IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD OF VERMONT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 1:18-CV-00373-MBH

PLAINTIFF'S OPPOSITION TO GOVERNMENT'S MOTION TO STAY PROCEEDINGS AND ALTERNATIVE MOTION FOR AN ENLARGEMENT OF TIME TO RESPOND TO THE COMPLAINT

This case is about the federal government's deliberate default on its obligation to pay for the health care costs of low-income Americans. The Affordable Care Act (ACA) requires the government—not insurers—to reduce out-of-pocket health care costs for people with income less than 250% of the federal poverty level. Health insurers that offer plans through the ACA marketplaces facilitate that benefit by reducing the cost-sharing obligations—deductibles, co-pays, and co-insurance—for eligible consumers. The government, in turn, is required to fund these benefits through payments made directly to insurers. These mandated payments to insurers are called cost-sharing reduction (CSR) payments. After making CSR payments to insurers for three-and-a-half years as required by law, in October 2017 the government abruptly stopped. Meanwhile, insurers like Plaintiff Blue Cross & Blue Shield of Vermont (BCBSVT) continue to fulfill their obligations to reduce the cost-sharing contributions of eligible consumers. BCBSVT has sued to recover its losses, which are mounting every day.

The government wants to delay this lawsuit indefinitely because the Federal Circuit is considering issues related to payments owed under another provision of the ACA, known as risk-corridor payments. The risk-corridor appeals involve a different program governed by a different statute. And the two primary arguments that the government has pressed in the risk-corridor

cases—namely, its claim that the risk-corridor program is budget-neutral, and its reliance on appropriations riders specific to risk-corridor payments—have no relevance to this case.[1] The government has no grounds for staying this litigation and its request should be denied.

BACKGROUND

As part of the ACA's comprehensive plan for making health insurance more accessible and affordable, Congress targeted an additional benefit at individuals and families with incomes less than 250% of the federal poverty level. The ACA directs participating insurers to reduce out-of-pocket costs like deductibles, co-pays, and co-insurance (collectively known as cost-sharing) for these low-income consumers. 42 U.S.C. § 18071(c)(2). But the ACA does not require insurers to bear these extra costs. Rather, the ACA expressly requires that the federal government compensate insurers for the cost-sharing reductions. *Id.* § 18071(c)(2).

BCBSVT's claim is simple: the ACA both requires cost-sharing reductions for low-income consumers and mandates that the government make "periodic and timely payments" to compensate insurers. "An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary *shall make periodic and timely payments to the issuer equal to the value of the reductions*." *Id.* § 18071(c)(3)(A) (emphasis added). That unqualified mandate for payment is repeated elsewhere in the statute and regulations. *See, e.g.*, *id.* § 18082(c)(3) ("The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies in the notice."); 45 C.F.R. § 156.430(b) (insurers "will

[1] The government tries to align this case with the risk-corridor cases by mistakenly asserting that BCBSVT alleges "that insurers are entitled to CSR payments from the government even though Congress did not appropriate funding for those payments." (Def.'s Stay Mot. at 1-2, ECF No. 6.) In fact, BCBSVT does not allege and does not concede that Congress did not appropriate funding for the CSR program. (*See* Compl. ¶¶ 31, 59, 63, ECF No. 1.) The federal government made CSR payments for three-and-a-half years in reliance on the permanent appropriation included in the ACA and codified at 31 U.S.C. § 1324(b). (*Id.* ¶ 31.)

receive periodic advance payments based on the advance payment amounts calculated in accordance with § 155.1030(b)(3)"). The federal government's statutory obligation for the CSR payments is indisputable.

Indeed, consistent with the ACA's design and express provisions, the Secretaries of the Treasury and Health and Human Services promptly implemented a program for making the payments in 2014. The government made monthly CSR payments to insurers, including BCBSVT, for three-and-a-half years. And the Department of Justice expressly acknowledged the government's obligation to make CSR payments. *See, e.g.*, Appellant's Br. at 50, *U.S. House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Oct. 24, 2016) (ACA "requir[es] the government to compensate the insurers for these cost-sharing reductions").

When the government stopped making CSR payments in October 2017, it breached its statutory and contractual obligations to BCBSVT. The government wrongly calls the CSR payments "insurance subsidies." (Def.'s Stay Mot. at 1, ECF No. 6.) The ACA did not set up CSR payments as a subsidy for insurers. Cost-sharing reductions are a benefit for low-income Americans, for which insurers act as a conduit: the government compensates insurers for the cost of providing more generous coverage to certain insureds. But now, insurers like BCBSVT are providing cost-sharing reductions without any compensation. BCBSVT is losing money every day. It seeks what the Court's rules promise: a "just, speedy, and inexpensive" determination of its claims. Rule of the Court of Fed. Claims 1.

ARGUMENT

The government's request for a stay is indefensible. The extraordinary circumstances of this case call for expeditious resolution, not indefinite delay. Since 2014, BCBSVT has agreed each year to offer affordable, high-quality qualified health plans under the ACA based on its expectation—consistent with statute, rule, and agency guidance and practice—that the government

would meet its obligations and make the required payments to insurers. Instead, BCBSVT faces millions of dollars in unexpected costs. The federal government caused this problem. It should not be allowed to saddle insurers like BCBSVT with months if not years of uncertainty and financial exposure.

The government cannot meet its heavy burden of justifying a stay in this case. Because the government requests a stay of indefinite duration, it must meet both the ordinary requirement of showing the requested stay is necessary *and* further show a "pressing need" for the stay. *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997); *see also Haddock v. United States*, 135 Fed. Cl. 82, 91 (2017).[2] Moreover, the government must also show that the "interests favoring a stay" outweigh BCBSVT's interests in expeditiously resolving this action. *Cherokee Nation*, 124 F.3d at 1416; *see also Nat'l Food & Beverage Co. v. United States*, 96 Fed. Cl. 258, 263 (2010) ("To justify suspending the regular course of litigation, the proponent 'must make a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay which he prays will work damage to someone else.'" (citations omitted)).

Given "the court's paramount obligation to exercise jurisdiction timely in cases properly before it," *Cherokee Nation*, 124 F.3d at 1416, the government's suggestion that the Federal Circuit's decision in the risk-corridor appeals may be "instructive" falls far short of justifying a stay. First, the primary liability issues in the pending risk-corridor appeals are specific to that program, and the Federal Circuit's decision on those issues will not affect BCBSVT's CSR claims. Second, the government cannot show a pressing need for a stay where other CSR cases are proceeding and, at most, a Federal Circuit ruling might prompt "new briefing." (Def.'s Stay Mot.

[2] Because it is uncertain how long the Federal Circuit will take to issue a decision in the pending risk-corridor cases, the requested stay is "indefinite." *See Haddock*, 135 Fed. Cl. at 91 (describing requested stay based on litigation in another forum as "indefinite" where it was "uncertain how long those proceedings may take").

at 3.) Third, BCBSVT's interests in a speedy resolution of this case outweigh any interest the government has in delay. Finally, the Court should also limit the government's requested extension of time. In light of the government's extraordinary conduct in defaulting on its own obligation *while still requiring insurers to incur these costs*, this case should proceed without undue delay.

I. The pending risk-corridor appeals do not justify a stay in this case.

The government's stay motion should be denied because it rests on the faulty premise that the issues in the risk-corridor appeals "mirror the arguments" in this and other CSR litigation. (Def.'s Stay Mot. at 3, 6.) The two sets of cases are superficially similar—in both, insurers press claims for payments owed by the government under the ACA. But the government's argument glosses over critical differences between the cases.

The CSR and risk-corridor programs derive from statutes with complementary but distinct aims: Congress implemented the risk-corridor program (along with the risk-adjustment and reinsurance programs) to moderate the financial risk to insurers as they entered the ACA-mandated health benefit exchange marketplaces. *See, e.g.*, *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 442 (2017). By contrast, the goal of the CSR program is to "help people get treatment once they have insurance" by reducing the amount of their own money they have to spend on the cost-sharing components of their health plans. *California v. Trump*, 267 F. Supp. 3d 1119, 1123 (N.D. Cal. 2017). Congress directed insurers—the entities who actually collect the cost-sharing amounts from those beneficiaries—to provide the benefit, and then required the government to reimburse the insurers. *See* 42 U.S.C. § 18071(c)(3)(A) (requiring "periodic and timely payments to the issuer equal to the value of the reductions"). In short, the government's obligation to make CSR payments is governed by a separate set of statutes, rules, and guidance documents that play no part in the pending risk-corridor appeals. (*See, e.g.*, Compl. ¶¶ 24, 28-35, ECF No. 1.)

Further, the primary arguments advanced by the government in the risk-corridor cases have no relevance to BCBSVT's claim for CSR payments. In its briefs to the Federal Circuit, the government relies on arguments specific to the risk-corridor program, namely, that the program was designed to be budget-neutral; that Congress capped risk-corridor payments at the amount collected from insurers; and that Congress cut off access to other sources of funding in subsequent appropriations acts. It argues that the "ACA created a self-funded risk-corridors program to distribute gains and losses between insurers" and Congress "expressly prohibited HHS from using other funds" to make payments to insurers. Appellee's Br. at 1-2, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Fed. Cir. Apr. 24, 2017); *see also, e.g.*, *id.* at 16-18, 22; Appellee's Br. at 1-2, 14-16, 21, *Maine Cmty. Health Options v. United States*, No. 17-2395 (Fed. Cir. Dec. 6, 2017). The Federal Circuit's ruling on those issues will not address the government's separate obligation to make CSR payments.

Because the issues in the risk-corridor appeals lack any substantial overlap with BCBSVT's CSR claims, the government cannot justify an indefinite stay of this case. The mere fact that in both contexts insurers seek recovery from the Judgment Fund does not warrant a stay—indeed, claimants under the Tucker Act uniformly seek to recover from the Judgment Fund. The government has not offered any specific explanation of how the Federal Circuit's risk-corridor decision would affect how this case is litigated or, ultimately, decided. That a future appellate decision might "provide guidance" in a nebulous, unspecified manner does not warrant indefinite and prejudicial delay for a plaintiff facing substantial financial harm. *Cf. Cherokee Nation*, 124 F.3d at 1418 (noting, in reversing stay granted by trial court, that resolution of a separate case was "not a necessary precursor to resolving whether the United States breached its fiduciary duty" in that case); *Nat'l Food & Beverage*, 96 Fed. Cl. at 269 ("Entering a stay in a case such as this one,

where there is no possibility for duplicative or conflicting decisions [in litigation regarding similar issues], would disserve the goal of a 'just, speedy, and inexpensive determination' of this action." (quoting Rule of the Court of Fed. Claims 1)).

II. The government cannot show a "pressing need" for a stay where other CSR cases are proceeding and the government has not identified any potential prejudice or harm if this case proceeds.

Because the government seeks an "indefinite" stay, it carries the heavy burden of showing a "pressing need." *Cherokee Nation*, 124 F.3d at 1416. That heavy burden is especially demanding here, because BCBSVT is not a party to the risk-corridor appeals, and "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Thus, even if the government were correct, and the risk-corridor appeals had substantial relevance here, its case for a stay would be weak. As explained above, however, the issues here contrast sharply with those in the risk-corridor appeals. The government has not identified any ground for a stay that satisfies this demanding standard.

First, the government has not, and cannot, argue that it will incur any significant additional litigation costs or burdens absent a stay. This is not a case that requires significant factual development: the controlling statutory language is undisputed; the cost-sharing reductions are tracked and reported; and the required CSR payments are readily calculable. *Cf.* Op. at 10, *Common Ground Healthcare Coop. v. United States*, No. 1:17-CV-00877 (Fed. Cl. Apr. 17, 2018) (noting that calculation of unpaid CSR payments "appears to be a rather straightforward process"). The government has not even suggested, much less shown, that the Federal Circuit's ruling would likely require the Court and the parties to expend substantial additional time or incur significant additional litigation costs. Indeed, the government does not attempt to show that the risk-corridor

decision will narrow or dispose of any issues here; rather, it only makes the unremarkable claim that the appeals could "provide guidance" or be "instructive" in this litigation. (Def.'s Stay Mot. at 3, 6.) At most, the government suggests, the parties might submit additional briefing to the Court following the Federal Circuit's decision. (*Id.* at 3.) That modest possible burden is hardly on par with the harm to BCBSVT that mounts as time passes.

Second, courts have denied stays in two of the four CSR-only cases identified by the government. *See* Order, *Mont. Health Co-op v. United States*, No. 1:18-CV-00143 (Fed. Cl. Mar.27, 2018) (Kaplan, J.) (noting CSR payments are not at issue in pending appeals and denying stay; government's response to complaint due June 1, 2018); Order, *Sanford Health Plan v. United States*, No. 1:18-CV-00136 (Fed. Cl. Mar. 28, 2018) (Firestone, S.J.) (denying stay; government's response due May 29, 2018).[3] That means the government must soon begin defending CSR claims brought by other insurers. The CSR issues will be litigated. The government cannot show a "pressing need" to delay this case when other related cases are proceeding.

BCBSVT has acted promptly to protect and assert its interests in light of the government's default. Moreover, as set forth in the complaint, BCBSVT has been uniquely harmed by the loss of CSR payments, because unlike most other insurers, it was not able to raise its 2018 premium rates *at all* to recoup these enormous financial losses. (Compl. ¶¶ 69-78.) It thus has an exceptionally strong interest in litigating its CSR claims—and should not be sidelined while other insurers move forward with their cases. The government has not satisfied its heavy burden of showing that a stay is justified in these circumstances.

[3] The government also notes that stays were granted in four other cases, but in those cases, the plaintiffs seek both risk-corridor payments *and* CSR payments. One of those stay requests was unopposed; in another, *Common Ground*, class certification issues are proceeding. (Def.'s Stay Mot. at 2, ECF No. 6.).

III. BCBSVT will be harmed by a stay, and its interests in a prompt resolution far outweigh the government's stated interests in, at most, avoiding potential additional briefing.

Any interest the government has in delaying this case is decisively outweighed by BCBSVT's overriding interest in an expeditious resolution. BCBSVT is a small non-profit insurer whose rates are fixed by state law. Its 2017 and 2018 rates were calculated and approved on the assumption that the government would make CSR payments. (Compl. ¶ 69.) Now the government owes it millions in unsatisfied CSR payments. And the government will certainly argue, when BCBSVT obtains a judgment for those losses, that the government cannot be forced to pay interest on its debt. It is bad enough that the government has walked away from its statutory obligation to make these payments. The government's motion would impose even more financial harm on BCBSVT by postponing indefinitely any recovery in this case. As this Court observed in rejecting a stay in another matter, "[a]ccepting the government's argument would create a means for the federal government to avoid or delay paying compensation." *Nat'l Food & Beverage*, 96 Fed. Cl. at 269; *see also Cherokee Nation*, 124 F.3d at 1416 ("Without a pressing need for the stay, this court refuses to impose such an onerous burden on a litigant's right to seek redress against the United States.").

BCBSVT is also harmed by prolonged uncertainty over the government's liability for these payments. As a regulated non-profit insurer, BCBSVT must maintain an appropriate level of reserves and must submit timely premium rate requests to state regulators that are sufficient to cover its liabilities and expected claims. As BCBSVT considers its reserve levels and rate submissions, its decisions are complicated by uncertainty over the outcome of this case. It needs a prompt decision.

Again, the government is responsible for this problem. Whether the fault lies with the Executive Branch, Congress, or both, the result is the same for BCBSVT: it is bearing costs that the federal government is supposed to fund, and it has no choice but to keep doing so. At a minimum, BCBSVT deserves a prompt judicial hearing on its claims. The Court should not allow the government to delay this case.

IV. The Court should limit the government's requested extension to 30 days.

As an alternative to a stay, the government seeks an additional 64 days to respond to the complaint. BCBSVT's interest in a prompt resolution should be taken into account in setting deadlines and addressing extension requests. As explained above, delay benefits the government and harms BCBSVT. Accordingly, the Court should ensure that this case proceeds without undue delay. The government must respond to similar complaints in two other CSR cases by June 1. BCBSVT respectfully requests that the Court limit the government's extension of time to 30 days, which would place its response date in this case approximately one week after its deadline in the other CSR cases.

CONCLUSION

For the reasons given above, the Court should deny the government's request for a stay and should extend the government's response deadline by no more than 30 days.

Respectfully submitted,

Dated: May 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, a copy of the attached Plaintiff's Opposition to Government's Motion to Stay Proceedings and Alternative Motion for an Enlargement of Time to Respond to the Complaint was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

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