

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HUMANA INC.,)	
)	
Plaintiff,)	No. 17-1664C
)	
v.)	
)	Judge Nancy B. Firestone
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
<hr/>)	

**UNITED STATES’ MOTION TO STAY PROCEEDINGS,
OR IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME**

The United States respectfully moves the Court to stay this action until the Federal Circuit issues a decision in *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, or *Moda Health Plan, Inc. v. United States*, No. 17-1994. The cases will be argued on January 10, 2018. Alternatively, the United States asks this Court to enlarge the deadline for the United States to respond to Humana’s Complaint by 90 days, until April 2, 2018.

On November 2, 2017, Humana filed suit seeking approximately \$611 million in money damages under the risk corridors program, 42 U.S.C. § 18062, created by the Patient Protection and Affordable Care Act. Dkt. 1. The United States’ response to Humana’s Complaint is currently due January 2, 2018.

Because this case raises the same legal issues as those brought in 42 other risk corridors filed with the Court, and in order to avoid a needless waste of this Court’s and the parties’ resources, this Court should stay proceedings.

I. BACKGROUND

A. This Case Is Similar to Other ACA Cases in This Court

As the Court is likely aware, this case is one of 43 cases filed in the last 21 months in this Court seeking relief under the risk corridors program. *See Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.); *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.); *Blue Cross and Blue Shield of North Carolina* (Griggsby, J.); *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (Lettow, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.) (“*Maine P*”); *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.); *BCBSM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.); *Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C (Lettow, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (“*Montana P*”); *Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Braden, J.); *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C (Griggsby, J.); *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C (Smith, J.); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.); *HPHC Ins. Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (“*HPHC P*”); *Medica Health Plans v. United States*, No. 17-94C (Horn, J.); *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C (Braden, J.); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.); *Blue Cross and Blue Shield of Alabama v. United States*, No. 17-347C (Campbell-Smith, J.); *BlueCross BlueShield of Tennessee, Inc. v. United States*, No. 17-348C (Horn, J.); *Sanford Health Plan v. United States*, No. 17-357C (Bruggink, J.) (“*Sanford P*”); *Raymond Farmer v. United States*, No. 17-363C (Campbell-Smith, J.); *Health Alliance Med. Plans, Inc. v. United States*, No. 17-653C

(Campbell-Smith, J.) (“*Health Alliance I*”); *EmblemHealth, Inc. v. United States*, No. 17-703C (Wheeler, J.); *Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, J.); *Nancy G. Atkins v. United States*, No. 17-906C (Kaplan, J.); *Doug Ommen v. United States*, No. 17-957C (Lettow, J.); *Wisconsin Physicians Service Ins. Corp. v. United States*, No. 17-1070C (Braden, J.); *HealthNow New York, Inc. v. United States*, No. 17-1090C (Hodges, J.); *Nancy G. Atkins v. United States*, No. 17-1108C (Horn, J.); *Premiera Blue Cross v. United States*, No. 17-1155C (Griggsby, J.); *Tom Glause v. United States*, No. 17-1157C (Braden, J.); *Maria T. Vullo v. United States*, No. 17-1185C (Wolski, J.); *HealthyCT, Inc. v. United States*, No. 17-1233C (Firestone, J.); *Montana Health CO-OP v. United States*, No. 17-1298C (Wolski, J.) (“*Montana IP*”); *QCC Ins. Co. v. United States*, No. 17-1312C (Coster Williams, J.); *Harvard Pilgrim Health Care, Inc. v. United States*, No. 17-1350C (Griggsby, J.) (“*HPHC IP*”); *Maine Cmty. Health Options v. United States*, No. 17-1387C (Bruggink, J.) (“*Maine IP*”); *Sanford Health Plan v. United States*, No. 17-1432C (Bruggink, J.) (“*Sanford IP*”); *Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542C (Wheeler, J.); and *Health Alliance Med. Plans, Inc. v. United States*, No. 17-1759C (Campbell-Smith, J.) (“*Health Alliance IP*”). These cases collectively implicate more than \$12.3 billion.

Four cases have been decided and are on appeal to the Federal Circuit. The Court decided *Land of Lincoln* in favor of the United States, 129 Fed. Cl. 81 (2016), and *Land of Lincoln* appealed. In *Moda*, the Court entered judgment in favor of the plaintiff, 130 Fed. Cl. 436 (2017), and the United States appealed. On May 30, 2017, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* will be treated as companion cases and will be argued before and decided by the same panel. Both appeals are fully briefed and the Federal Circuit has set argument for January 10, 2018.

The Court has entered judgment in the government's favor in two other cases: *Blue Cross and Blue Shield of North Carolina*, 131 Fed. Cl. 457 (2017), *appeal pending*, No. 17-2154 (Fed. Cir.); and *Maine I*, 133 Fed. Cl. 1 (2017), *appeal pending*, No. 17-2395 (Fed. Cir.).¹ *Blue Cross and Blue Shield of North Carolina* will be fully briefed on November 29, 2017, and briefing in *Maine I* is currently scheduled to be completed by the end of December 2017.

B. Most Cases Have Been Either Temporarily Stayed Pending Appellate Review or Are Fully Briefed Already

In light of the pending Federal Circuit appeals in *Land of Lincoln* and *Moda*, the Court has entered stays in 30 cases: *Health Republic*, *New Mexico Health Connections*, *Minuteman Health*, *BCBSM*, *Alliant Health Plans*, *Blue Cross of Idaho Health Service*, *Neighborhood Health Plan*, *Medica Health Plans*, *Molina*, *Blue Cross and Blue Shield of Alabama*, *BlueCross BlueShield of Tennessee*, *Sanford I*, *Farmer*, *Blue Cross and Blue Shield of Kansas City*, *HPHC I*, *Health Net*, *Health Alliance I*, *EmblemHealth*, *Common Ground Healthcare Cooperative*, *Ommen*, *Wisconsin Physicians Service Insurance Corp.*, *HealthNow*, *Premera*, *Glause*, *Vullo*, *HealthyCT*, *QCC*, *HPHC II*, *Maine II*, and *Sanford II*.

In the only other risk corridors case before this Court, *HealthyCT*, this Court entered a stay “pending the Federal Circuit’s decisions” in *Land of Lincoln* and *Moda* one day following

¹ In *Molina*, the Court entered partial summary judgment in the plaintiffs’ favor. 133 Fed. Cl. 14 (2017). Further proceedings in *Molina* are stayed pending the *Land of Lincoln* and *Moda* appeals.

the United States' motion to stay proceedings (which was unopposed). No. 17-1233C, Dkt. 7 (Oct. 13, 2017).

II. A STAY WILL CONSERVE SUBSTANTIAL RESOURCES

“It is well established that every trial court has the power to stay its proceedings, which is ‘incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’” *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). “Moreover, when and how to stay proceedings is within the sound discretion of the trial court.” *Id.* (citation and internal punctuation omitted). The Supreme Court has highlighted the conservation of judicial resources as an important reason for a trial court to stay proceedings in any matter pending before it, particularly where the appellate court may resolve issues before the trial court. *Landis*, 299 U.S. at 254-55; *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010) (“The orderly course of justice and judicial economy is served when granting a stay simplifies the ‘issues, proof, and questions of law which could be expected to result from a stay.’”) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Indeed, the Supreme Court also recognized that in cases of great complexity and significance, like the risk corridors issues in this case, “the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted,” especially where, as here, a Federal Circuit ruling in *Land of Lincoln* and *Moda* would “settle” or “simplify” the issues presented. *See Landis*, 299 U.S. at 256.

Because the legal issues presented in this case are similar to the issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, the further development of those companion cases on appeal will be instructive and possibly dispositive. A stay therefore will conserve judicial

resources and the resources of both parties by reducing the amount of briefing of issues already pending before the Federal Circuit. That the Federal Circuit has now set *Land of Lincoln* and *Moda* for oral argument makes a stay in this case all the more appropriate.

A. Proceeding in This Case Before the Federal Circuit Rules Would Be a Waste of Resources

In its Complaint, Humana makes two claims for relief: a statutory claim and a claim for breach of an implied-in-fact contract. Dkt. 1 at 24-28. Both *Land of Lincoln* and *Moda* raise the same claims, which are now before the Federal Circuit with oral argument pending. There can be no dispute that the issues raised in Humana's Complaint overlap with the issues pending before the Federal Circuit. Thus, there can be no legitimate grounds for proceeding toward decision on those issues in this Court while the Federal Circuit is simultaneously addressing and resolving those same issues.

Should the Court deny a stay and the parties file dispositive motions, the parties would then have to file supplemental briefs following decisions by the Federal Circuit in *Land of Lincoln* and *Moda*. In contrast, staying the case until the Federal Circuit rules in *Land of Lincoln* and *Moda*, as this Court did in *HealthyCT*, will avoid that needless waste of resources.

B. The United States Does Not Seek an Indefinite Stay

As other risk corridors plaintiffs represented by Humana's counsel have done repeatedly before the Court, Humana will likely argue, relying upon *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997), that the Court should not enter an "indefinite" stay because the United States has not shown a "pressing need." See, e.g., *Health Net*, No. 16-1722C, Dkt. 14 at 2-12. Other judges of the Court have rejected that argument, recognizing while the exact date the Federal Circuit will decide *Land of Lincoln* and *Moda* is unknown, the fact of a decision in the near future is definite. See, e.g., *Health Republic*, No. 16-259C, Dkt. 62; *Farmer*,

No. 17-363C, Dkt. 9. Now that the Federal Circuit has set a date for oral argument, the fact of a decision in the near future – which will undoubtedly dispose of or narrow the issues in this case – is even more definite.

C. A Brief Stay Will Not Prevent Humana from Having Its Claim Heard or Delay Potential Recovery

Humana cannot provide any legitimate justification for moving forward in this case now while the appeals in *Land of Lincoln* and *Moda* are pending and set for argument. A brief stay will not delay any potential recovery for Humana should it prevail. As noted above, the Federal Circuit panel that will hear and decide *Land of Lincoln* and *Moda* will address the same legal issue before this Court. Thus, even if Humana ultimately prevails on its claim in this Court, Humana will not recover until the appeals in those risk corridors cases, as well as its own case, have concluded.

Briefly staying this case until the Federal Circuit decides *Land of Lincoln* and *Moda* will not alter Humana's ability to obtain a timely decision or potential recovery – it will only drastically reduce the resources expended by the Court and the parties in reaching that resolution. The question for this Court in considering the stay request is whether the parties and Court will waste resources on the full scope of this case now, or will prudently allow controlling law to efficiently shape future proceedings. Choosing the former, however, will *not* speed Humana's potential ultimate recovery.

III. CONCLUSION

For these reasons, the United States respectfully moves the Court to stay this case until the Federal Circuit issues a decision in *Land of Lincoln* or *Moda*. Alternatively, should this Court deny a stay, the United States asks this Court to enlarge the deadline for the United States to respond to Humana's Complaint by 90 days, until April 2, 2018.

Dated: November 24, 2017

Respectfully submitted,

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ATTORNEYS FOR THE UNITED
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 24, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO STAY PROCEEDINGS, OR IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks

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