

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH CARE SERVICE CORPORATION, an Illinois Mutual Legal Reserve Company, doing business as BLUE CROSS BLUE SHIELD OF ILLINOIS, BLUE CROSS BLUE SHIELD OF MONTANA, BLUE CROSS BLUE SHIELD OF NEW MEXICO, BLUE CROSS BLUE SHIELD OF OKLAHOMA, and BLUE CROSS BLUE SHIELD OF TEXAS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 1:20-cv-00259-CFL

Hon. Charles Lettow

JOINT STATUS REPORT

On April 1, 2020, this Court stayed this case and ordered the parties to “file a joint status report within 20 days of disposition” of *Maine Community Health Options v. United States*, No. 18-1023 (U.S.). The U.S. Supreme Court issued its decision in *Maine Community Health Options* on April 27, 2020, *see* 140 S. Ct. 1308 (2020), and the parties accordingly submit this report describing their positions on how to proceed.

Plaintiff’s Position

The U.S. Supreme Court’s decision last month in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), resolves this case. There, the Supreme Court held, consistent with Count 1 of Plaintiff Health Care Service Corporation’s (“HCSC’s”) Complaint (Dkt. 1), that: (i) Section 1342 of the Affordable Care Act creates an enforceable obligation for the government to make risk corridors payments according to the statutory formula; (ii) Congress

did not later amend or abrogate that payment obligation; and, (iii) issuers like HCSC may sue in the U.S. Court of Federal Claims (“CFC”) to recover damages of the amount the government has failed to pay. *Id.* at 1319. HCSC opposes any effort by the United States to re-litigate these issues.

Further, HCSC objects to the government’s request to substantially delay further the resolution of this case. The government has had years to analyze potential defenses to issuers’ claims and previously stipulated to a final judgment raising materially identical issues. *See Moda Health Plan, Inc. v. United States*, 1:16-cv-00649, Dkt. 24 (Fed. Cl. Mar. 1, 2017) (stipulating to judgment where “the only remaining issue in [the] case [wa]s the amount of risk corridors payments not yet paid to” the issuer); *accord Sanford Health Plan v. United States*, No. 17-357, Dkt. 6 at 6 (government conceding that a ruling by the CFC “in *Maine [Community Health Options]* will likely resolve [Plaintiff]’s statutory claim” in risk corridors case by other issuer). It should follow the same course here.

While HCSC does not oppose a modest extension of time for the government to confirm HCSC’s damage calculations, these calculations should not require over two months to complete. The U.S. Center for Medicare & Medicaid Services (“CMS”) has already determined the amount to which HCSC is entitled under Section 1342. The government therefore only needs to confirm how much of that receivable remains unpaid. That basic record search should not take until June 29—when the government proposes to next update this Court. *See infra* at 5.

HCSC accordingly proposes that, consistent with orders entered by another CFC judge in risk corridors cases brought by other issuers, this Court set June 12, 2020 as the deadline for the parties to provide their next status report. *See, e.g., Local Initiative Health Auth. for L.A. Cty. v. United States*, 1:17-cv-1542, Dkt. 55 (Fed. Cl. May 13, 2020) (Wheeler, J.). There is no good

reason to put HCSC's case on a different timeline, especially given the government's intent to "resolve all issuers' potential entitlement under section 1342 in a similar manner." *See infra* at 4.

The United States' Position

On April 27, 2020, the Supreme Court issued its decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). The Supreme Court held that the risk corridors statute, section 1342 of the Patient Protection and Affordable Care Act ("ACA"), "created an obligation neither contingent on nor limited by the availability of appropriations or other funds." *Id.* at 1323. The Court also determined that the obligation was not affected by subsequently enacted legislation and held that the "petitioners may seek to collect payment through a damages action in the Court of Federal Claims." *Id.* at 1331. Along with three other similar risk corridors cases, the Court reversed the judgments of the Federal Circuit and remanded the cases to that court for further proceedings consistent with the opinion.

The United States continues to review the Supreme Court's opinion. That process of review requires that we confer with various components within the Department of Justice and the Department of Health and Human Services in order to discern a path forward. We ask the Court to permit the United States additional time to consider how the Supreme Court's ruling impacts all of the cases in this Court in which a plaintiff seeks damages under section 1342, so that we may propose an efficient and appropriate process to reach a conclusion in this, and every other risk corridors case before the Court.

We also request additional time for review because risk corridors was a nationwide program involving every single health insurance issuer participating on an 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 in a similar manner. In order to do so, the United States must consider and address a number of issues before these cases proceed.

To start, we note that since the time that most complaints were filed, the Department of Health and Human Services ("HHS") has made additional pro rata distribution of risk corridors collections to many of the plaintiffs before this Court. HHS is now determining the precise amount of risk corridors payments paid to and remaining for each health insurance issuer before this Court, as well as to any issuer with a potential risk corridors claim. Agency 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. HHS must finish this review before the United States will be in a position to pursue a potential consensual resolution of an issuer's case, and that review is most efficiently done on a program-wide, rather than piecemeal (or ad hoc) basis.

To cite another consideration, some of the plaintiffs 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 evaluate the issues. 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. Finally, because the United States has not yet, with one exception, answered any of the plaintiffs' complaints, the United States needs to consider whether it would be appropriate to raise defenses not previously considered and whether to answer and counterclaim.

For all of these reasons, the United States requests that the Court allow the government 40 days 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.¹ Within that time, the Court could allow 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 40-day period.

¹ Less than one week ago, on May 12, 2020, the United States and plaintiffs filed joint status reports in many of the other risk corridors cases, with the United States (where no agreement could be reached with the plaintiff) requesting 45 days in 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. To date, at least four judges on the Court, in at least eight risk corridors cases, have granted the time sought by the United States.

Dated: May 18, 2020

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