IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,	:	Judge Griggsby
Plaintiff,	:	Case No. 16-651C
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' SUPPLEMENTAL BRIEF

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The United States hereby files its supplemental brief in accordance with this Court's February 13, 2017 Scheduling Order, Docket No. 25.

1. "Whether the purpose of the risk corridor program may only be fulfilled by the full, annual payment of risk corridor payments"

No. HHS's annual pro-rata risk corridors payments, to the extent funds are available from risk corridors collections, fulfills the purpose of the risk corridors program by mitigating some of issuers' losses. The purpose of the 3Rs programs is "to mitigate the potential impact of adverse selection and provide stability for health insurance issuers in the individual and small group markets." *Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment*, 77 Fed. Reg. 17,220 (Mar. 23, 2012). The purpose of the risk corridors program, specifically, is to "protect against uncertainty in rates for QHPs by limiting the extent of issuer losses (and gains)." *Id.* at 17,221. None of the 3Rs programs, however, were intended to *eliminate* risk to issuers, but merely to *mitigate* risk to the extent necessary to "provide stability." *See Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 775 (2017) ("insurers have an incentive to adjust their premiums and costs to avoid paying a penalty to HHS and to ensure, once the risk corridors program concludes, that premiums will cover costs"). By making annual payments—to the extent of available funds from collections, or "Payments In" under the statute—HHS's implementation of the risk corridors program undoubtedly served the purpose of the program. Issuers' losses, including BCBSNC's, have been mitigated. And BCBSNC has continued to offer qualified health plans on the exchanges in 2017, after the conclusion of the risk corridors program.

HHS's annual payment schedule undoubtedly serves section 1342's purpose, and Judge Lettow rejected the argument that anything less than "full payments annually defeats the purpose of the risk-corridors program[.]" *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 107 (2016), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2010). As Judge Lettow

recognized, "HHS's payments in due course, not necessarily annually, to the extent funds are available from 'payments in' without resort to appropriated funds, can still serve the program, albeit not to the extent [issuers] urge[]." *Id.* "Congress directed HHS to establish the risk-corridors program and make payments as necessary and appropriate, but it gave HHS discretion in administering the program," and HHS's implementation of the program does not lead to a "'bizarre' result." *Id.*[1]

In any event, as set forth in the United States' Motion to Dismiss, Docket No. 10, at 23-30, Congress did not require HHS to make risk corridors payments other than out of risk corridors collections, and when finally Congress appropriated funds to make risk corridors payments in calendar year 2015, it restricted the use of any funds other than collections. Indeed, Congress gave HHS no choice but to limit annual payments to the extent of its funding authority. Congressional intent regarding the budgetary impact of section 1342 cannot be overcome with reliance on the general purpose of the program because "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original). *See also Land of Lincoln*, 129 Fed. Cl. at 107. Indeed, to rely solely on the program's general purpose "ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74

[1] In *Health Republic*, Judge Sweeney noted the importance of annual risk corridors payments to issuers to achieving the program's purpose. 129 Fed. Cl. at 776. Judge Sweeney went on to note that, consistent with this purpose, HHS had interpreted section 1342 to require annual payments and had, in fact, made such payments. *Id.* at 776-78.

(1986). Here, while Congress mandated the creation of the 3Rs programs to provide stability to issuers during the early years of the ACA's reforms, it did so on the express understanding, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the federal deficit between 2010 and 2019." ACA § 1563. That projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010. In short, full payments annually are not required to fulfill the purpose of the risk corridors program—HHS's implementation of the risk corridors program serves the program's purpose while also adhering to congressional intent that the program be self-funded.

2. "Whether the United States Department of Health and Human Service's ('HHS') [final] rule dated March 23, 2012, at 77 Fed. Reg. 17,220-01, 17,238, 2012 WL 959270 (Mar. 23, 2012), requires that HHS provide full, annual risk corridor payments"

No. HHS's March 23, 2012 Final Rule does not entitle issuers to full, annual risk corridors payments by its terms and because Congress never appropriated funds for such payments in the event of a shortfall in collections. HHS issued its final rule implementing the risk corridors program on March 23, 2012. 77 Fed. Reg. 17,220; *see* 45 C.F.R. § 153.510. Nothing in this rule requires full, annual risk corridors payments. First, HHS, at 77 Fed. Reg. 17,238, merely characterizes the payment methodology provided in 45 C.F.R. § 153.510(b). Indeed, in the final rule itself, HHS specifically noted that it had not "propose[d] deadlines," 77 Fed. Reg. at 17,238, and stated that it would "address the risk corridors payment deadline in the HHS notice of benefit and payment parameters," *id.* at 17,239, to which, under the regulation, issuers must adhere, 45 C.F.R. § 153.510(a). In the Notice and Benefit of Payment Parameters for 2014, HHS adopted a rule requiring issuers to remit charges within 30 days after notification of payment and charge amounts, but did not set a deadline for HHS to make payments. 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013); *see* 45 C.F.R. § 153.510(d). When HHS issued its Notice of Benefit and Payment

Parameters for 2015, it announced that it "intend[ed] to implement this program in a budget neutral manner." 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014). HHS elaborated on its budget-neutral implementation in further guidance, *see* United States' Appendix at A144, and rulemaking, *Exchange and Insurance Market Standards for 2015 and Beyond Final Rule*, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014); *HHS Notice of Benefit and Payment Parameters for 2016*, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015). HHS made payments in accordance with these rules and guidance in both 2015 and 2016.

Second, HHS's March 23, 2012 final rule could not reasonably be interpreted as a commitment by the agency to make risk corridors payments without regard to appropriations because such a commitment would be a clear violation of the Anti-Deficiency Act, 31 U.S.C. § 1301. HHS has repeatedly recognized that risk corridors payments would be made "subject to the availability of appropriations." *See, e.g.*, 79 Fed. Reg. at 30,260 ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In [the event that risk corridors collections are insufficient to fund payments over the three-year life of the program], HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*.") (emphasis added); 80 Fed. Reg. at 10,779 (same).

In any event, "[a] regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." GAO, *Principles of Federal Appropriations Law* ("*GAO Redbook*") (Ch. 2) 2–22 (4th ed. 2016). And the Supreme Court has held that an agency's statements cannot create a payment obligation on the part of the Treasury beyond what Congress has authorized by statute. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990) ("We hold that payments of money from the Federal Treasury are limited to those authorized by statute."). The Supreme Court emphasized that "[i]f agents of the Executive were

able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive," a result that could "render the Appropriations Clause a nullity." *Richmond*, 496 U.S. at 428.

Here, Congress did not authorize HHS to make full, annual risk corridors payments, if those payments exceeded collections in the aggregate. Following HHS's announcement of its budget-neutral implementation of the risk corridors program, Congress passed the 2015 Spending Law noting that "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). Thus, Congress mandated through the Spending Laws that HHS could make risk corridors payments only to the extent of collections. In short, congressional intent as provided in the statute, not statements or regulations issued by the agency, govern issuers' rights under section 1342.

3. "Whether the Court should dismiss Count I of the complaint pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ('RCFC'), if the Court concludes that the plaintiff is not entitled to 'presently due money damages' under Section 1342 of the Patient Protection and Affordable Care Act ('ACA')"

Yes. If the Court concludes that it has jurisdiction over BCBSNC's complaint, but concludes that plaintiff is not entitled to "presently due money damages" under section 1342, the Court should dismiss Count I under Rule 12(b)(6). As set forth in the United States' Motion to Dismiss, at 14-20, because final payment is not yet due under HHS's three-year, budget neutral framework, issuers are not entitled to "presently due money damages," a prerequisite for jurisdiction under the Tucker Act. *But see Land of Lincoln*, 129 Fed. Cl. at 97-98; *Health Republic*,

129 Fed. Cl. at 772; *Moda Health Plan, Inc. v. United States*, -- Fed. Cl. --, 2017 WL 527588, at *10 (Feb. 9, 2017). If, however, the Court concludes that it has jurisdiction over Count I, and concludes that BCBSNC is not entitled to "presently due money damages," then the only proper disposition is dismissal for failure to state a claim on which relief can be granted under RCFC 12(b)(6).

Under RCFC 12(b)(6), the Court must dismiss a claim "when the facts asserted by the claimant do not entitle [it] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). BCBSNC's claim in Count I is that it is "entitled under section 1342 of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government for [calendar year] 2014" and "[t]he Governments failure to make full and timely risk corridor payments to BCBSNC for [calendar year] 2014 constitutes a violation and breach of . . . section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b)," resulting in alleged damages of the amount of BCBSNC's calculated risk corridors payment for the 2014 benefit year, less any pro-rated payments received. Complaint ¶¶ 160, 164-65. As set forth above, notwithstanding BCBSNC's alleged reliance on 45 C.F.R. § 153.510, if the Court concludes that BCBSNC is not entitled to presently due money damages under section 1342, then Count I necessarily fails as a matter of law and must be dismissed.

Indeed, the Court in *Land of Lincoln* determined, as a merits question, that HHS's implementation of section 1342 is reasonable. 129 Fed. Cl. at 103-08. Noting that Congress gave discretion to HHS in administering the risk corridors program, the Court determined that the three-year framework fills a gap in the statute left by Congress and reflects the agency's considered deliberation, including in notice and comment rulemaking. *Id.* at 105-07. Moreover, HHS's implementation "reasonably reflects" (1) the Congressional Budget Office's scoring of the ACA

in 2010, (2) Congress's decision not to specifically appropriate funds for risk corridors payments, and (3) Congress's choice to omit from section 1342 the appropriation language used in the Medicare Part D statute. *Id.* at 107. As a result, the Court held that "[s]ection 1342 . . . does not obligate HHS to make annual payments or authorize the use of any appropriated funds." *Id.* The Court, therefore, granted the United States' motion for judgment on the statutory and regulatory claim.

Judge Lettow's analysis is undoubtedly correct and would support dismissal of the Complaint in this case under RCFC 12(b)(6). In *Land of Lincoln,* at plaintiff's request, the Court ordered the United States to produce an administrative record and directed the parties to file simultaneous dispositive motions. BCBSNC takes the position that administrative record review is not appropriate in these cases and has informed the Federal Circuit that it will not seek an administrative record in this case. *See* Br. for Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City as Amici Curiae Supporting Appellant at 3-4, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Fed. Cir. Feb. 7, 2017). But as the United States noted in its briefing in *Land of Lincoln*, because the statutory and regulatory claim presented a pure question of law, the United States was also entitled to judgment as a matter of law on that count. *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C, United States' Motion to Dismiss, at 22 n.7, Docket No. 22. Indeed, in reaching his decision, Judge Lettow relied only on material that is already before this Court, specifically, the statutory text, the regulation, the proposed and final rules published in the Federal Register, and the GAO's opinion. Accordingly, should the Court conclude that BCBSNC is not

entitled to presently due money damages under section 1342, the Court should dismiss Count I pursuant to RCFC 12(b)(6).

4. "Whether the Court should dismiss Counts II-IV of the complaint, pursuant to RCFC 12(b)(6), if the Court concludes that the plaintiff is not entitled to 'presently due money damages' under Section 1342 of the ACA"

Yes. If the Court concludes that BCBSNC is not entitled to presently due money damages under section 1342, it should dismiss Counts II-V under Rule 12(b)(6) because they are dependent on BCBSNC's alleged right to receive full, annual risk corridors payments under section 1342.[2] As noted in the United States' Motion, at 20 n.6,

> Counts II, III, IV, and V are each dependent on an alleged right, under section 1342 or 45 C.F.R. § 153.510, to receive risk corridors payments in full annually. *See* Compl. ¶ 178 (alleging breach of express contract for failure to fulfill obligations under section 1342 or 45 C.F.R.§ 153.510), ¶ 182 (alleging section 1342 and 45 C.F.R.§ 153.510 constituted an offer to enter an implied-in-fact contract), ¶ 202 (assuming existence of an express or implied-in-fact contract to make full risk corridors payments annually and alleging that failure to require full, annual payments breached implied duty of good faith and fair dealing), ¶ 213 (alleging vested property right to receive full risk corridors payments annually under section 1342, 45 C.F.R. § 153.510, express contract, or implied-in-fact contract).

Thus, if the Court concludes that BCBSNC has no right to presently due damages under section 1342, those counts fail as a matter of law and should be dismissed.[3]

With respect to Count II, BCBSNC alleges that the QHP Agreement "incorporates the provisions of section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b)," Complaint ¶ 173, and

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[2] The Court's Scheduling Order addressed only Counts II-IV. The United States includes Count V for completeness.

[3] In *Land of Lincoln*, the United States also moved to dismiss plaintiff's contracts and takings claims for failure to state a claim upon which relief could be granted, but noted that the administrative record did not address those claims and opposed judgment on the administrative record on those claims. *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C, United States' Motion to Dismiss, at 22 n.7, Docket No. 22; United States' Opposition To Plaintiff's Cross-Motion For Judgment On The Administrative Record On Counts II-V, at 9-12, Docket No. 43. The court dismissed those claims under RCFC 12(b)(6). *Land of Lincoln*, 129 Fed. Cl. at 108-14

"[t]he Government's breach of section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) by failing to make full and timely . . . risk corridors payments to BCBSNC is a material breach of the 2014 [benefit year] QHP Agreement," *id.* ¶ 178. As for Count III, BCBSNC alleges an implied contractual obligation to make "full and timely risk corridors payments to BCBSNC," *see, e.g.*, Complaint ¶ 197, arising out of an alleged "offer" contained in section 1342, 45 C.F.R. § 153.510, and HHS's "admissions" regarding its "obligation to make risk corridors payments," Complaint ¶ 182. But if section 1342 does not entitle BCBSNC to full, annual risk corridors payments, then even assuming a contractual obligation to make risk corridors payments in accordance with section 1342, the United States could not have breached the QHP Agreement or the alleged implied contract. *See Land of Lincoln*, 129 Fed. Cl. at 113. Without a breach, BCBSNC cannot, as a matter of law, prevail on its contract claims. *Id.*

Indeed, if the Court concludes that section 1342 does not authorize payment of full amounts calculated under the statutory formula without regard to collections, then the Court must conclude that HHS lacked authority to enter into contracts providing for such payments. *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997) (the plaintiff "must allege facts sufficient to show that the Government representative who entered into its alleged implied-in-fact contract was a contracting officer or had implied actual authority to bind the Government"). Thus, if the Court concludes that section 1342 does not entitle BCBSNC to presently due money damages, then Counts II and III must be dismissed for failure to state a claim.

As for Count IV, the duty of good faith and fair dealing is a duty "not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract.*" *Metcalf Const. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (emphasis in original). And the implied covenant "cannot expand a party's contractual duties beyond those in the express contract." *Id.* If

the Court concludes that section 1342 does not entitle BCBSNC to presently due damages, then no contract allegedly incorporating section 1342 could require full, annual risk corridors payments. Absent an existing right to those payments, the duty of good faith and fair dealing cannot create one. Thus, Count IV should be dismissed for failure to state a claim.

Finally, regarding Count V, if the Court concludes that section 1342 does not entitle BCBSNC to "presently due money damages," *i.e.*, full annual payment as a matter of statute or contract, then BCBSNC has not been deprived a property interest in risk corridors payments, and its Takings claim fails as a matter of law.

Conclusion

The Complaint should be dismissed.

Dated: March 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, a copy of the foregoing, *The United States' Supplemental Brief*, was served on Lawrence S. Sher, Counsel for Plaintiff, via the Court's ECF system.

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