

In the United States Court of Federal Claims

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BLUE CROSS & BLUE SHIELD OF		*
VERMONT,		*
	Plaintiff,	*
	v.	*
UNITED STATES,		*
	Defendant.	*
* * * * *		*

No. 18-373C
Filed: January 7, 2019

ORDER

Defendant in the above-captioned case has moved to dismiss plaintiff’s complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC) (2018) and plaintiff has cross-moved for partial summary judgment as to liability pursuant to RCFC 56. Despite the parties’ briefing to date on the cross-motions, the record before the court remains unclear on certain issues. The court, therefore, **ORDERS** the parties to file simultaneous supplemental briefing on or before **Thursday, January 31, 2019**, to address the following:

1. The parties dispute whether a recovery of damages from the Judgment Fund, codified at 31 U.S.C. § 1304(a) (2018), for an alleged violation of Section 1402 of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18071 (2018), when there has been an absence of an appropriation of funding, is recoverable in this court. Defendant argues that recovery from the Judgment Fund is not permitted, while plaintiff claims that recovery from the Judgment Fund is permitted. Both parties, however, only briefly address their respective positions in one paragraph each, and each only cite to one case. Both parties shall address more fully whether recovery from the Judgment Fund, in the absence of an appropriation by Congress, would be recoverable in the above-captioned case filed in this court.

In addition, plaintiff notes that defendant’s position in the above-captioned case, that recovery from the Judgment Fund is not allowed, is inconsistent with defendant’s position in prior litigation involving the United States Department of Justice in United States House of Representatives v. Burwell et al., 185 F. Supp. 3d 165, 174 (D.D.C. 2016), appeal dismissed, Case No. 16-5202 (D.C. Cir. May 16, 2018), in which defendant argued that “the absence of an appropriation” for Section 1402 of ACA “does not necessarily preclude recovery from the Judgment Fund (31 U.S.C. § 1304) in a Tucker Act suit.” Thus, the parties also shall address what relevance, if any, given

the facts and issues raised in the case before this court, does defendant's position in Burwell regarding the Judgment Fund have on the above-captioned case, and in the case of the defendant, why the apparent change in position.

2. Both parties cite to Greenlee County, Arizona v. United States, 487 F.3d 871 (Fed. Cir. 2007), which states that a "mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." Id. at 877. In Greenlee, however, the government had allegedly under-appropriated a certain amount of funds. See id. at 874. In the above-captioned case, however, unlike in Greenlee, the government has failed to appropriate any amount of funds for Section 1402 cost-sharing reimbursement payments. The parties do not cite to any cases in their filings before this court in which a plaintiff is seeking to recover damages in the absence of a complete failure to appropriate funds. The parties, therefore, shall address whether Greenlee is applicable to the facts of the above-captioned case and the significance of the difference identified above.
3. Both parties also cite to Moda Health Plan, Inc. v. United States, 892 F.3d 1311 (Fed. Cir.), reh'g denied, 908 F.3d 738 (Fed. Cir. 2018), in which the United States Court of Appeals for the Federal Circuit recently found that Congress "adequately expressed" its intent to modify a statutory obligation to make certain payments when it passed appropriation bills which used language "to temporarily cap the payments required by the statute at the amount of payments in for each of the applicable years." Moda Health Plan, Inc. v. United States, 892 F.3d at 1323, 1325. Unlike in Moda, there is no evidence in the record in the above-captioned case before this court that Congress has passed any appropriation bills that could have potentially suspended or altered the payment requirement contained in Section 1402 of ACA. The parties, therefore, shall address whether Moda is applicable to the facts of the above-captioned case and if Congress, in fact, has enacted legislation that suspended or altered the required payment in Section 1402 of ACA. The parties also shall address whether Congress's continuing failure to appropriate funds for Section 1402 cost-reimbursement payments sufficiently evidences an intent by Congress to repeal or modify Section 1402, including citations to any supporting statutes, regulations, and/or case law.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
Judge