

No. 2017-1224

In the
United States Court of Appeals
for the Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, an Illinois
Non-Profit Mutual Insurance Corporation,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States
Court of Federal Claims, Case No. 1:16-cv-00744-CFL.
The Honorable **Charles F. Lettow**, Judge Presiding.

**CORRECTED BRIEF OF *AMICUS CURIAE* KATE BUNDORF, SCOTT
HARRINGTON, MARK PAULY, MICHAEL CHERNEW, THOMAS
MCGUIRE, LEEMORE DAFNY, AND KOSALI SIMON IN SUPPORT OF
PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Land of Lincoln Mutual Health Insurance Company v. United States of America

Case No. 17-1224

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Kate Bundorf, Scott Harrington, Mark Pauly, Michael Chernew, Thomas McGuire, Leemore Dafny, Kosali Simon
certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Kate Bundorf	N/A	None
Scott Harrington	N/A	None
Mark Pauly	N/A	None
Michael Chernew	N/A	None
Thomas McGuire	N/A	None
Leemore S. Dafny	N/A	None
Kosali Simon	N/A	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

None

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See Fed. Cir. R. 47.4(a)(5) and 47.5(b).* (The parties should attach continuation pages as necessary).

See Attachment A.

8/13/2018

Date

/s Stephen A. Swedlow

Signature of counsel

Stephen A. Swedlow

Printed name of counsel

Please Note: All questions must be answered

cc: _____

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Attachment A

Federal Circuit

Blue Cross and Blue Shield of North Carolina v. United States, No. 17-2154

Maine Cmty. Health Options v. United States, No. 17-2395

Moda Health Plan, Inc. v. United States, No. 17-1994

Court of Federal Claims

Alliant Health Plans, Inc. v. United States, No. 16-1491C (Braden, J.)

BCBSM, Inc. v. United States, No. 16-1253C (Coster Williams, J.)

Blue Cross and Blue Shield of Alabama v. United States, No. 17-347C
(Campbell-Smith, J.)

Blue Cross and Blue Shield of Kanas City v. United States, No. 17-95C
(Braden, J.)

Blue Cross Blue Shield of Tennessee v. United States, No. 17-348C (Horn,
J.)

Blue Cross of Idaho Health Service, Inc. v. United States, No. 16-1384C
(Lettow, J.)

Common Ground Healthcare Cooperative v. United States, No. 17-877C
(Sweeney, J.)

EmblemHealth, Inc. v. United States, No. 17-703C (Wheeler, J.)

Farmer v. United States, No. 17-363C (Campbell-Smith, J.)

First Priority Life Ins. Co. v. United States, No. 16-587C (Wolski, J.)

Health Alliance Medical Plans, Inc. v. United States, No. 17-653C
(Campbell-Smith, J.)

Health Net, Inc. v. United States, No. 16-1722C (Wolski, J.)

Health Republic Ins. Co. v. United States, No. 16-259C (Sweeney, J.)

HPHC Ins. Co., Inc. v. United States, No. 17-87C (Griggsby, J.)

Medica Health Plans v. United States, No. 17-94C (Horn, J.)

Minuteman Health Inc. v. United States, No. 16-1418C (Griggsby, J.)

Molina Healthcare v. United States, No. 17-97C (Wheeler, J.)

Montana Health CO-OP v. United States, No. 16-1427C (Wolski, J.)

Neighborhood Health Plan, Inc. v. United States, No. 16-1659C (Smith, J.)

New Mexico Health Connections v. United States, No. 16-1199C (Bruggink, J.)

Ommen v. United States, No. 17-712C (Lettow, J.)

Sanford Health Plan v. United States, No. 17-357C (Bruggink, J.)

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INTEREST OF *AMICI*¹

Amici are distinguished economists and professors of health policy, economics, and management.² They occupy prominent positions at preeminent universities and institutions, and are widely recognized as academic experts in health policy and, in particular, the study of regulated health insurance markets. They have no personal stake in the outcome of this case, but have an interest in assisting this Court in understanding the problems that finding for the Government in this case will create for the Government's future ability to incentivize private actors to achieve policy objectives.

SUMMARY OF THE ARGUMENT

Regardless of one's views of the Affordable Care Act ("ACA") and the many reforms it brought to the healthcare industry, the Government clearly sought to create new health insurance markets and to incentivize private firms to provide coverage to consumers within those markets. The use of incentives to influence the behavior of private firms and individuals is one of the Government's most powerful tools for achieving policy objectives. The Government influences

¹ Pursuant to Fed. R. App. P. 29, counsel for *amici* represents that counsel and *amici* authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29 and Fed. Cir. R. 29(c), all parties have consented to the filing of this brief. Pursuant to Fed. Cir. R. 35(g), *amici* have filed a motion for leave to file this brief.

² A list of *amici curiae* is attached as Appendix A.

behavior through the use of incentives in a wide variety of markets and for a wide variety of purposes, such as encouraging farmers to plant certain types of crops, convincing young men and women to join the military, and, as here, encouraging businesses to participate in markets. The ways in which the Government creates the incentives for such private action vary, but they include (among others) risk mitigation programs and financial subsidies.

The key, however, to the Government's ability to incentivize private actors to achieve the goals of policymakers is the ability of those actors to rely on the Government's promises. If, as happened here, the Government induces private parties to enter and/or more fully participate in a market using financial incentives, but then chooses not to make the payments it promised, then the Government will weaken its ability to influence the behavior of private actors in the same or different markets in the future. To ensure its ability to promote and preserve well-functioning markets, it is thus critical that the Government make good on payments promised in situations like the ACA's risk corridor program, or else it will significantly compromise its ability to influence the behavior of firms. We believe this is a non-partisan issue, as ensuring the credibility of governmental promises vis a vis financial incentives bolsters the ability of any party to impact markets and related behavior of various stakeholders.

ARGUMENT

I. Private Firms Make Decisions by Assessing the Costs and Benefits of Their Actions

Private firms and individuals make decisions by assessing the benefits and costs of potential alternatives, generally choosing the course of action which maximizes their individual welfare. Private firms usually seek to maximize their economic value, which depends on the expected magnitude and risk of future cash flows. Risk that cannot be transferred to other entities or diversified away within the firm represents a significant cost to many firms of engaging in productive activity. This is especially true for insurance firms, which receive an upfront payment, usually referred to as a premium, in exchange for covering a consumer's future health care expenditures for a given period of time. Firms facing greater uncertainty in claim costs require greater amounts of capital to back their promises to pay future claims, raising capital costs and increasing premiums.

II. One of the Government's Primary Tools for Achieving Policy Objectives is to Influence Firm Behavior Through the Use of Financial Incentives

From an economic perspective, two of the key functions of government are to set the rules that allow markets to work and to intervene when markets do not function well. While policy makers and economists may disagree over the merits of particular policies or whether government intervention is desirable in particular situations, there is broad consensus that an essential economic role of government

is to influence the behavior of private parties when market outcomes are likely to be inefficient. For decades, the Government has used private citizens' rational self-interest to help spur action to achieve its policy objectives. For example, there is a long history of the Government using subsidies, price supports, and crop insurance to support various types of agricultural production. These programs shape private action by both reducing the risks and increasing the benefits associated with such production. Other examples of the numerous ways that the Government has created incentives for private actors, include, among many others, the use of emission reduction credits and cap-and-trade programs to promote more environmentally-friendly technologies; federal excise taxes on tobacco products to reduce smoking; federal tax credits to promote the adoption of electric vehicles; and financial awards to relators (*i.e.*, "whistleblowers") in successful False Claims Act cases.³ In each of these cases, the Government uses financial incentives to influence the behavior of individuals or firms by altering the benefits and costs of alternative courses of actions.

³ See <https://www.epa.gov/environmental-economics/economic-incentives#permit> (EPA cap and trade/credits); https://www.ttb.gov/main_pages/schip-summary.shtml (federal excise tax); <https://www.energy.gov/eere/electricvehicles/electric-vehicles-tax-credits-and-other-incentives> (electric vehicle tax credits); https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (False Claims Act relator financial awards)

While the Government intervenes throughout the economy in many different ways, the ability of the Government to use these types of incentives is particularly important in the context of health insurance markets. Health insurance markets are highly regulated with regulations spanning a wide range of areas, including financial (e.g., reserve requirements; medical loss ratio regulation) to customer service (e.g., requirements for raising and resolving customer complaints) to access (e.g., “network adequacy” rules). The ability of the Government to design and implement regulation may help ensure that health insurance markets operate effectively and that high risk and low-income consumers have access to coverage.

The Government’s use of financial incentives in health insurance markets has long predated the ACA. Focusing on the issue for this appeal, however, the ACA’s risk corridors program helped shift the risk-benefit analysis for prospective qualified health plan (“QHP”) issuers by reducing the risk of participation in the ACA’s newly created health insurance exchanges.⁴ The program did so by reducing the chance that QHP issuers would suffer outsized losses from participating in the exchanges during their early years, when the health characteristics and utilization of enrollees (and, thus, the issuers’ risk profile) were still largely unknown. The lack of information on previously uninsured enrollees’ likely use of health care made it exceptionally difficult for insurers to determine

⁴ See <https://www.healthaffairs.org/doi/10.1377/hblog20140514.038975/full/>

the level of premiums necessary to cover the costs of health care used by potential enrollees. Significantly, the program also constrained profits in those early years, so that insurers which happened to enroll people who were more healthy than predicted would not receive windfalls. In other words, the program reduced the risk to insurers of entering the new market by reducing the likelihood of both excessive losses and profits due to unanticipated levels of medical costs. This program had precedent in the context of the Medicare Part D prescription drug program, in which the Government created similar incentives over a decade ago to encourage private firms to participate in a newly created market for subsidized insurance for prescription drugs for aged and disabled beneficiaries.

By reducing the risk of participating in a newly created market, the Government encouraged firms to enter a new market characterized by considerable uncertainty in the risk profile of potential enrollees (and, thus, profitability). It is also important to note that the risk corridors program was only one of a variety of financial incentives created by the ACA intended to influence the behavior of both firms and individuals. Other incentives included reinsurance, risk adjustment, premium and cost-sharing subsidies, and the individual mandate. Taken together, these policies created a complex set of financial incentives for insurers to navigate as they evaluated the desirability of participating in the new market. While it was unclear at the time that insurers chose whether to participate in the exchanges and

set their premiums whether any given policy would have either its intended effects or even create unintended negative consequences, it is clear that insurers had strong incentives to consider how each of these policies would likely affect demand for their products and their risk pool when making these decisions.

III. The Government Damages its Ability to Use Financial Incentives to Achieve Policy Objectives by, After the Fact, Not Paying the Amounts it Promised

A key requirement underlying the Government's ability to create incentives for private economic action is that the Government stand behind any financial promises it makes to the actors whose behavior it wishes to affect. This is particularly important when financial incentives are paid out only *after* the private actor has committed to behaving in the way the Government prefers. In that situation, the private actor takes actions and commits resources based on how the incentives promised by the Government affect the benefits and costs of those actions. If the Government does not honor those commitments, it has induced the private actor to commit to a course of action based on inaccurate information regarding the likely consequences.

If the Government proves itself to be an unreliable counterparty, it creates a clear disincentive in the future for private actors to participate in the Government's efforts to influence their behavior. Put differently, if the Government's promises to pay are unreliable and subject to "bait and switch" behavior—and private actors

have limited ability to compel compliance with those promises, such as through litigation like this—then the Government’s ability to achieve policy objectives through incentivizing private action will be substantially undermined.

This issue is not specific to the Affordable Care Act; it affects the more general ability of the Government to incentivize private actors. If, as the Government argues in this case, it can legally avoid its payment obligations to private actors after it has already incentivized their market participation through promises to make payments contingent upon particular outcomes, then it will severely compromise its ability to use these types of incentives to achieve policy objectives in the future. Such a result would remove one of the most powerful tools the Government has to affect the nature and direction of the economy.

CONCLUSION

For the reasons discussed above, in order to preserve a sound system for governments to use financial incentives to influence the actions of private parties – particularly as it involves economic decisions, the Court should carefully consider the adverse consequences of allowing the Government to fail to honor promises on which private parties relied.

Dated: August 13, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word count limitation of Fed. Cir. R. 29(b)(4), and contains 1,941 words, exclusive of the portions exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

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I, Rose E. Olejniczak, being duly sworn according to law and being over the age of 18, upon my oath deposes and states that:

Counsel Press was retained by Stephen A. Swedlow, Quinn Emanuel Urquhart & Sullivan, LLP, Counsel for *Amicus Curiae* Kate Bundorf, Scott Harrington, Mark Pauly, Michael Chernew, Thomas McGuire, Leemore Dafny, and Kosali Simon, to print this document. I am an employee of Counsel Press.

On August 14, 2018, Mr. Swedlow authorized me to electronically file the foregoing Corrected Brief of *Amicus Curiae* Kate Bundorf, Scott Harrington, Mark Pauly, Michael Chernew, Thomas McGuire, Leemore Dafny, and Kosali Simon In Support of Plaintiff-Appellant's Petition for Rehearing En Banc with the Clerk of the Federal Circuit using the CM/ECF System, which will serve e-mail notice of such filing on the following:

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Eighteen paper copies will be filed with the Court within the time provided in
the Court's rules.

/s/ Rose E. Olejniczak
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August 14, 2018