IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD OF VERMONT,	)	
Plaintiff,	)	No. 18-373 C (Judge Horn)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO THE COURT'S
SEPTEMBER 4, 2019 SUPPLEMENTAL BRIEFING ORDER

Defendant, the United States, respectfully responds to the Court's September 4, 2019 order directing the parties to submit supplemental briefs "addressing the impact, if any, of the Supreme Court's decision to grant certiorari [in the cases of *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 18-1038 and *Moda Health Plan Inc. v. United States*, No. 18-1028 (the risk-corridors cases)[1]] on any of the issues in the defendant's motion to dismiss plaintiff's complaint for failure to state a claim or plaintiff's motion for partial summary judgment." *See* Order, ECF No. 29 (Sept. 4, 2019).

As the Court is aware, the risk-corridors cases pending before the Supreme Court concern a program authorized by Section 1342 of the Affordable Care Act (ACA). The ACA established a temporary subsidy program to help mitigate risk and uncertainty issuers would face in participating in the Exchanges, by collecting a portion of the revenue of plans that proved to be relatively profitable (payments in) and offsetting a portion of the costs of plans that proved to be relatively unprofitable (payments out). The ACA itself, however, did not appropriate any funds

[1] The Supreme Court also granted certiorari in *Maine Community Health Options*, No. 18-1023, another risk-corridors case. All three cases have been consolidated for briefing and oral argument.

with which to make payments out to unprofitable plans, instead leaving the policy decisions of whether and to what extent to fund the risk-corridors program to future Congresses in the ordinary appropriations process. When Congress subsequently confronted those policy decisions in enacting appropriations acts for the relevant years, it expressly and repeatedly prohibited HHS from using the only potential source of funds to make payments out, other than payments in collected from profitable issuers under the risk-corridors program itself.

This case—and others like it currently pending before both the Federal Circuit and other judges of this Court—concerns a different ACA program. Section 1402 of the ACA requires issuers to reduce cost sharing (such as deductibles and co-payments) for eligible insureds, and further provides that the Secretary of Health & Human Services (HHS) shall make payments to issuers equal to the value of the cost-sharing reductions issuers provide on behalf of their eligible insureds. Congress chose not to appropriate funds for cost-sharing reduction (CSR) payments to issuers, but the ACA left issuers free to recoup their cost-sharing expenses by raising premiums, as many in fact have done.

While the Supreme Court cases and the case here concern different ACA programs, the Supreme Court's risk-corridors decision may prove relevant here. As this Court observed in its supplemental briefing order, both parties relied upon the Federal Circuit's rulings in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018), and the companion case, *Land of Lincoln Mutual Health Insurance Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018), in their briefing on the pending motions. *See* Order, ECF No. 29 (Sept. 4, 2019). Of course, were the Supreme Court to overturn these decisions in whole or in part, the parties' arguments based upon them would likely be affected.

Moreover, there is a likelihood that the Supreme Court's decision in these matters will provide guidance to the Court with respect to the pending motions. If the Supreme Court holds that a statutory directive to an agency to make payment must properly be read in conjunction with Congress's exercise of its constitutional authority to control Government spending via the Appropriations Clause and the Anti-Deficiency Act's constraints on Executive Branch spending, such a holding would support dismissing plaintiff's (BCBS Vermont) complaint here. While the United States has until October 21, 2019 to file its merits brief with the Supreme Court in the risk-corridors cases, the briefs filed by the petitioners raise many of the same legal issues discussed in the parties' briefing here.

For example, one of the petitioners in the consolidated matters argues, "the absence of an appropriation to support" risk-corridors payments "did not negate" the (putative) statutory obligation to make payments and that any resulting damages for non-payment can be recovered in the United States Court of Federal Claims. *See* Brief for Petitioner at 30-32, *Maine Cmty. Health Options v. United States*, No. 18-1023 (U.S. Aug. 30, 2019), 2019 WL 4167073. Likewise, BCBS Vermont has argued in this case that a statutory obligation to make CSR payments exists regardless of whether Congress has failed to appropriate funds and that it "may recover its damages in this Court even absent a specific appropriation for CSR payments." Pl. Opp. and Cross-Mot. at 23-24, ECF No. 18 (Sep. 14, 2018). Thus, to the extent that the Supreme Court opines on this issue in deciding the risk-corridors cases, that opinion may provide helpful guidance to this Court in deciding the issues before it. Therefore, were the Court inclined to stay

this matter pending the Supreme Court's decision in the risk-corridors cases, the Government would not be opposed.[2]

The Court may also wish to consider the Federal Circuit's eventual decisions in the pending CSR appeals in determining future proceedings in this case. Those appeals have been fully briefed and the Federal Circuit issued an order in July directing the Clerk to place these cases on the next available oral argument calendar. *See Maine Cmty. Health Options v. United States*, No. 2019-2102, ECF No. 13 (Fed. Cir. July 30, 2019) (order granting motion to treat as companion case). These appeals cover the main issues that have been briefed in the parties' pending cross-motions here, including whether there is a statutory obligation to pay out CSRs in the absence of an appropriation, the impact of issuers' ability to account for the absence of CSR payments by raising premiums, and whether issuers have implied-in-fact contracts for CSR payments.[3] As such, the Federal Circuit's decision in those appeals will be dispositive here.

Indeed, several other judges on this Court have stayed CSR cases to await the Federal Circuit's rulings in the CSR appeals—including cases in which the parties had already completed briefing. *See Harvard Pilgrim Health Care, Inc. v. United States*, No. 18-1820C, ECF No. 10

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[2] As the Court is aware, the Government moved to stay this case in May 2018 to await the Federal Circuit's guidance in the risk-corridors appeals. BCBS Vermont opposed that motion and argued that "the issues in the risk-corridor appeals lack any substantial overlap with [plaintiff] BCBSVT's CSR claims." Pl. Opp. to Mot. to Stay at 6, ECF No. 7 (May 4, 2018). However, after the Federal Circuit issued its decision in *Moda*, BCBS Vermont premised its statutory argument upon *Moda*, maintaining that "*Moda's* logic requires judgment for BCBSVT here, because the CSR statute contains functionally identical money-mandating language . . . ." and contended that *Moda* is both "dispositive" and "controlling." *See* Pl. Opp. and Cross-Mot. at 2, 26, 32.

[3] BCBS Vermont has also asserted Fifth Amendment takings and illegal exaction claims here, which the Federal Circuit CSR appeals do not directly address. However, while the Government has moved to dismiss BCBS Vermont's Fifth Amendment claims, BCBS Vermont has not cross-moved for summary judgment on them, and therefore those claims would not present an independent basis upon which the Court could at present rule for plaintiff.

(Fed. Cl. Fed. 28, 2019) (granting consent motion to stay); *Health Alliance Medical Plans, Inc. v. United States*, No. 18-334C, ECF No. 22 (Fed. Cl. March 28, 2019) (granting consent motion to stay); *Guidewell Mutual Holding Corp. v. United States*, No. 18-1719C, ECF No. 21 (Fed. Cl. May 15, 2019) (granting contested motion to stay); *Montana Health Co-Op v. United States*, No. 19-568C, ECF No. 9 (Fed. Cl. May 17, 2019); *Sanford Health Plan v. United States*, No. 19-569C, ECF No. 9 (Fed. Cl. May 17, 2019) (granting contested motion to stay). In *Blue Cross Blue Shield of North Dakota v. United States*, No. 18-1983, Judge Hertling reasoned that a stay would promote judicial economy and that the Federal Circuit's ruling would likely settle the key legal issues in the CSR cases:

> The Court finds that a stay will in fact promote the interests of justice and ultimately may produce a more expeditious final judgment while also conserving the parties' and the Court's resources. The Court believes that the fact that all three pending appeals in the relevant cases before the Federal Circuit will be heard and decided together by the same merits panel means that, in the absence of any eventual *en banc* or *certiorari* petitions, the Federal Circuit's ruling will dispose of the key contested legal issues.

Blue Cross Blue Shield of North Dakota, ECF No. 33 at 1-2 (Fed. Cl. July 9, 2019) (granting contested motion to stay).

As such, because the Federal Circuit's decision in the CSR appeals is likely to determine the outcome of this case, if the Court were inclined to stay this matter pending a decision by the Federal Circuit in the CSR appeals, we would not have any objection.

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