

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MDWISE MARKETPLACE, INC.)	
)	
Plaintiff,)	No. 17-1958C
)	
v.)	Judge Coster Williams
)	
THE UNITED STATES,)	
)	
Defendant.)	
)	
)	

JOINT STATUS REPORT

I. INTRODUCTION

On February 6, 2018, the Court stayed this case pending the Federal Circuit’s decisions in *Moda Health Plan, Inc. v. United States* and *Land of Lincoln Mutual Health Insurance Co. v. United States*. Dkt. 6. The Government requested the stay by explaining that *Moda* and *Land of Lincoln* “concern legal issues nearly identical to those presented in this case.” Dkt. 5 at 1.

On June 26, 2018, the Court continued the stay until rehearing and U.S. Supreme Court proceedings in *Moda* and *Land of Lincoln* were complete. Dkt. 8. In requesting this continued stay, the parties jointly explained to the Court:

As numerous judges of the Court have recognized, the issues involved in *Land of Lincoln* and *Moda* are nearly identical or substantially similar to those involved in ... this one, in which health insurance companies claim that they are entitled to additional payments under the risk corridors program created by section 1342 of the Patient Protection and Affordable Care Act, 42 U.S.C. §18062.

Dkt. 7 at 1.

When this Court continued the stay, it directed that “[t]he parties shall file a joint status report with the Court within fifteen days of the date on which the judgments in *Land of Lincoln* and *Moda* become final.” *Id.* That has now occurred.

The parties have conferred and are not in full agreement on how this matter should now proceed. Their respective positions are set forth herein.

II. PLAINTIFF MDWISE MARKETPLACE, INC.’S POSITION

A. The Supreme Court’s decision is dispositive of the risk-corridors claim. When the Government moved for a stay of these proceedings, it represented that *Moda* and *Land of Lincoln* “concern legal issues nearly identical to those presented in this case.” Dkt. 5 at 1. And in requesting that the Court continue the stay, the parties jointly explained that “the issues involved in *Land of Lincoln* and *Moda* are nearly identical or substantially similar to those involved in ... this one.” Dkt. 7 at 1.

That was correct. *Maine Community*, which included *Moda* and *Land of Lincoln* on a consolidated appeal, decided exactly the issues raised by this case, in particular the statutory claim made in Count I of Marketplace’s complaint. The Supreme Court held

that §1342 of the Affordable Care Act established a money-mandating obligation, that Congress did not repeal this obligation, and that petitioners may sue the Government for damages in the Court of Federal Claims.

Slip Op. at *3. The Supreme Court added that “these holdings reflect a principle as old as the Nation itself: the Government should honor its obligations.” *Id.* at *17. The Supreme Court has thus made clear that Marketplace is entitled to the “full amount calculated by” §1342. Slip Op. at 9.

With these principles settled, there are no questions left to resolve on the risk-corridors claims in this case. Marketplace's claim is brought under §1342 of the Affordable Care Act.¹ The Government's own published records show that it failed to make payments that Marketplace was entitled to under § 1342, and the same records reveal the precise amount that is owing. Therefore, the Supreme Court's decision requires judgment in favor of Marketplace.

In Marketplace's case, CMS's calculation of the amount owing is, to Marketplace's knowledge, undisputed. CMS's own calculation establishes the amount owed to Marketplace as \$9,751,130.86.² Accordingly, Marketplace submits that the stay should be lifted and final judgment be entered in favor of Marketplace in the amount of \$9,751,130.86.

Marketplace is willing to work cooperatively with the Government to reach the preferred outcome of a consensual resolution of the risk-corridors claim. However, under the circumstances, the Government's proposed 45 days' delay is unnecessarily long. Marketplace proposes that the court provide the Government 15 days, in addition to the 15 days that have already elapsed since the Supreme Court's ruling, to consider whether it is willing to stipulate to judgment in this amount. Specific to this case, the only issue that arguably needs verification is whether the Government intends to now question CMS's prior, published calculation of the amount owed. That can readily be decided within 15 days, even given the pendency of a number of other, similar cases.

Thus, the Court should order that the current stay shall expire 15 days from the date of this joint status report, so that if the parties have not reached an agreed resolution by that time, Marketplace can proceed to file a motion for summary judgment.

¹ The other claims in the Complaint are alternative legal theories for recovering the same damages and so no longer need to be addressed.

² CMS's published "Risk Corridors Payment and Charge Amounts" reports are available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs>.

Beyond its desire to verify CMS's previously calculated risk corridors amount owed to Marketplace, none of the reasons for additional time offered by the Government warrant further delay. The Government apparently seeks additional time not merely to verify amounts owed, but also to develop new defenses. This case has been pending since December 2017. So have many others asserting the same claims. Three such cases have made their way to, and through, review by the United States Supreme Court. If there were any viable new, unasserted defenses (the Government does not articulate any), the Government has had ample time to prepare them. Certainly, none arise as a result of the Supreme Court's ruling. The Government's concern about other potential outstanding debts is irrelevant to the disposition of this case. An amount, if any, Marketplace may owe to the Government under another program is no defense to the claim at issue here; such a possible item does not warrant delay of final judgment in this case.

Similarly, that the Government may need to address newly filed risk-corridors claims in light of the Supreme Court's ruling provides no justification to further delay disposition of this specific case. Marketplace's entitlement to payment is clear and its ability to collect what is owed should not be hindered because of other, as-yet unfiled claims.

B. Marketplace wishes to add cost-sharing-reduction claims. On October 3, 2019, Marketplace moved for leave to amend its complaint, to "add[] claims for money damages regarding the Government's failure to make cost-sharing reduction payments ... under Section 1402 of the ACA." Dkt. 9 at 2. The Court dismissed the motion, without prejudice to renew after "the stay on this matter is lifted." Dkt. 10. Once the stay is lifted, Marketplace does intend to renew its motion to amend to assert cost-sharing reduction payments claims.

III. 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 45 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. 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 45-day period.

Dated: May 12, 2020

Respectfully submitted,

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