover until *Montana I* and the cases already before the Federal Circuit are resolved. The question for this Court in considering the stay request is whether the parties and Court will waste resources on the full scope of this case now, or will prudently allow controlling law to efficiently shape future proceedings. Choosing the former, however, will *not* speed Montana's potential ultimate recovery (particularly while *Montana I* remains pending).

III. CONCLUSION

For these reasons, the United States respectfully moves the Court to stay this case until *Montana I* has been finally decided. Alternatively, the United States requests a 60-day stay until January 15, 2018, to give the Court and the parties the opportunity to see if the Federal Circuit schedules argument in *Land of Lincoln* and *Moda*. Should this Court deny a stay, the United States asks that this Court enlarge the deadline for the United States to respond to Montana's motion for summary judgment by 90 days, until March 11, 2018.

³ This Court previously denied stay motions for failure to show a “pressing need” in *Montana I* and *Health Net*.

Dated: November 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO STAY PROCEEDINGS, OR IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME 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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