IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS,	)	
	)	
Plaintiff,	)	**No. 16-967C**
	)	
v.	)	
	)	**Judge Bruggink**
THE UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	
	)	

UNITED STATES' SUPPLEMENTAL REPLY BRIEF

Pursuant to this Court's March 9, 2017 order, Dkt. 30, the United States submits this supplemental reply brief in support of the United States supplemental brief (Def. Supp. Br.), Dkt. 31, and in response to Maine Community Health Options' (Maine) supplemental brief (Pl. Supp. Br.), Dkt. 32. In our prior briefing, we explained that Congress planned section 1342 of the Affordable Care Act (ACA), 42 U.S.C. § 18062 (2012), to be self-funding as demonstrated by the text and structure of the statute and by Congress's omission of any appropriation or authorization of funding, in contrast to the Medicare Part D program on which the ACA risk corridors program is based. We also explained that, to the extent there could be any ambiguity about section 1342, Congress removed all doubt when it enacted the 2015 and 2016 Spending Laws,[1] appropriating risk corridors collections as the only source of funding for risk corridors payments and expressly barring the use of other funds. In its supplemental brief, Maine fails to provide any reason to conclude that billions of dollars in taxpayer funds should be used to make risk corridors payments.

[1] *See* Pub. L. No. 113-235, div. G, title II, § 227 (the 2015 Spending Law), Def. Supp. Br. Appendix (A_) at 62; Pub. L. No. 114-113, div. H, title II, § 225 (the 2016 Spending Law), A75.

I. Maine's Reliance on Congress's Silence Is Unsupported By Law

Recognizing that section 1342 does not appropriate funds for risk corridors payments, Maine argues that Congress's decision not to include an appropriation (or, as in Medicare Part D risk corridors, authorization for an obligation in advance of an appropriation, Def. Supp. Br. at 4-5) demonstrates that Congress intended the United States' liability to be limitless. Pl. Supp. Br. at 1 ("the Government's liability . . . is absolute"); *see also id.* at 9 ("the 'shall pay' mandate in Section 1342 is unconditional"). Maine is wrong. As we have explained, section 1342 by itself did not make risk corridors payments an obligation of the government, and Congress did not create an uncapped liability to indemnify insurers for their losses. *See, e.g.*, Def. Supp. Br. at 3-8. The so-called "'shall-pay' mandate" is embedded in the statute's "payment methodology" provision, section 1342(b). *See* 42 U.S.C. § 18062(b). The operative provision is section 1342(a), which directs the Secretary to establish and administer a program of payment adjustments among insurers. 42 U.S.C. § 18062(a). Thus, the language on which Maine relies simply describes how the Secretary shall administer the program of payment adjustments; it is not a freestanding directive to the agency to make payments. And without further action by Congress in annual appropriation legislation, no payments could be made under section 1342.

Maine's argument is, essentially, that Congress's *silence* evidences Congress's intent to obligate the United States for unlimited risk corridors payments. *See* Pl. Supp. Br. at 6 ("Congress also *omitted* from Section 1342 its typical words of limitation on an agency's budget authority . . ."). No legal authority supports such a position. Rather, the Federal Circuit has recognized that statutory language directing an agency to pay amounts calculated under a statutory formula does not, without more, create an obligation on the part of the government to provide for full payments in the absence of appropriations. *See, e.g.*, *Prairie County, Montana v.*

United States, 782 F.3d 685, 691 (Fed. Cir. 2015) (noting that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language"). Here, Congress's silence, in contrast to Medicare Part D and the dozens of provisions in the ACA appropriating or authorizing appropriations, Def. Supp. Br. at 4, demonstrates that Congress did not create an uncapped liability in section 1342.

Moreover, Congress need only consider *limiting* budget authority when such budget authority was previously or is simultaneously granted. Here, when Congress did grant budget authority – in the 2015 Spending Law authorizing risk corridors collections to be used to make risk corridors payments – it simultaneously limited that authority by expressly prohibiting payment of risk corridors payments from the lone available potential source the CBO had identified, the annually appropriated CMS Program Management lump sum appropriation.

II. Maine Confuses this Court's Jurisdiction with Congress's Power of the Purse

The United States does not dispute that section 1342 is money mandating, and this Court has determined it has jurisdiction. March 9, 2017 Order. And while section 1342's "shall pay" language may grant Maine access to this Court, it does not demonstrate that Congress appropriated funds for risk corridors payments in excess of collections. Maine's reliance on *United States v. Langston*, 118 U.S. 389 (1886), and *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc), is misplaced. *See* Pl. Supp. Br. at 3-4. As we explained, in *Langston*, Congress yearly had appropriated funds for the salary of the ambassador to Haiti; the issue before the Court concerned two appropriations that were less than the salary designated by statute. Def. Supp. Br. at 17-18. Here, there were no funds appropriated when section 1342 was passed, and the only appropriations laws authorizing risk corridors payments permitted the

Department of Health and Human Services (HHS) to use only risk corridors collections and expressly barred the use of other funds.

Slattery is simply not relevant. *Slattery* was a breach of contract case where the issue was limited to this Court's jurisdiction. The Federal Circuit held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. 635 F.3d at 1321; *see also id.* at 1316 (the Judgment Fund is not a jurisdictional "limitation" of claims within the scope of the Tucker Act). But as *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 2000), and the other cases discussed in our supplemental brief demonstrate, Def. Supp. Br. at 12-13, 15-18, Congress's exercise of its power of the purse is of central relevance to the *merits question of liability under a statute*.

Here, Congress reserved that power when it passed section 1342. When Congress addressed funding for risk corridors payments in the 2015 and 2016 Spending Laws, Congress appropriated only risk corridors collections, and unequivocally barred the use of any other funds. *Cf. Slattery*, 635 F.3d at 1318 ("The appropriation provisions of [FIRREA] were an appropriation to pay governmental obligations."). Moreover, the United States here is not arguing that Maine must prove a "'second waiver' of sovereign immunity." *See* Pl. Supp. Br. at 5. What Maine must do, as demonstrated by controlling law, Def. Supp. Br. at 12-13, is demonstrate that Congress obligated the United States to pay risk corridors payments in excess of collections. Maine cannot do that.[2]

[2] *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12 (2011), does not aid Maine. Pl. Supp. Br. at 5-6. ARRA decided a motion to dismiss on jurisdictional grounds, determining whether the statute at issue was money mandating. Again, there is no dispute that section 1342 is money mandating. *ARRA* does not help Maine demonstrate that Congress intended that section 1342 obligate the United States to pay risk corridors payments beyond collections.

III. In Section 1342 of the ACA, Congress Did Not Appropriate Funds for Risk Corridors Payments or Make Such Payments an Obligation of the Government

Though not addressed in Maine's motion for summary judgment, Maine now points to a provision of the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1)(B), to argue that, even though section 1342 contains no appropriation, Congress otherwise "authorized by law" that HHS pay risk corridors payments without regard to risk corridors collections. Pl. Supp. Br. at 8, 10. Maine's argument is without merit. The GAO Redbook discusses the "exceptions" by which Congress may "authorize by law" an agency to obligate funds. GAO–06–382SP, Principles of Fed. Appropriations Law, Vol. II, Ch. 6, page 6-88 – 6-93 (3d ed. 2006). But none apply here. As the GAO explains:

> The statutory authority must be more than just authority to undertake the particular activity. For example, statutory authority to acquire land and to pay for it from a specified fund is not an exception to the Antideficiency Act. 27 Comp. Gen. 662 (1921). It merely authorizes acquisitions to the extent of funds available in the specified source at the time of purchase. *Id.* Similarly, the authority to conduct hearings, without more, does not confer authority to do so without regard to available appropriations.

Id. at 6-91. Here, in section 1342, Congress directed HHS to undertake an activity (the Secretary shall "establish and administer . . .") but did not confer authority to make risk corridors payments "without regard to available appropriations." In any event, 31 U.S.C. § 1341(a)(1)(B) addresses only whether HHS would violate the ADA if it paid risk corridors payments in excess of appropriated collections. The agency has not made risk corridors payments in excess of appropriated collections, so HHS has not violated the ADA.

Maine's assertion, Pl. Supp. Br. at 10, that Congress authorized by law full risk corridors payments regardless of appropriations, as it did for Medicare Part D risk corridors, has no basis in the text of section 1342. As we explained, like section 1342, the Medicare Part D statute directs HHS to make payments. Def. Supp. Br. at 4-7 (explaining Judge Wheeler's misreading

of 42 U.S.C. § 1395w-115; *see Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 at 452, 455 (2017)). But unlike section 1342, the Part D statute also states: "This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section." 42 U.S.C. § 1395w-115(a)(2). Maine provides no basis for the Court to ignore this critical difference in the language of the statutes.

IV. Congress Appropriated Funds Collected from Insurers but Barred HHS from Using Other Funds for Risk Corridors Payments

In our supplemental brief, we explained that, in the 2015 and 2016 Spending Laws, Congress appropriated the funds that insurers would pay into the risk corridors program to make risk corridors payments, but expressly barred HHS from using other funds to make risk corridors payments. The text, structure, and history of the legislation make clear that section 1342 required "payments out" to be made solely from "payments in." And even if there could be a question as to the meaning of section 1342, the appropriations acts definitively capped "payments out" at the total amount of "payments in." Def. Supp. Br. at 8-13.

In its supplemental brief, Maine misconstrues the effect of the Spending Laws. *See* Pl. Supp. Br. at 12. Congress neither repealed the risk corridors program nor amended section 1342's direction to HHS to establish and administer the program. Instead, by appropriating user fees for those years, the Spending Laws gave HHS limited budget authority to make payments to the extent of collections. Without these appropriations, HHS could not have made any risk corridors payments at all. Thus, no payment obligation to make risk corridors payments arose until 2015 and only then because of Congress's exercise of its appropriations power. But even assuming that section 1342 did create an obligation for risk corridors payments in excess of collections, controlling authority establishes that appropriations legislation can amend a

preexisting statutory obligation. *United States v. Dickerson*, 310 U.S. 554, 556 (1940). "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883). In our supplemental brief, relying on *Highland Falls* and *Star-Glo Associates, LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), we explained that, in the 2015 and 2016 Spending Laws, which were passed *before* any obligation for HHS to pay risk corridors payments could have arisen, Congress appropriated only risk corridors collections and expressly restricted HHS's use of other appropriated funds to make such payments. Def. Supp. Br. at 12-13. The purpose of these restrictions 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. H9838 (daily ed. Dec. 11, 2014), A69.[3] Thus, even if section 1342 created a statutory payment obligation, the 2015 and 2016 Spending Laws definitively capped payments at amounts collected and thus superseded any such obligation.

Additionally, Maine relies upon *Langston* and *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), to argue that the Spending Laws cannot limit risk corridors payments to risk corridors collections. Pl. Supp. Br. at 13-14. But those cases, as we discussed in our supplemental brief, do not apply here. Def. Supp. Br. at 15-16, 17-18. Maine also relies upon Judge Wheeler's erroneous determination that the Spending Laws, which expressly prohibited use of the *only* identified source for risk corridors payments (other than collections),

[3] While this House of Representatives explanatory statement clearly expresses Congress's objective, we also explained in our supplemental brief how, in early 2014, Members of Congress requested from the GAO an analysis of what sources of appropriations might be available when risk corridors payments came due. *See Dep't of Health & Human Servs.-Risk Corridors Program*, B-325630 (Comp. Gen.), 2014 WL 4825237, at *1 (Sept. 30, 2014), A76. In response to that analysis, Congress passed the 2015 Spending Law to expressly cut off the sole source of funding (other than risk corridors collections) identified by GAO. Def. Supp. Br. at 8-10.

left open the Judgment Fund as an available appropriation. Pl. Supp. Br. at 15. But, as we explained, no case holds that Congress must specify "any other Act" or similar language in order to preclude liability in the Court of Federal Claims. Def. Supp. Br. at 14.[4]

Maine also now argues that fiscal year 2014 appropriations were available for risk corridors payments. Pl. Supp. Br. at 17-18. That is incorrect. By law, the CMS Program Management lump sum fiscal year 2014 appropriation expired at the end of that fiscal year (September 30, 2014). *See* Pub. L. No. 113-76, div. H, title V, § 502, 128 Stat. 408, A42 (Jan. 17, 2014) ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."). Under the plain language of section 1342, payments and charges under section 1342 are calculated on the basis of the full year's costs and premiums. Risk corridors payments could not be calculated until long after the time to obligate funds under the FY 2014 appropriation had expired.[5]

[4] Maine's apparent argument that the 2015 Spending Law was applied retroactively, Pl. Supp. Br. at 16, is meritless. At oral argument, Maine conceded that the earliest HHS could have made the initial risk corridors payments was July 2015. Def. Supp. Br. at 8. Congress passed the 2015 Spending Law eight months earlier (December 2014). The 2015 Spending Law necessarily applied to payments to be made after its passage. It cannot apply retroactively, and it must govern future payments made during fiscal year 2015 if it is to have any effect at all. In any event, "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994); *see also id.* at 267 ("the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.").

[5] We explained in our supplemental brief that the continuing resolutions passed by Congress between the end of the fiscal year 2014 and the passage of the 2015 Spending Law provided funding only for projects or activities for which appropriations were made during fiscal year 2014, and those funds likewise expired before the end of 2014. Def. Supp. Br. at 10 n.5. Thus, Maine is wrong when it suggests that the continuing resolution funding is "unrestricted" and available for risk corridors payments. Pl. Supp. Br. at 18.

V. The Judgment Fund Is Not a Back-Up Appropriation for Maine's Claim

Relying primarily on *Slattery* and *Moda*, Maine asserts that it does not matter whether Congress appropriated funds for section 1342 because "the Judgment Fund *is an appropriation*." Pl. Supp. Br. at 18-19. However, we explained in our supplemental brief that the Judgment Fund is not a back-up source of appropriations, nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury.[6] Def. Supp. Br. at 13-15.

Maine incorrectly asserts that the government's position in this case is inconsistent with the position taken in *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), *appeal held in abeyance*, No. 16-5202, 2016 WL 8292200 (D.C. Cir. Dec. 5, 2016). *See* Pl. Supp. Br. at 19. The statutory question in the *House* litigation concerns the scope of the permanent appropriation established by 31 U.S.C. § 1324. The House has argued that the ACA's amendment to 31 U.S.C. § 1324 makes that permanent appropriation available for only one component of the ACA's health insurance subsidies (premium tax credits) and not for the other component (cost-sharing reduction payments). The Executive Branch has argued that the ACA's amendment to 31 U.S.C. § 1324 encompasses both components of the ACA's health insurance subsidies. That dispute has no bearing on the issues presented in the risk corridors litigation.

Here, for the risk corridors program, the question is whether ACA section 1342 alone created a statutory payment obligation on the part of the United States. It did not. And, finally,

[6] The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interests and costs." 31 U.S.C. § 1304(a). Until entry of judgment or execution of a settlement, the Judgment Fund's permanent appropriation is unavailable. *See Slattery* 635 F.3d at 1317 (recognizing that "[t]he purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims").

even if section 1342 created a payment obligation, Congress specifically limited that obligation to the amount of risk corridors collections in the 2015 and 2016 Spending Laws.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 10, 2017, 2017, I electronically filed the foregoing UNITED STATES' SUPPLEMENTAL REPLY BRIEF 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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