

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GUIDEWELL MUTUAL HOLDING CORPORATION, et al,)	
)	
)	
Plaintiffs,)	
)	
v.)	No. 18-1791C
)	Judge Griggsby
THE UNITED STATES,)	
)	
Defendant.)	

JOINT STATUS REPORT

Pursuant to the Court’s November 26, 2018 Order, *see* ECF No. 5, Plaintiff, GuideWell Mutual Holding Corporation, *et al.*, and Defendant, the United States, respectfully submit the following joint status report regarding further proceedings in this case in light of the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018), *reh’g en banc denied*, No. 17-1994 (Fed. Cir. Nov. 6, 2018) (*Moda*).

PLAINTIFFS’ POSITION

Plaintiff does not believe that the Court should stay proceedings in this case in light of the cert petition or petitions to be filed in *Moda*. (On this point, Plaintiff and Defendant are in agreement.)

The cost-sharing reduction (CSR) program (Section 1402), 42 U.S.C. § 18071, and the risk corridors program (Section 1342), are separate programs. The circumstances in *Moda* that produced a victory for the Government in that case is not presented here.

In *Moda*, the plaintiffs sought payments under the risk corridors program (Section 1342).

The Federal Circuit held that the “shall pay” language of the relevant statute was “unambiguously mandatory” and imposed a legal obligation on the United States. *Moda*, 892 F.3d at 1320. However, the Federal Circuit held that the enactment of subsequent appropriations riders specific to the risk corridors program suspended the underlying payment obligation. This served as the basis for the Federal Circuit’s decision and will be addressed in the certiorari petitions. But in the CSR case before this Court, no subsequent appropriations legislation even arguably placed any limitations on CSR payments. In other words, there is no subsequent appropriations rider issue here. *See, e.g., Sanford Health Plan v. United States*, 139 Fed. Cl. 701, 708 (2018) (“There have been no appropriations bills enacted that make reference to § 1402.”) (citing *Moda*); *Montana Health Co-op v. United States*, 139 Fed. Cl. 213, 220 (2018).

The Government is appealing Judge Kaplan’s decisions in *Montana* and *Sanford* to the Federal Circuit. Plaintiff notes that other CSR cases are proceeding pending that appeal. For example, the *Maine Community Health Options* case (Fed. Cl. 17-2057) (Sweeney, J.) and the *L.A. Care Health Plan* case (Fed. Cl. 17-1542) (Wheeler, J.) are proceeding. Plaintiff here similarly seeks an opportunity to be heard on the critical issues presented in this case. A stay in this matter would deny Plaintiff that opportunity, and would be inconsistent with the “percolation principle,” that the resolution of multiple plaintiffs’ claims in similar cases better informs the court of appeals about important issues. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (stressing the importance of allowing “difficult question[s]” to percolate among the multiple courts of appeals before granting certiorari); *Prati*, 82 Fed. Cl. at 378 (noting that “additional [cases of the type at issue] could benefit the Federal Circuit”); *Columbus Fruit & Vegetable Co-op. Ass’n, Inc. v. United States*, 8 Cl. Ct. 525, 529 (1985) (citing *Mendoza*, 464 U.S. 154 (1984)).

Plaintiff notes that Judge Firestone transferred the *Sanford* case to Judge Kaplan after Judge Kaplan rendered a decision in *Montana*. Plaintiffs would not oppose such a transfer here at the Court's convenience under RCFC 40.1(b) if the Court deems it to be in the interest of expeditiously resolving the case.

GOVERNMENT'S POSITION

The Government does not believe that this case should be stayed pending a final resolution of *Moda*. In *Moda*, the Federal Circuit ruled in favor of the Government and held that the Government was not liable for ACA section 1342 risk corridors payments under either the statutory or contract theories advanced by the plaintiff. In contrast here, plaintiffs have filed suit seeking to recover CSR payments pursuant to section 1402 of the ACA. Although there are certain common legal principles at issue in both the CSR and risk corridors litigation that originally prompted us to seek a stay pending the Federal Circuit's resolution of *Moda* in earlier-filed CSR cases, we see no reason to stay this case based on the possibility that one of the risk corridors plaintiffs might file a petition for certiorari in the Supreme Court of the United States.

We note, however, that in another CSR matter, *Montana Health Co-op v. United States* (Fed. Cl. 18-143) (Judge Kaplan), the Court entered judgment in plaintiff's favor on October 9, 2018, after denying the Government's motion to dismiss and granting the plaintiff's cross-motion for summary judgment. Similarly, in *Sanford Health Plan v. United States* (Fed. Cl. 18-136) (Judge Kaplan), the Court entered judgment on October 17, 2018, after denying the Government's motion to dismiss and granting the plaintiff's cross-motion for summary judgment. Both *Montana Health Co-op* and *Sanford* involve claims for fourth quarter 2017 CSR payments. Most of the damages sought by plaintiffs here are also for 2017 (the rest are from

earlier years). On December 6, 2018, the Government filed notices of appeal in both cases. *Montana Health Co-op* and *Sanford Health Plan* involve the same dispositive issue present in this case—*i.e.*, whether insurers are entitled to CSR payments from the Government even though Congress did not appropriate funding for those payments. The Government defers to the Court as to whether a stay of proceedings is appropriate in this case pending the Federal Circuit’s disposition of the *Montana Health Co-op* and/or *Sanford* appeals.

Finally, we note that to the extent that plaintiffs suggest the case should be transferred to Judge Kaplan, such a request is at odds with plaintiffs’ reliance on the “percolation principle.” The Government would respectfully suggest that if the Court were to determine not to stay this matter pending a decision by the Federal Circuit in the *Montana Health Co-op* and *Sanford* appeals, the case should not be transferred.

Respectfully submitted,

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