IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 17-2057C
	)	Judge Sweeney
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO STAY PROCEEDINGS IN THIS CASE PENDING A DECISION BY THE FEDERAL CIRCUIT IN *LAND OF LINCOLN MUTUAL HEALTH INS. CO. v. UNITED STATES*, No. 17-1224 AND/OR *MODA HEALTH PLAN, INC. v. UNITED STATES*, No. 17-1994

Defendant, the United States, respectfully submits this motion to stay proceedings in this case pending a decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 and/or *Moda Health Plan, Inc. v. United States*, No. 17-1994. In the alternative, we respectfully request the Court extend the due date for our responses to the complaint and the motion for summary judgment filed by plaintiff, Maine Community Health Options (Maine CHO), so that the two response dates are the same. Currently, our response to the complaint is due on February 26, 2018, and our response to the motion for summary judgment is due on February 9, 2018. We respectfully request a 60-day extension of time, until April 27, 2018, to respond to both the complaint and the motion for summary judgment. We have consulted counsel for plaintiff, who opposes both our request for a stay and alternative request for an extension of time.

INTRODUCTION

Maine CHO alleges that insurers are entitled to cost-sharing reduction (CSR) payments from the Judgment Fund even though Congress did not appropriate funding for those payments. ECF No. 1. Without awaiting a scheduling order, let alone a response to the complaint, Maine CHO filed a motion for summary judgment two weeks after it filed the complaint. ECF No. 6.

We respectfully request that this Court stay proceedings in this case pending the Federal Circuit's decision in *Land of Lincoln* and/or *Moda*, where oral arguments were heard on January 10, 2018. This Court previously entered such a stay in *Common Ground Healthcare Cooperative v. United States*, No. 17-877C, where, as here, the insurer alleges that it is entitled to cost-sharing reduction payments from the Judgment Fund. *See* Order of Aug. 11, 2017 (staying merits proceedings in *Common Ground* pending the Federal Circuit's decision in *Land of Lincoln* and/or *Moda*); Order of Nov. 30, 2017 (continuing the stay after Common Ground amended its complaint to add a CSR count).

A stay of proceedings is equally warranted here. There is little doubt that the Federal Circuit's decisions in the risk corridors appeals will provide guidance in the CSR cases. Indeed, the arguments made in Maine CHO's summary judgment motion mirror the arguments that Land of Lincoln, Moda, and Maine *themselves* have made to the Federal Circuit in the pending risk corridors appeals. There, as here, insurers contend that they are entitled to specified payments from the Judgment Fund regardless of whether Congress appropriated funding for those payments. And in those other cases, as here, insurers contend that provisions of the Patient Protection and Affordable Care Act (ACA or Act) create implied-in-fact contracts between the government and insurers even though the relevant statutory provisions

do not use the language of contract. Maine CHO can provide no reason to treat this case differently from *Common Ground* or to proceed without the Federal Circuit's guidance on the central legal issues Maine CHO raises, which are currently before the Federal Circuit in the risk corridors appeals. Indeed, proceeding without the benefit of the Federal Circuit's guidance will only delay the ultimate resolution of this case, because new briefing will be required after the Federal Circuit issues an opinion in the risk corridors cases. Accordingly, this Court should stay proceedings in this case pending the Federal Circuit's disposition of *Land of Lincoln* and/or *Moda*.

BACKGROUND

As this Court is aware, the appeals in *Land of Lincoln* and *Moda* involve the risk corridors program authorized by Section 1342 of the ACA. They are the two lead cases of dozens of Tucker Act suits filed by insurers claiming that they are entitled to additional risk corridors payments from the Judgment Fund. Two other appeals are fully briefed, one of which was filed by the plaintiff in this case. *See Maine Community Health Options v. United States*, No. 17-2395 (Fed. Cir.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 17-2154 (Fed. Cir.).

This suit and *Common Ground* involve insurance subsidies authorized by the ACA called cost-sharing reduction (CSR) payments. 42 U.S.C. § 18071 (requiring insurers to reduce cost sharing for qualifying insureds, and directing the government to compensate insurers for those reductions). For several years, the government made CSR payments to issuers from an existing appropriation known as the Section 1324 appropriation. In 2016, however, a district court ruled that the text of the ACA does not allow the government to make CSR payments to issuers from the Section 1324 appropriation. *See U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d

165, 168 (D.D.C. 2016).[1]

In October 2017, while the appeal in *U.S. House of Representatives* was pending, the government concluded that the district court's interpretation was correct and announced that it would cease making CSR payments. *See California v. Trump*, 267 F. Supp. 3d 1119, 1121 (N.D. Cal. 2017) (describing this background). California and other States brought suit and sought a preliminary injunction to enjoin the cessation of CSR payments. Denying that motion, Judge Chhabria concluded that the States were not likely to succeed on the merits and also failed to show irreparable harm sufficient to warrant an injunction.

Four insurers — Common Ground, Maine CHO, Sanford Health Plan, and Montana Health CO-OP — have since filed Tucker Act suits in this Court, alleging that they are entitled to CSR payments from the Judgment Fund regardless of whether Congress appropriated funds for such payments. In *Common Ground*, this Court stayed proceedings on the merits pending the Federal Circuit's disposition of *Land of Lincoln* and/or *Moda*. *See* Order of Aug. 11, 2017 (staying merits proceedings in *Common Ground*); Order of Nov. 30, 2017 (continuing the stay after Common Ground amended its complaint to add a CSR count).[2] Despite that stay and without awaiting a scheduling order or even our response to the complaint, Maine CHO moved for summary judgment on January 12, 2018, two weeks after filing its complaint.[3]

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[1] The district court stayed its injunction pending appeal. The parties to the *U.S. House of Representatives* litigation have since reached a conditional settlement, which, once completed, would result in dismissal of the appeal. *See* Joint Status Report, No. 16-5202 (D.C. Cir. Dec. 17, 2017); Joint Motion for Remand, No. 16-5202 (D.C. Cir. Jan. 19, 2018).

[2] This Court allowed briefing to go forward on Common Ground's motion for class certification. The government's response to Common Ground's motion to certify a CSR class is due on February 20, 2018.

[3] Sanford Health Plan's complaint was filed on January 26, 2018, and has been assigned to Judge Firestone (Fed Cl. No. 18-136). Montana Health CO-OP's complaint was filed on January 30, 2018, and has been assigned to Judge Kaplan (Fed Cl. No. 18-143). Sanford Health Plan and

ARGUMENT

I. Standard For Issuing A Stay Of Proceedings

"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 CSR 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." *See Landis*, 299 U.S. at 256.

II. This Court Should Stay Proceedings Pending The Federal Circuit's Decisions In *Land of Lincoln* and/or *Moda*

The standard for issuing a stay of proceedings is easily met in this case, most importantly because the arguments Maine CHO makes in its summary judgment motion mirror the

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Montana Health CO-OP are represented by the same counsel as Maine CHO.

arguments that Maine CHO and other insurers have made in the Federal Circuit, strongly indicating that the Federal Circuit's decisions will be at the very least, instructive. In the risk corridors appeals, the insurers' central contention is that Congress's limitation on the funds available to the Department of Health and Human Services (HHS) to make risk corridors payments is irrelevant, because the insurers are seeking recovery against the United States from the Judgment Fund. For example, in its Federal Circuit brief, Maine CHO argued that "[b]ecause Congress only blocked *HHS's* ability to make [risk corridors program (RCP)] payments from certain funds, but did not bar any or all funds to pay the RCP debts *of the United States*, the [g]overnment's RCP obligations were not abrogated" and "liability can be exercised against the Judgment Fund." Opening Br. 23, *Maine Community Health Options v. United States*, No. 17-2395 (Fed. Cir.). Judge Wheeler adopted that reasoning in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 462 (2017), ruling that "HHS's inability to access the CMS Program Management account for risk corridors payments means that insurers like Moda must receive risk corridors payments from the Judgment Fund."[4] This issue is now squarely before the Federal Circuit in *Moda*.

Maine CHO's summary judgment motion here echoes the line of argument that was adopted by Judge Wheeler and is now before the Federal Circuit. Maine CHO argues that "it does not matter whether Congress appropriated funds in the ACA (31 U.S.C. § 1324) *for HHS* to make CSR payments" because "[t]he Judgment Fund is a permanent appropriation against which [Maine CHO] can seek to exercise its judgment." Motion for Summary Judgment 14. In other

[4] By contrast, Judge Bruggink explicitly rejected Judge Wheeler's reasoning and held that the existence of the Judgment Fund is "immaterial" because "[r]etreat to the Judgment Fund assumes a liability in the first instance." *Maine Community Health Options v. United States*, 133 Fed. Cl. 1, 13 (2017) (citing *OPM v. Richmond*, 496 U.S. 414, 432 (1990)).

words, Maine CHO invites this Court to adjudicate the very issue before the Federal Circuit in *Moda*.

The same is true of Maine CHO's implied-in-fact contract claim. Maine CHO argues that a contract for CSR payments may be implied from the language of Section 1402 of the ACA because the asserted purpose of such payments is to "*induce* [insurers] to offer insurance coverage in the individual market." Motion for Summary Judgment 17. For support, Maine CHO relies on the Claims Court's decision in *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957). This argument mirrors Judge Wheeler's reasoning in *Moda*, which declared that a contract could be implied from the language of Section 1342 because the availability of risk corridors payments created incentives for insurers to offer insurance coverage on the exchanges. *See Moda*, 133 Fed. Cl. at 462-64. And like Maine CHO, Judge Wheeler relied primarily on *Radium Mines*.[5] All of this is, again, squarely before the Federal Circuit.

Because the issues Maine CHO raises in this case are the same issues the parties have raised before the Federal Circuit in the risk corridors appeals, those decisions will provide important guidance in the CSR cases. Importantly, the Court has stayed both the risk corridors count *and the CSR count* in *Common Ground*, pending the Federal Circuit's decisions. To allow Maine CHO to jump in front of that stayed case, which was the first filed, simply because it

[5] By contrast, Judge Lettow and Judge Griggsby rejected the same implied-in-fact contract claim as contrary to precedents of the Supreme Court and Federal Circuit, which hold that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985) (quoted in *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012)). *See Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 110-13 (2016) (Lettow, J.); *Blue Cross & Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457, 478-79 (2017) (Griggsby, J.).

wishes an expedited ruling contravenes all notions of judicial efficiency.

III. Alternatively, The Court Should Extend Our Time To Respond To The Complaint And The Motion For Summary Judgment

Even if the Court determines not to stay this case pending the Federal Circuit's decisions, we respectfully request an extension of time to respond to the complaint and to the motion for summary judgment, our response to which is due well before our response to the complaint. Although this case will be informed by the Federal Circuit's decisions in the risk corridor appeals, it is the first-ever CSR summary judgment motion in this Court, requiring us to engage in extensive consultation with the client agency, HHS, and within the Department of Justice. For this reason, we require an additional 60 days to respond to the complaint. Also for this reason, we request that our response to the motion for summary judgment be due the same day as our response to the complaint, April 27, 2018. Maine CHO offers no reason why its motion should be expedited before the Government has had the chance to fully consider the complaint.

CONCLUSION

For these reasons, this Court should stay proceedings in this case pending the Federal Circuit's decisions in *Land of Lincoln* and/or *Moda*. Alternatively, we respectfully request the Court extend the deadline for the government's response to Maine CHO's complaint by 60 days, until April 27, 2018. We also respectfully request that the Court extend the deadline for our response to Maine CHO's motion for summary judgment to the same day as our response to the complaint.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ CLAUDIA BURKE
CLAUDIA BURKE
Assistant Director

/s/ CHRISTOPHER J.CARNEY
CHRISTOPHER J. CARNEY
Senior Litigation Counsel
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
United States Department of Justice
Civil Division, Commercial Litigation Branch
Telephone: (202) 305-7597
Facsimile: (202) 307-0494
Christopher.Carney@usdoj.gov

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Attorneys for the United States of America