

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Washington, D.C.

WISCONSIN PHYSICIANS SERVICE
INSURANCE CORPORATION and WPS
HEALTH PLAN, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 1:17-cv-01070-EJD

JOINT STATUS REPORT

On August 23, 2017, this Court stayed this case involving the risk corridors statute, section 1342 of the Patient Protection and Affordable Care Act, pending the Federal Circuit's decisions in *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994. Docket 7. After the Federal Circuit decided those cases and denied petitions for rehearing *en banc*, the parties in this case filed a joint status report on December 6, 2018, proposing that the stay in the case be continued pending potential Supreme Court review in *Land of Lincoln* and *Moda Health*, and that the parties file a status report within 30 days after final disposition by the Supreme Court. Docket 11. On April 27, 2020, the Supreme Court issued a decision in *Land of Lincoln, Moda Health*, and other related cases. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020). The parties submit this joint status report in accordance with the parties' proposal in their December 2018 status report.

I. The United States' Position

On April 27, 2020, the Supreme Court issued its decision in *Maine Community Health Options v. United States*, No. 18-1023, 590 U.S. --- (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.” Slip Op. at 16. 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 30. 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 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 until Monday, June 29, 2020, 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 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 by June 29, 2020.

II. Plaintiffs' Position

Plaintiffs do not oppose the relief requested by the United States.

Dated: May 19, 2020

Respectfully submitted,

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