

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE)	
COMPANY, INC., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 16-587C
)	Judge Wolski
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

THE UNITED STATES’ RESPONSE TO THE PENNSYLVANIA INSURANCE DEPARTMENT’S APPLICATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Defendant, the United States of America (“United States”), respectfully responds to the Pennsylvania Insurance Department’s Application for Leave to File a Brief as *Amicus Curiae* in Opposition to the United States’ Motion to Dismiss (“Application for Leave”) [docket no. 11] as follows.

1. On May 17, 2016, Plaintiff First Priority Life Insurance Company (“Highmark”) and five Highmark affiliates (collectively, “Plaintiffs”) filed this action seeking over \$222 million in money damages in reliance upon section 1342 of the Patient Protection and Affordable Care Act (“ACA”) and related contracts and takings theories. *See* Complaint [docket no. 1].¹ On September 16, 2016, the United States filed its Motion to Dismiss [docket no. 8], seeking

¹ Ten other cases are currently pending seeking monetary relief under the same section. *See Health Republic Ins. Co. v. United States*, No. 16-259C; *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C; *Moda Health Plan, Inc. v. United States*, No. 16-649C; *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C; *Maine Community Health Options v. United States*, No. 16-967C; *New Mexico Health Connections v. United States*, No. 16-1199C; *BCBSM, Inc. v. United States*, No. 16-1253C; *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C; *Minuteman Health Inc. v. United States*, No. 16-1418C; *Montana Health CO-OP v. United States*, No. 16-1427C.

dismissal of the case on jurisdictional and ripeness grounds for lack of a presently due money damages claim and further seeking dismissal of Plaintiffs' contracts and takings claims for failure to state a claim on which relief can be granted. On October 14, 2016, Highmark filed its brief in opposition ("Opposition") to the United States Motion to Dismiss [docket no. 12]. The same day, the Pennsylvania Insurance Department (the "Department") filed its Application for Leave.

2. As this Court has held, "there is no right to participate as amicus curiae; the decision 'is left entirely to the discretion of the court.'" *Wolfchild v. United States*, 62 Fed. Cl. 521, 536 (2004) (citation omitted), *rev'd on other grounds*, 559 F.3d 1228 (Fed. Cir. 2009). When deciding whether to grant leave, courts have considered such factors as opposition of the parties, the interest of the movants, partisanship, adequacy of representation, and timeliness. *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285 (1996).

3. Although the United States does not oppose the filing of the Department's *amicus* brief, it files this response to apprise the Court that the issues addressed by the Department's brief are not relevant to the issues now pending before the Court. Specifically, the Department contends that the "administration of [the risk corridors program] directly implicates health insurance company solvency, market competition, and overall market stability, thereby indirectly implicating health insurance premium rates" and that, "[a]s such . . . the Department has a direct interest in the outcome of this case[.]" Application at 2-3. First, 2016 is the final benefit year of the risk corridors program, 42 U.S.C. § 18062(a), and issuers are making decisions regarding Exchange participation and rate-setting for future benefit years with the understanding that the protection provided by the risk corridors program will not be available beginning in 2017 (indeed, premiums and plan participation for 2017 have already been determined with that

understanding in mind). Second, the Department's interest is not relevant to the narrow questions before the Court. Those questions are:

- Whether additional risk corridors payments are presently due under an administrative regime that does not require final payments until the conclusion of the program;
- Whether Plaintiffs' claims are ripe given that additional payments will be made this year and next year, and if a shortfall exists at the conclusion of the program, HHS intends to "work[] with Congress on the necessary funding for outstanding payments," Pls.' Opp'n at 12; and
- Whether Plaintiffs have adequately alleged contract and takings claims where the express contract on which they rely has nothing to do with risk corridors, and where the implied-in-fact contract and takings claims rest wholly on statutory and regulatory rights.

Nothing in the Department's proposed brief bears on these issues. The brief merely presents the Department's view that full payments would be good for insurance markets in Pennsylvania. Whether or not that is true, it has no relevance to the limited questions before the Court at this time, a factor considered by courts in deciding whether to permit *amicus* participation. *See, e.g., T.B. Proprietary Corp. v. Sposato Builders, Inc.*, No. 94-6745, 1996 WL 674010, at *4 (E.D. Pa. Nov. 20, 1996) (denying leave to file amicus brief where it addressed issues "not relevant to the issues before the court"); *Korow v. Aaron's Inc.*, No. 10-6317, 2015 WL 7720491, at *12 (D.N.J. Nov. 30, 2015) (same); *see also Imperial Chem. Indus., PLC v. Heumann Pharma GmbH & Co.*, 991 F.2d 811 (Fed. Cir. 1993) (denying leave to file amicus brief where, among other things, it did "not address the merits" of the issue before the court).

4. The Court also should be aware that, although the Department asserts that issuers that signed QHP Agreements "did so with the assumption that" full risk corridors payments would be made, Proposed Br. at 5, there is no evidence in the record of what Plaintiffs assumed when they entered their QHP Agreements in 2013, 2014, and 2015. The Department's claim to

know Plaintiffs' state of mind is unsupported. Moreover, the Department's assertion that Plaintiffs (or other issuers) assumed they would receive full annual payments after HHS announced its three-year framework in April 2014 and after the industry itself projected a significant shortfall in collections is fundamentally at odds with the undisputed chronology of events in this case. *Cf. Fluor*, 35 Fed. Cl. at 286 ("courts have 'frowned on participation which simply allows the amicus to litigate its own views' or present 'its version of the facts.'") (citations omitted). And of course, what each of the Plaintiffs assumed in 2013, 2014, and again in 2015, when they decided—notwithstanding HHS's three-year budget neutral framework—to continue their participation in the Pennsylvania Exchange is a factual question that has no relevance to whether payments are presently due under section 1342 or whether Plaintiffs have adequately pleaded contract and takings claims.

5. The interests of the Department and the Plaintiffs are aligned in this case. The Department approved the rates that Highmark set, *see* Proposed Br. at 6, and it has taken credit for the low rates that led Highmark to request hundreds of millions of dollars in risk corridors payments. *See* Press Release, Pennsylvania Department of Insurance (October 17, 2016) ("In 2015, [the Commissioner] saved consumers nearly \$80 million dollars by pushing back on rate increases filed for 2016.").² HHS, by contrast, had no role in setting premiums and no ability to require issuers such as Highmark to raise their rates. This alignment of interests should be considered by the Court as it evaluates the Department's Application. *See New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (an amicus should not be partisan).

² Available at <http://www.prnewswire.com/news-releases/pennsylvania-insurance-department-announces-2017-affordable-care-act-rates-moves-to-join-lawsuit-asking-federal-government-to-make-required-payments-to-insurers-300345861.html>

6. If the Court grants the Department leave to file its brief, the United States respectfully requests an opportunity to respond in full to the Department's arguments set forth in its proposed brief.

Respectfully submitted,

Dated: October 31, 2016

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CERTIFICATE OF SERVICE

I certify that on October 31, 2016, a copy of the attached Response to the Pennsylvania Insurance Department's Application for Leave to File a Brief as *Amicus Curiae* was served via the Court's CM/ECF system on counsel of record in this case.

/s/ Charles Canter

Charles E. Canter

U.S. Department of Justice