

**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

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

This suit is one of twenty-three Tucker Act cases filed in the Court of Federal Claims, 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). Collectively, the insurers seek billions of dollars. The lead case is *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (*Lincoln*), where appellate briefing will close on May 22 and this Court ordered that oral argument be set for the first available calendar after close of briefing. *See* Doc. 13 at 2, No. 17-1224. The government respectfully asks the Court to stay its appeal in this case pending this Court's decision in *Lincoln*, which will control the resolution of all of the risk-corridors cases.

The plaintiffs in *Lincoln* and *Moda* have separately moved to have the *Lincoln* and *Moda* appeals assigned to the same panel for oral argument and decision, noting that it would be inefficient to have the cases heard by different panels. *See Lincoln's* Motion to Submit Related Appeals to the Same Panel (Doc. 121, No. 17-1224) (*Lincoln's* Mot.); *Moda's* Motion to Submit Related Appeals to the Same Panel (Doc. 7-1, No. 17-1994) (*Moda's* Mot.). Because the *Moda* appeal should be stayed pending this Court's decision in *Lincoln*, plaintiffs' motions should be denied as moot. Contemporaneously with this motion, we are filing responses in opposition to the motions submitted by *Lincoln* and *Moda*.

### STATEMENT

1. Under the risk-corridors program created by section 1342 of the ACA, the Department of Health & Human Services (HHS) collects "payments in" from profitable insurers and uses those funds to make "payments out" to unprofitable insurers. 42 U.S.C. § 18062(b). Section 1342 of the ACA neither appropriated funds nor authorized appropriations for risk-corridors payments. And unlike the preexisting Medicare Part D statute on which section 1342 was generally modeled, section 1342 does not include any language that would make risk-corridors payments an obligation of the government without regard to appropriations.

When the time came to appropriate funds for risk-corridors payments, Congress appropriated "payments in" but expressly barred HHS from using other

funds to make risk-corridors payments. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, § 227, 128 Stat. 2130, 2491 (2014). That legislation ensured 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). For the 2014 benefit year, this restriction meant that HHS was able to pay 12.6% of risk-corridors claims in that payment cycle. *See* Centers for Medicare & Medicaid Services, Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015).

2. Insurers filed twenty-three separate Tucker Act suits in the Court of Federal Claims, alleging that the government is obligated to pay insurers the full amount calculated under the formula in section 1342(b)(1), regardless of how much insurers paid into the program under section 1342(b)(2). Collectively, the insurers seek billions of dollars from the government.

The insurers allege that the language of section 1342 created an obligation on the part of the government to pay out the full amounts calculated under the statutory formula, regardless of the amount that insurers paid in. They further allege that Congress’s express limitations on appropriations for risk-corridors payments do not alter the obligation that section 1342 allegedly created. (Lincoln and some other insurers also allege contract and takings claims, but those claims are dependent upon the statutory claim.)

3. The first case to reach final judgment was *Land of Lincoln Mutual Health*

*Insurance Co. v. United States*, No. 16–744C (Lettow, J.). The trial court rejected Lincoln’s claims on the merits, holding that section 1342 of the ACA does not obligate the government to use taxpayer funds to make up shortfalls in collections from insurers. Lincoln appealed and moved to expedite the appeal. Although this Court did not grant the highly expedited schedule that Lincoln proposed (which would have given the government only 12 business days to prepare its brief), this Court ordered that *Lincoln* “will be placed on the next available oral argument calendar after briefing is complete.” Doc. 13 at 2, No. 17-1224.

Appellate briefing in *Lincoln* is nearly complete. Amicus briefs supporting Lincoln’s position were filed by insurers that filed other risk-corridors cases, including Moda Health Plan, which is the plaintiff in this case. See Corrected Amicus Br. of Avera Health Plans, Inc.; DAKOTACARE; and Moda Health Plan, Inc., No. 17-1224 (Doc. 79). In addition, after the trial court in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017) (Wheeler, J.), issued a decision in the Moda’s favor, Lincoln submitted the *Moda* opinion to this Court as a supplemental authority in its appeal, explaining that the *Moda* opinion addressed “virtually identical factual and legal claims.” Doc. 83 at 3, No. 17-1224. Accordingly, the government addressed the *Moda* court’s reasoning in its appellee’s brief in *Lincoln*. See Doc. 107, No. 17-1224. Appellate briefing in *Lincoln* will close on May 22, when Lincoln files its reply brief.

4. In addition to the final judgments entered in *Lincoln* and *Moda*, one other risk-corridors case recently reached final judgment. In *Blue Cross and Blue Shield of*

*North Carolina v. United States*, No. 16-651C (Fed. Cl. Apr. 18, 2017) (Griggsby, J.) (BCBSNC), the trial court entered final judgment in favor of the government. BCBSNC has not yet filed a notice of appeal, which is due June 16.

The remaining cases are in various stages of proceedings. Three have been fully briefed and argued and are awaiting decision. 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.). In three other cases, merits briefing is due to close soon. See, e.g., *HPHC Insurance Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (briefing due to close 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). Other cases are in earlier stages of briefing. See *Blue Cross and Blue Shield of Kanas City v. United States*, No. 17-95C (Braden, J.) (motion to dismiss due May 23); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.) (motion to dismiss due May 31). And in a number of cases, the trial courts have stayed proceedings pending this Court's decision in *Lincoln*. See, e.g., *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 of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Lettow, J.); *Medica Health Plans v. United States*, No. 17-94C (Horn, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.); *Neighborhood Health*

*Plan, Inc. v. United States*, No. 16-1659C (Smith, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.).

4. The United States filed a notice of appeal in *Moda* on May 4, and the appeal was docketed on May 9. Two days later, Lincoln and Moda filed identical motions asking the Court to assign the cases to the same panel for oral argument and decision, noting that it would be inefficient to have the cases considered by different panels.

### **ARGUMENT**

The government respectfully requests that this Court stay the government's appeal in this case pending this Court's decision in *Lincoln*, which will control the disposition of this case and the twenty-one other risk-corridors cases. The *Lincoln* appeal will be fully briefed on May 22. This Court previously ordered that the *Lincoln* appeal will be placed on the next available oral argument calendar after briefing is complete. Doc. 13 at 2, No. 17-1224. There is no reason to delay oral argument in *Lincoln* or to burden this Court with duplicative briefing in *Moda*, where the government's appeal was docketed only a few days ago.

There is no dispute that this Court's decision in *Lincoln* will control the resolution of *Moda* and the twenty-one other risk-corridors cases. See *Moda's Mot. 2* (Doc. 7-1, No. 17-1994) ("The appeals in *Moda Health* and *Land of Lincoln* involve substantially similar legal questions."); *id.* at 3 ("*Moda Health* and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues."); *Lincoln's Mot. 2* (Doc. 121, No. 17-1224) ("The appeals in *Moda Health* and *Land of*

*Lincoln* involve substantially similar legal questions.”); *id.* (“*Moda Health* and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues.”).

The legal issues presented by the risk-corridors cases were comprehensively addressed in the voluminous briefing filed in the *Lincoln* appeal (No. 17-1224). In addition to Lincoln’s 56-page opening brief (Doc. 20), seven amicus briefs were filed in support of Lincoln’s position by health insurance companies and their trade associations. Moda itself filed a 29-page amicus brief in support of Lincoln’s position. *See* Corrected Amicus Br. of Avera Health Plans, Inc.; DAKOTACARE; and Moda Health Plan, Inc. (Doc. 79). Amicus briefs in support of Lincoln’s position also were filed by other health insurance companies that, like Lincoln and Moda, claim to be legally entitled to additional risk-corridors payments. *See* Docs. 63, 69, 77 (amicus briefs filed by Blue Cross and Blue Shield of South Carolina; BlueChoice HealthPlan of South Carolina, Inc.; Health Republic Insurance Co.; Highmark Inc.; Highmark BCBSD Inc.; Highmark West Virginia Inc.; Blue Cross and Blue Shield of North Carolina; Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas City). In addition, amicus briefs were filed by two trade associations: America’s Health Insurance Plans (AHIP), which is the national trade association representing the health-insurance industry, *see* Doc. 67, and the National Alliance of State Health CO-OPs (NASHCO), which represents non-profit health

insurance Consumer Operated and Oriented Plans that were established pursuant to section 1322 of the ACA, *see* Doc. 30.

In addition, after the trial court in *Moda* issued a decision in the insurer's favor, Lincoln submitted the *Moda* opinion to this Court as a supplemental authority, explaining that it addressed "virtually identical factual and legal claims." Doc. 83 at 3. Accordingly, the government addressed the *Moda* court's reasoning in its appellee's brief in *Lincoln*, in addition to responding to the arguments made by Lincoln and its amici. *See, e.g.*, Doc. 107, at 30-36, 40, 50, 56.

In any event, this Court may consider the reasoning of the trial court opinions in *Moda*, *BCBSNC*, and other risk-corridors cases regardless of whether such opinions are formally filed with the Court. As discussed above, many risk-corridors cases are fully brief or almost fully briefed in trial court, and decisions in those cases may be issued at any time. This Court may consider the reasoning of such opinions in the course of the *Lincoln* appeal, without the burdens and delay that would arise from full briefing of a series of appeals that present the same legal issues. Moreover, a number of trial courts have stayed their risk-corridors cases pending this Court's *Lincoln* decision, and a delay of the *Lincoln* appeal would be inconsistent with the expectations of the trial courts and parties in those cases.

Contrary to the assertion made by *Moda* and *Lincoln* in their motions, nothing in the government's brief in *Lincoln* appeal suggested that resolution of the legal issues in the risk-corridors cases will depend on a "specific insurer's financial



circumstances.” Moda’s Mot. 8; Lincoln’s Mot. 8. In reality, as Moda and Lincoln acknowledge, the government expressly informed this Court that the “decision in *Land of Lincoln* ‘is expected to control the disposition of’ all Risk Corridor cases.” Moda’s Mot. 4; Lincoln’s Mot. 4.

Nor did the government’s appellate brief in *Lincoln* suggest that anything turns on the procedural posture of a particular risk-corridors case. Instead, the government’s brief demonstrates that the claims alleged by insurers in all of the risk-corridors cases fail as a matter of law on grounds that are generally applicable. Those legal issues will be fully briefed on May 22, and the *Lincoln* appeal should be set for argument during the next available calendar as previously ordered by this Court. Doc. 13 at 2, No. 17-1224. This appeal (and future appeals in risk-corridors cases) should be stayed pending this Court’s decision in *Lincoln*, which will control the disposition of all of the risk-corridors cases.

## CONCLUSION

For the foregoing reasons, the Court should stay the government's appeal in this case pending this Court's decision in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224.

Respectfully submitted,

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s/ Alisa B. Klein

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MAY 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on May 12, 2017, I electronically filed the foregoing motion 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*  
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Alisa B. Klein