

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE	:	
COMPANY,	:	No. 16-259C
	:	
Plaintiff,	:	Judge Davis
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION FOR CLARIFICATION

Plaintiff, on behalf of the sole remaining class member in this action, Colorado Health Insurance Cooperative, Inc. (“Colorado Health”), has moved for “clarification” of this Court’s August 19, 2022 Opinion and Order denying its motion to dismiss the counterclaim of the Department of Health and Human Services (“HHS”). The motion should be denied because rather than seeking clarification, the motion asks the Court to decide a new issue that is neither before the Court nor ripe for consideration. As explained below, Colorado Health seeks a ruling on the scope of the Secretary of the Treasury’s authority pursuant to 31 U.S.C. § 3728 when the Secretary has not acted, and at this time could not act, under that statute with regard to Colorado Health’s claims or debts.

As the Federal Circuit recognized in a similar circumstance, there is no occasion to reach questions regarding section 3728 where no judgment has been issued. *Conway v. United States*, 997 F.3d 1198, 1215-16 (Fed. Cir. 2021) (finding that, “[b]y its terms § 3728 only applies if ‘a judgment’ has been entered” and thus “does not prevent the Claims Court from entering judgment”). This Court relied *Conway* when it stated that the opinion “provides sufficient grounds to dispense with the [§ 3728] argument here.” Slip Op. 24 (citing *Conway*, 997 F.3d at

1215–16). As this Court has already held that the HHS is entitled to seek judgment on its counterclaim, nothing in the Court’s Opinion warrants clarification.

BACKGROUND

As this Court has previously recognized, Colorado Health seeks judgment for amounts allegedly owed by the Department of Health and Human Services (“HHS”) under section 1342 of the Affordable Care Act (“ACA”). In turn, the United States filed a counterclaim against Colorado Health seeking judgment for amounts owed under other sections of the ACA. Colorado Health moved to dismiss the counterclaim for lack of jurisdiction, and the Court denied that motion. In so doing, the Court further held that the United States could not seek offset in these proceedings. Prior to filing an answer to the counterclaim, Colorado Health filed the instant motion to “clarify” the Court’s position on future contingent events concerning the Secretary of the Treasury’s statutory authority under 31 U.S.C. § 3728(a).

Because Colorado Health has chosen to bring counsels’ conversations before the Court, we, too, review those exchanges. On August 24, 2022, the United States’ counsel emailed Colorado Health’s counsel “to touch base about Judge Davis’ recent decision . . . and discuss next steps in the litigation.” Declaration of Terrance Mebane (“Mebane Decl.”), attached as Exhibit A, ¶ 3 and Exhibit A-1. The next day, counsel spoke for approximately 5 minutes before the call became disconnected. *Id.* During that call, counsel for the United States did not state, as Colorado Health now suggests, that HHS “may seek to directly reduce or eliminate the payment of the judgment owed to [Colorado Health] by requesting from Treasury . . . an administrative offset.” Mebane Decl. ¶ 2.¹ The next day, the United States’ counsel followed up with Colorado

¹ Colorado Health’s counsel also indicated that he had “multiple” conversations with the United States’ counsel. Swedlow Declaration ¶ 2, Docket No. 173-1; Motion at 1. But the parties spoke only once, briefly, on August 25, 2022. Mebane Decl. ¶ 2. After the call dropped, the United

Health’s counsel, but received no response. Id. Three weeks later, Colorado Health’s counsel asked for the United States’ position on the reach of 31 U.S.C. § 3728(a). Id. The United States’ counsel asked about “the status of Colorado Health’s estate [and] whether the estate anticipates having assets to pay any portion of a claim on the judgment,” stated that “presenting a judgment to the Treasury Secretary[] isn’t something that’s come up or been litigated,” and asked counsel for his “thoughts” on these issues. Id. Nearly two weeks later, Colorado Health’s counsel ignored the inquiries about Colorado Health’s estate and stated his opinion about what the Court decided in its Opinion. Id. That same day, the United States’ counsel responded that questions about satisfaction of a judgment seem “academic” because Colorado Health not yet answered the counterclaim and indicated that was where the parties should “start.” Id.

On October 7, 2022, Colorado Health filed the motion for clarification. Docket No. 173. In the motion, Colorado Health’s counsel states his subjective belief that if the Court were to enter a judgment, the United States “may request” that the Secretary of the Treasury exercise the authority granted to her by Congress in 31 U.S.C. § 3728(a). Based solely on Colorado Health’s counsel’s conjecture, Colorado Health seeks a declaration regarding the Secretary’s authority with respect to hypothetical, future events.

ARGUMENT

The motion for clarification seeks an improper advisory opinion regarding the Secretary of the Treasury’s authority under 31 U.S.C. § 3728(a), which provides: “The Secretary of the Treasury shall withhold paying that part of a judgment against the United States Government presented to the Secretary that is equal to a debt the plaintiff owes the Government.” The

States’ counsel called Colorado Health’s counsel several more times, but Colorado Health’s counsel has not returned those calls and the parties only exchanged the emails attached as Exhibit A-1. Mebane Decl. ¶¶ 2–3.

Motion should be denied for several reasons—but simply put, there is no case or controversy before the Court involving the rights of the Secretary of the Treasury pursuant to section 3728(a).

First, the Court’s opinion speaks for itself, and the only issue pertaining to 31 U.S.C. § 3728(a) is now moot. As the Court is aware, the United States identified section 3728(a) in support of an alternative argument that it would be futile to dismiss HHS’s counterclaim. The Court rejected the argument and denied the motion to dismiss on other grounds, stating “*Conway* provides sufficient grounds to dispense with the argument here.” Slip Op. 24. The discussion in *Conway*, is as follows:

By its terms, § 3728 only applies if a ‘judgment’ has been entered. It may prevent Conway from enforcing his judgment against the government, and we do not reach that issue here. But § 3728 does not prevent the Claims Court from entering judgment.

997 F.3d at 1215–16. Because section 3728 was raised only as an alternative argument in support of this Court’s retention of jurisdiction, and that matter has been decided, further consideration of section 3728 in this case would be inappropriate. There is no record before this Court regarding the application of section 3728 to any interest possessed by Colorado Health, and nor could there be at this time. Thus, any consideration of section 3728 in this case is moot.²

Second, Colorado Health concedes, as it must, that the Secretary of the Treasury has not exercised any authority adverse to Colorado Health, and Colorado Health cannot challenge any actual action by the Secretary since there is none. As such, the dispute Colorado Health wants to litigate is not ripe. A question is not ripe for judicial review if it is premised upon “contingent

² Regarding section 3728, this Court also stated, “[i]n short, § 3728 provides no reason why Defendant’s claim for offset should otherwise survive dismissal.” Slip Op 25. The only assertions of an offset right before the Court were based upon 28 U.S.C. §§ 1503 and 2508 and thus the Court’s conclusion was that the assertion of futility was no a ground for recognizing offset as asserted under those provisions.

future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998). The “basic rationale . . . is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized[.]” *Abbott Labs. V. Gardner*, 387 U.S. 136, 148–49 (1967).

Here, the questions posed by the motion depend on a multitude of contingent future events and administrative decisions. As an initial matter, Colorado Health has not answered the counterclaim, and neither party has moved for judgment in its favor. Even if the Court enters judgment in HHS’s favor, HHS will have a right to seek appellate review of the Court’s determinations concerning its offset rights. If HHS were unsuccessful after exhausting all avenues for appellate review, HHS could submit any judgment for payment from Colorado Health’s estate. If the estate satisfies the claim, the parties’ dispute would be resolved. HHS might ultimately face decisions regarding an unsatisfied judgment and it then might need to make internal decisions regarding referral of a judgment to the Treasury. At that point, the Secretary of the Treasury might need to decide, what action, if any, to take under 31 U.S.C. § 3728(a). In short, several future contingent events and administrative decisions would need to play out in a particular manner before the questions posed by the motion would be ripe for review.

Third, the motion improperly seeks declaratory relief. The Tucker Act, under which Colorado Health asserts jurisdiction, waives sovereign immunity for certain non-tort claims against the United States founded upon the Constitution, a federal statute or regulation, or a contract and empowers the Court to award monetary damages. 28 U.S.C. § 1491(a)(1). The

Court’s jurisdiction to grant equitable or declaratory relief under the Tucker Act is limited to three statutorily defined circumstances: (i) “orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records” where “incident and collateral to” a money judgment, 28 U.S.C. § 1491(a)(2); (ii) actions brought under the Contract Disputes Act of 1979, *id.*; and (iii) bid protests, *id.* § 1491(b)(2). *See, e.g., Annuity Transfers, Ltd. v. Thompson*, 86 Fed. Cl. 173, 181–82 (2009).

Here, none of the circumstances under which the Court may enter declaratory relief apply. The motion seeks an early declaration as to whether the Secretary of the Treasury could exercise the authority provided in 31 U.S.C. § 3728 if certain future contingent events unfold in a particular manner. But Colorado Health has no “judgment” against which the Secretary would withhold, and HHS has presented no debt (or judgment) to the Secretary for withholding. Any determination regarding Secretary’s authority is necessarily declaratory in nature. Colorado Health’s disregard for the defined limits of this Court’s jurisdiction are aptly captured in the motion: “plaintiff is seeking clarification relating to what Defendant as a party to this litigation **may** do to seek to enforce its rights or enforce any judgment it **may** obtain . . .” Motion at 3 n. 7 (emphasis added). Such relief is not available in cases before this Court.

Fourth, the Court should not determine the Secretary’s authority in the absence of a proper case with full briefing as applied to actual facts and events, not hypotheticals that may takes years to unfold. In resolving the motion to dismiss, this Court considered a narrow issue related to 31 U.S.C. § 3728(a)—whether it would render dismissal of the counterclaim futile. The Court denied the motion to dismiss on other grounds, rendering that futility argument moot. If the Court is to decide what is potentially an issue of first impression, the Court’s decision should await receipt of a case presenting that actual controversy based upon a factual record in

which a plaintiff can allege the government took action under section 3728 that the plaintiff considers adverse and that gives rise to a claim for monetary damages. No such claim under 31 U.S.C. § 3728(a) exists in this case.

CONCLUSION

For these reasons, the motion for clarification should be denied.

Respectfully submitted,

Dated: November 4, 2022

BRIAN M. BOYTON
Principal Deputy Assistant Attorney General
Civil Division

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
MARC S. SACKS
FRANCES M. MC LAUGHLIN
PHILLIP SELIGMAN
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Phone: (202) 307-0493
terrance.a.mebane@usdoj.gov

Attorneys for the United States of America

EXHIBIT A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE	:	
COMPANY,	:	No. 16-259C
	:	
Plaintiff,	:	Judge Davis
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

DECLARATION OF TERRANCE A. MEBANE

I, Terrance A. Mebane, under penalty of perjury and in lieu of affidavit as permitted by 28 U.S.C. § 1746, declare as follows:

1. My name is Terrance A. Mebane, and I am an attorney with the Department of Justice representing the United States Department of Health and Human Services in this case.
2. On August 25, 2022, I spoke with counsel for Plaintiff for approximately 5 minutes before our call became disconnected. During that call, I did not state that “Defendant may seek to directly reduce or eliminate the payment of the judgment owed to Plaintiff by requesting from Treasury, under the alleged authority of 31 U.S.C. § 3728(a), an ‘administrative offset’ for the debt owed by Plaintiff to the government.” This is the only telephone conversation I have had with counsel for Plaintiff following the Court’s August 19, 2022 Order and Opinion.

3. Attached as Exhibit A-1 to this Declaration is the relevant electronic correspondence between myself and Plaintiff’s counsel following the Court’s Order and Opinion.

Executed this 4th day of November 2022

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
United States Department of Justice

EXHIBIT A-1

Mebane, Terrance A. (CIV)

From: Mebane, Terrance A. (CIV)
Sent: Tuesday, September 27, 2022 2:53 PM
To: Stephen Swedlow
Cc: Margaret Haas
Subject: RE: [EXTERNAL] RE: Health Republic (Colorado Health)

Steve,

This all seems academic to me at this point of the proceedings. The counterclaim survived plaintiff's motion to dismiss as to the principal amounts sought by CMS, and plaintiff has an answer due next Monday. If you believe a stipulated judgment may be feasible, then that seems like the place to start.

Terrance A. Mebane
U.S. Department of Justice
(202) 307-0493

From: Stephen Swedlow <stephenswedlow@quinnmanuel.com>
Sent: Tuesday, September 27, 2022 12:48 PM
To: Mebane, Terrance A. (CIV) <Terrance.A.Mebane@usdoj.gov>
Cc: Margaret Haas <margarethaas@quinnmanuel.com>
Subject: RE: [EXTERNAL] RE: Health Republic (Colorado Health)

You wrote that you are not yet sure how the government intends to attempt to satisfy a judgment (assuming we can agree to stipulated judgments). Our understanding of the Court's Opinion and Order is that the Government has one, and only one, possible road to such satisfaction: the Colorado insolvency proceeding. Is that not your understanding? Regarding 31 U.S.C. § 3728, we also think the Opinion and Order makes clear that the Government cannot seek to use that statute to achieve an offset. Please let us know if your read of the Opinion and Order is different.

Stephen Swedlow
Managing Partner - Chicago
312-705-7488
Cell 773-610-2512

From: Mebane, Terrance A. (CIV) <Terrance.A.Mebane@usdoj.gov>
Sent: Friday, September 16, 2022 12:47 PM
To: Stephen Swedlow <stephenswedlow@quinnmanuel.com>
Cc: Margaret Haas <margarethaas@quinnmanuel.com>
Subject: RE: [EXTERNAL] RE: Health Republic (Colorado Health)

[EXTERNAL EMAIL from terrance.a.mebane@usdoj.gov]

Hi Stephen,

Thanks for your email. I've been waiting for you to reach back out since our last call ended abruptly. I look forward to our discussing next steps in this litigation.

Judge Davis' opinion held that the court has jurisdiction to entertain the government's counterclaims under the ACA. Although appeal considerations remain, perhaps we can work toward a stipulated judgment, as was suggested by the Judge and has been done in other ACA cases.

As to satisfaction of the government's judgment, I'm not sure I can answer that question at this point. In terms of presenting a judgment to the Colorado insolvency court, I think that's certainly a possibility. However, I'll note that we haven't had any discussions with the liquidator as to the status of Colorado Health's estate or whether the estate anticipates having assets to pay any portion of a claim on the judgment. That's information we've been able to obtain from liquidators in other cases involving insurer insolvency proceedings, so I'm hoping we can obtain similar information in this case.

Regarding 31 U.S.C. § 3728 and presenting a judgment to the Treasury Secretary, that isn't something that's come up or been litigated in the other ACA cases. In other cases, I believe that plaintiffs voluntarily agreed to an offset against their recovery. I'm curious to hear any thoughts you may have on these issues.

Terrance A. Mebane
U.S. Department of Justice
(202) 307-0493

From: Stephen Swedlow <stephenswedlow@quinnmanuel.com>
Sent: Wednesday, September 14, 2022 12:52 PM
To: Mebane, Terrance A. (CIV) <Terrance.A.Mebane@usdoj.gov>
Cc: Margaret Haas <margarethaas@quinnmanuel.com>
Subject: RE: [EXTERNAL] RE: Health Republic (Colorado Health)

I write regarding Judge Davis's recent Order (Dkt. 170). I want to clarify what I understood to be the Government's position regarding 31 U.S.C. § 3728. In the event the Government succeeds in getting a judgment against Plaintiff on its Counterclaim, does the Government intend to attempt to satisfy that judgment by presenting it to Treasury, such that Treasury may offset the judgment pursuant to 31 U.S.C. § 3728, rather than to execute on the judgment solely through the Colorado insolvency proceeding?

If that is your position, how do you reconcile it with the Court's ruling that "Defendant may continue to pursue its proof of claim, with a judgment in hand, in the Colorado insolvency proceeding" in the event the Government is entitled to recover something from Colorado HealthOp (Opinion at 33)?

Stephen Swedlow
Managing Partner - Chicago
312-705-7488
Cell 773-610-2512

From: Mebane, Terrance A. (CIV) <Terrance.A.Mebane@usdoj.gov>
Sent: Friday, August 26, 2022 8:47 AM
To: Stephen Swedlow <stephenswedlow@quinnmanuel.com>
Subject: RE: [EXTERNAL] RE: Health Republic (Colorado Health)

[EXTERNAL EMAIL from terrance.a.mebane@usdoj.gov]

Hi Steve,

I'm not sure what happened yesterday, but let me know if you have time to continue our conversation today.

Regarding damages, I've attached the numbers I sent to you and Margaret in January 2022. I don't believe there should be much disagreement about the amounts, as the program amounts are publicly available. But if you need more information, I can request a breakdown from my client.

Terrance A. Mebane
U.S. Department of Justice
(202) 307-0493

From: Mebane, Terrance A. (CIV)
Sent: Thursday, August 25, 2022 12:52 PM
To: Stephen Swedlow <stephenswedlow@quinnmanuel.com>
Subject: Re: [EXTERNAL] RE: Health Republic (Colorado Health)

Our call dropped, and I've been unable to reach you again. Please give me a call back when you're able.

Sent from my iPhone

On Aug 24, 2022, at 11:58 AM, Stephen Swedlow <stephenswedlow@quinnmanuel.com> wrote:

Terrance I just tried to call you – straight to voice mail. Please call me on my cell number below whenever you are available today thanks

Stephen Swedlow
Managing Partner - Chicago
312-705-7488
Cell 773-610-2512

From: Mebane, Terrance A. (CIV) <Terrance.A.Mebane@usdoj.gov>
Sent: Wednesday, August 24, 2022 10:54 AM
To: Stephen Swedlow <stephenswedlow@quinnmanuel.com>
Cc: Margaret Haas <margarethaas@quinnmanuel.com>
Subject: Health Republic (Colorado Health)

[EXTERNAL EMAIL from terrance.a.mebane@usdoj.gov]

Hi Steve,

Hope all is well. I'd like to touch base about Judge Davis' recent decision in Health Republic and discuss next steps in the litigation. I know Colorado Health's answer is due next Friday, September 2. Let me know if you have time before then for a call.

Terrance A. Mebane
U.S. Department of Justice
(202) 307-0493