

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS OF IDAHO HEALTH)
SERVICE, INC.)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)
_____)

No. 16-1384 C
Judge Holte

JOINT STATUS REPORT

The parties respectfully submit the following Joint Status Report pursuant to the Court’s May 12, 2020 Order (Doc. No. 25) granting in part the Defendant’s request for additional time in the parties’ May 12, 2020 Joint Status Report, and ordering the parties to “file a joint status report on or before 29 May 2020 proposing a schedule for future proceedings in this case.”

Plaintiff’s Position

In the Joint Status Report filed on May 12, 2020, Plaintiff set forth the reasons why the Supreme Court’s decision in *Maine Community Health Options v. United States*, No. 18-1023, 140 S. Ct. 1308 (2020) is dispositive of Plaintiff’s identical risk corridors claims in this case and Plaintiff provided the exact amount of total risk corridors damages caused by the Government’s breach of its statutory payment obligation.

As Plaintiff described in the May 12 Joint Status Report, the total risk corridors amounts owed Plaintiff are based on the Government’s own published calculations and publicly available reports. *See* Doc. No. 1, Ex. 42; Bulletin, CMS, “Risk Corridors Payment and Charge Amounts

for the 2015 Benefit Year” (Nov. 18, 2016)¹; Bulletin, CMS, “Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year” (Nov. 13, 2017)². For all three years of the risk corridors program (CY 2014, CY 2015 and CY 2016), the Government indisputably owed Plaintiff total risk corridors payments of \$97,629,608.35. To-date, the Government has made partial risk corridors payments to Plaintiff totaling only \$6,704,517.30, which the Government has treated as partial payment toward the CY 2014 risk corridors amounts it owes to Plaintiff. The Government did not make any payments at all to Plaintiff for the risk corridors it owes for CY 2015 or CY 2016. Subtracting the CY 2014 partial payments received from the Government to date, the Government still owes Plaintiff \$90,925,091.05 in total risk corridors payments. Accordingly, \$90,925,091.05 is the total amount of Plaintiff’s risk corridors damages.

Pursuant to this Court’s May 12 Order, Plaintiff respectfully proposes that the Court set a schedule to finally resolve this matter as follows:

1. If the parties are able to stipulate to the amount of total risk corridors damages owed, then the parties will file a consent motion for entry of final judgment in that total damages amount within 14 days, by June 12, 2020.³
2. If the parties are for some reason not able to stipulate to the total amount risk corridors damages amount owed, they must explain the difference/discrepancy in total damages amounts each party asserts is owed in a joint status report due to be

¹ Available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf>.

² Available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-Amounts-2016.pdf>.

³ If necessary, to expedite final resolution of this case, Plaintiff has advised Defendant that Plaintiff is willing to voluntarily dismiss, without prejudice, the alternative claims, set forth in Counts II-VI of its Complaint, so that a final judgment can be entered disposing of all of Plaintiff’s claims without delay.

filed within the same 14-day period, by June 12, 2020. Thereafter, Plaintiff shall have 5 days to file a motion for entry of final judgment so this case can be concluded.

Defendant has represented to Plaintiff that the Government does not anticipate that future proceedings will be necessary in this case, but Defendant proposes an additional 31 days, until June 29, 2020 to calculate a total final damages number and report that number to the Court. Plaintiff submits that Defendant has not demonstrated a legitimate need for an additional 31 days (beyond the 32 it has already had since the Supreme Court's decision). The 14 additional days Plaintiff propose should be more than sufficient for the Defendant to confirm whether it agrees with the amount of pro-rata payments it has made to date and the total risk corridors damages amount due (provided to Defendant on May 12, 2020), or whether Defendant has calculated a different sum of total damages it owes to Plaintiff. June 12, 2020 is also the same date that Judge Wheeler has ordered the parties in three other risk corridors cases to either stipulate to the total amount of risk corridors damages owed and file a motion for entry of judgment or to file a joint status report explaining the discrepancy. *See Molina Healthcare of California, Inc. v. United States*, No. 17-097, Doc. No. 34 and No. 18-333, Doc. No. 13, *Local Initiative Health Authority for L.A. County v. United States*, No. 17-1542, Doc. No. 55. There is no reason that Defendant cannot respond by June 12, 2020 in this case as well without further delay.

The United States' Position

Since the Supreme Court issued its decision on April 27, 2020, in *Maine Community Health Options v. United States*, No. 18-1023, 590 U.S. --- (2020), the United States has been reviewing that decision and assessing the next steps in all the risk corridors cases affected by that decision. This review and assessment, both internally at the Department of Justice, and in consultation with the Department of Health and Human Services ("HHS"), is ongoing. We ask the Court to permit

the United States 31 additional days, until June 29, 2020, to adopt a proposed process for the efficient and appropriate resolution of this, and every other risk corridors case before the Court.

As the Court is likely aware, risk corridors was a nationwide program involving every health insurance issuer participating on a Patient Protection and Affordable Care Act (“ACA”) Exchange during benefit years 2014, 2015, or 2016. Some of those issuers are represented in the more than 64 individual cases pending before this Court; others are represented in this Court through either of two class actions; and still other issuers have not commenced litigation. The United States believes it would be most appropriate and fair to resolve all issuers’ potential entitlement under section 1342.

The United States has been considering and addressing many complicated, and often interrelated, issues such as the exact amounts paid to issuers under the risk corridors program and any amounts potentially owed to the United States by issuers under other ACA programs. The United States has also been conducting essential due diligence on whether it would be appropriate to raise defenses not previously considered and whether to answer and counterclaim.

In determining the precise amount of risk corridors payments paid to and remaining for each health insurance issuer before this Court, HHS staff requires additional time to review the record of payments and charges and the history of distributions made to ensure they are complete and accurate. We have compiled a master list of all named plaintiffs in the risk corridors cases and provided that list to HHS to enable the agency to identify and verify issuers who participated on an Exchange in 2014, 2015 and/or 2016 and determine the current amount of risk corridors payments owed to each. HHS must finish its review before the United States will be in a position to pursue a consensual resolution of an issuer’s case, and that review is most efficiently done on a program-wide, rather than piecemeal basis.

Similarly, HHS needs additional time to review and assess those plaintiffs that may have outstanding debts owed to HHS under other ACA programs. In order to determine which issuers have such debts pending, HHS must review its records across ACA programs and distill that information for consideration by government officials with authority to assess liability. Those parties owing debts and the United States should then have an opportunity to confer to seek to resolve those issues, and, as necessary, to prepare and propose a procedure to dispose of outstanding matters.

For all of these reasons, the United States requests that the Court allow the government 31 days, until June 29, 2020, within which to consider its position in these cases and to propose, jointly with the plaintiff to the extent possible, a course to govern proceedings moving forward. Within that time, the Court could allow any plaintiff the opportunity to refine or update its claim for damages whether through formal amendment of its complaint or through less formal means. We also request that, in the interest of efficiency, the Court defer the government's obligation to respond to a complaint or an amended complaint upon consideration of the joint status report we propose be due at the end of the requested 31-day period.⁴

⁴ The government has made similar requests in the other risk corridors cases and the vast majority of those requests have been granted. *See, e.g., Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Damich, J.) (July 10); *Blue Cross Blue Shield of Kansas City v. United States*, No. 17-95C (Damich, J.) (June 29); *BlueCross BlueShield of Tennessee, Inc. v. United States*, No. 17-348C (Hertling, J.) (June 29); *EmblemHealth, Inc. v. United States*, No. 17-703C (June 26) (Wheeler, J.); *Common Ground Healthcare Cooperative v. United States*, No. 17-877C (Sweeney, C.J.) (June 29); *Atkins v. United States*, No. 17-906C (Kaplan, J.) (June 29); *Glause v. United States*, No. 17-1157C (Damich, J.) (June 29); *Health Republic Insurance Co. v. United States*, No. 17-1185C (Sweeney, C.J.) (June 29); *HealthyCT v. United States*, No. 17-1233 (Solomson, J.) (June 29); *Scott and White Health Plan v. United States*, No. 17-1850C (Coster Williams, J.) (June 26) *Community Health Choice, Inc. v. United States*, 18-5C (Sweeney, C.J.) (June 29); *Oregon Health CO-OP v. United States*, No. 18-94C (Kaplan, J.) (June 29); *Affinity Health Plan, Inc. v. United States*, No. 18-110C (Kaplan, J.) (June 29); *Blue Cross Blue Shield of Arizona, Inc. v. United States*, No. 18-282C (Kaplan, J.) (June 30); *Richardson v. United States*, No. 18-1731 (Solomson) (July 6); *Aetna Health, Inc. v. United States*, No. 19-1338C

Dated: May 29, 2020

Respectfully submitted,

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(Kaplan, J.) (July 13); *Blue Cross of California, Inc. v. United States*, No. 19-1770C (Tapp, J.) (June 29); *Independent Health Benefits Corp. v. United States*, No. 20-163C (Lettow, J.) (June 29); *HealthFirst PHSP, Inc. v. United States*, No. 20-179C (Sweeney, C.J.) (June 29); *Health Care Service Corp. v. United States*, No. 20-259C (Lettow, J.) (June 29).

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