

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

MODA HEALTH PLAN, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 17-1994

**REPLY IN SUPPORT OF MOTION TO STAY THIS APPEAL PENDING
THIS COURT'S DECISION IN *LAND OF LINCOLN MUTUAL
HEALTH INSURANCE CO. v. UNITED STATES*, No. 17-1224**

Our stay motion explained that this Court's decision in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (*Lincoln*), will control the disposition of this case and the twenty-one other cases in which health insurance companies contend that they are legally entitled to payment of additional amounts under the risk-corridors program created by Section 1342 of the Patient Protection and Affordable Care Act (ACA). Moda's response confirms that there is no reason to conduct full briefing in a series of appeals arising out of other risk-corridors cases. Accordingly, the Court should stay this appeal (and future appeals in other risk-corridors cases) pending this Court's decision in *Lincoln*.

1. The procedural posture of the lead appeal, *Lincoln*, is not in dispute. On Lincoln's emergency motion to expedite proceedings, this Court denied the truncated briefing schedule that Lincoln had proposed but ordered that the appeal "will be placed on the next available oral argument calendar after briefing is complete." Doc. 13 at 2, No. 17-1224. Briefing in *Lincoln* will close on May 22. Thus, oral argument in *Lincoln* should be heard during one of the Court's summer sessions.¹

When this Court hears oral argument in *Lincoln*, it will have before it not only the parties' briefs but also the eight amicus briefs filed by health insurance companies and their trade associations, including the 29-page amicus brief filed by Moda Health Plan, the plaintiff in this case. See Doc. 79, No. 17-1224. In addition, this Court will have before it the trial court's opinion in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017) (Wheeler, J.), which Lincoln submitted as a supplemental authority because the *Moda* opinion addressed "virtually identical factual and legal claims." Doc. 83 at 3, No. 17-1224.

2. There is no dispute that this Court's decision in *Lincoln* will control the disposition of the 22 other risk-corridors cases, including this case. As noted above, Lincoln explicitly informed this Court that its suit and *Moda* present "virtually

¹ This Court's order in *Lincoln* indicated that the parties should not anticipate any extensions of time. Doc. 13 at 2, No. 16-1224. Although Lincoln later gave consent to an extension for the government's brief, that consent was explicitly contingent on the government's agreement not to seek any further extension, see Doc. 91 at 3, No. 16-1224, and the government abided by that commitment.

identical factual and legal claims.” Doc. 83 at 3, No. 17-1224. Moda likewise informed this Court that “the appeals in *Moda Health* and *Land of Lincoln* involve substantially similar legal questions,” and that “*Moda Health* and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues.” Doc. 7-1 at 2, 3, No. 17-1994.

3. There is no reason to delay oral argument in *Lincoln* or to burden this Court with rounds of duplicative briefing in a series of risk-corridors appeals. Although Moda focuses on its own case, other risk-corridors cases likewise will produce appeals while the *Lincoln* appeal is pending. Final judgment has already been entered in *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.) (*BCBSNC*), where the notice of appeal is due June 16. Three other cases have been fully briefed and argued, and final judgments may be issued at any time. See *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.). And in three other cases, merits briefing recently closed or is due to close soon. See *HPHC Insurance Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (briefing closed May 15); *Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.) (briefing due to close June 1); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.) (briefing due to close June 16).

All of these risk-corridors cases may produce new appeals while *Lincoln* is pending before this Court. On Moda’s logic (at 3-4), the plaintiffs in all of these

cases can demand full briefing of their appeals and an indefinite delay of the oral argument in *Lincoln*, on the ground that this Court's *Lincoln* decision will control the resolution of their suits. That makes no sense and is contrary to this Court's practice, which is to consider joint argument when multiple cases have been briefed, not when one case is nearly ready for submission to a panel and a newly filed case is months away from briefing.

Moda cannot plausibly deny that full briefing of follow-on risk-corridors appeals would duplicate the voluminous briefing—including Moda's own amicus brief—already filed in the *Lincoln* appeal. The inevitable duplication is underscored by Moda's recent filings, which repeat verbatim the arguments set out in Lincoln's filings. *Compare* Lincoln's Motion to Submit Related Appeals to the Same Panel (Doc. 121, No. 17-1224), *with* Moda's Motion to Submit Related Appeals to the Same Panel (Doc. 7-1, No. 17-1994); *compare* Lincoln's Reply in Support of Motion to Submit Related Appeals to the Same Panel (Doc. 125, No. 17-1224), *with* Moda's Reply in Support of Motion to Submit Related Appeals to the Same Panel (Doc. 10, No. 17-1994).

Nor is there anything about Moda's suit that differentiates it from *Lincoln* or other risk-corridors cases. Even a cursory examination of the government's brief in *Lincoln* shows that the legal arguments apply equally in all risk-corridors cases. *See* Doc. 107, No. 17-1224. Contrary to Moda's present suggestion (at 2-3), an insurer's status as a going concern has no bearing on the insurer's asserted right receive risk-

corridors payments, and the government's brief made no mention of Lincoln's liquidation. The only reference in the government's brief to Lincoln's specific circumstance was a single sentence informing the Court of the amount of Lincoln's claim, *id.* at 12, a figure that has no bearing on the legal issues presented. Likewise, nothing in the *Lincoln* appeal depends on the procedural posture in which that case was decided by the trial court. To the contrary, the government's brief explicitly acknowledged that the trial court's decision in its favor "presents issues of law that are subject to de novo review." *Id.* at 18. Although *Moda* now states (at 2) that the trial court's disposition of *Lincoln* on an administrative record was error and that this "singular approach" distinguishes *Lincoln* from its own case, *Moda's* amicus brief in the *Lincoln* appeal made no such argument. See Doc. 79, No. 17-1224.

Although *Moda* suggests (at 4) that a delay of the *Lincoln* oral argument would produce no hardship, trial courts in an array of risk-corridors cases have stayed their proceedings in anticipation of this Court's decision in *Lincoln*. See, e.g., Doc. 9, *New Mexico Health Connections*, No. 16-1199C (Smith, J., reassigned from Bruggink, J.); Doc. 7, *BCBCM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.); Doc. 19, *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Lettow, J.); Doc. 9, *Minuteman Health, Inc. v. United States*, No. 16-1418C (Griggsby, J.); Doc. 7, *Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Braden, J.). Our stay motion explained (at 8) that a delay of the *Lincoln* appeal would be inconsistent with the

expectations of the trial courts and parties in those cases. Moda offers no response and, indeed, fails to acknowledge the stayed cases.

4. For the reasons discussed above, this Court should grant the government's motion to stay the appeal in this case (and future risk-corridors cases) pending this Court's decision in *Lincoln*. At a minimum, the Court should stay this appeal (and future risk-corridors appeals) until oral argument in *Lincoln* is heard. At that point, the panel that hears argument can decide for itself whether it would benefit from additional targeted briefing with respect to issues presented by trial court opinions in other risk-corridors cases. Such opinions will include not only *Moda* and *BCBSNC* but also the interlocutory rulings that have already been issued in *Health Republic Insurance Co. v. United States*, 129 Fed. Cl. 757 (2017) (Sweeney, J.), and *Maine Community Health Options v. United States*, No. 16-967C, 2017 WL 1021837 (Fed. Cl. Mar. 9, 2017) (Bruggink, J.), as well any new risk-corridors opinions that have been issued by the time the Court hears oral argument in *Lincoln*.

CONCLUSION

The government's motion to stay this appeal should be granted.

Respectfully submitted,
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MAY 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

Alisa B. Klein