

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BCBSM, INC.)	
)	
)	
Plaintiff,)	
)	
v.)	No. 16-1253 C
)	Judge Coster-Williams
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

JOINT MOTION TO STAY PROCEEDINGS

BCBSM, Inc. (“BCBSM”) and the United States of America (“United States”) jointly move the Court to stay this action pending further developments in several earlier-filed cases raising similar issues and enactment of an appropriations law applicable to the 2017 payment cycle.

I. Background

On October 3, 2016, BCBSM filed this action seeking approximately \$7 million in money damages under Section 1342 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18062, and 45 C.F.R. § 153.510(b). Compl. ¶ 7 [Dkt. No. 1]. The United States’ response is currently due on Friday, December 2, 2016.¹

Twelve other cases in this Court are currently seeking relief under identical and related legal theories to those asserted by BCBSM. *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.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.); *Land of Lincoln*, No. 16-744C

¹ Encompassed in the parties’ consensual stay of proceedings is their agreement to stay this deadline for the United States to respond to the Complaint.

(Lettow, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C (Merow, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Bruggink, 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.); *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.); *Montana Health CO-OP v. United States*, No. 16-1427 (Wolski, J.). The first decision was entered in these cases in *Land of Lincoln* on November 10, 2016, and, on November 15, 2016, Land of Lincoln filed a notice of appeal from the judgment entered in that case.

The cases involve several provisions of the ACA as well as complex issues of appropriations law. *See, e.g.*, Compl. ¶¶ 4, 5, 7, 11, 72-74, 78-80. The Department of Justice represents the United States in each of these cases, which implicate a total of \$8.3 billion for the 2014 and 2015 benefit years.

Dispositive motions have been filed and are pending in three additional earlier-filed cases referenced above. In *Health Republic*, the Court has scheduled oral argument on the United States' fully-briefed motion to dismiss for December 8, 2016, and a motion to certify a class has been filed.² Dispositive motions also have been fully briefed in *First Priority* and *Blue Cross and Blue Shield of North Carolina*, and briefing will be completed by December 23, 2016 in *Moda*.³ Several *amicus* filings also have been submitted.

² On December 1, 2016, we were informed that the hearing on the motion to dismiss in *Health Republic* has been postponed.

³ In *Moda*, where dispositive briefing is nearly complete, the Court denied the United States' contested motion for a stay. In contrast, the United States has not responded to BCBSM's complaint and the parties move jointly for the stay sought here.

The activity in the five first-filed cases has consumed substantial resources of the United States since their filing earlier this year. The importance and complexity of the issues and the amount of public funds at stake would necessitate a similar dedication of resources to this case.

II. A Stay Is Proper and Will Conserve Substantial Resources

The parties propose to stay further activity in this case pending further developments in the presently pending appeal in *Land of Lincoln Mutual Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.) and the dispositive motions in the earlier-filed cases. Because some of the legal issues presented by this case overlap with the issues raised in the first-filed cases, the further development of those cases (whether in this Court or on appeal) is likely to be instructive to both parties. A stay therefore will conserve judicial resources and the resources of both parties by potentially reducing the amount of briefing of issues already pending before four other judges of this Court.

Furthermore, because of the importance of the issues presented in these cases and the likelihood that each party will consider its full rights to judicial review, the requested stay will not affect the timing of any potential recovery by BCBSM. A consensual stay has already been entered in *New Mexico Health Connections* and *Minuteman Health*, and is pending approval in *Blue Cross of Idaho*.

At the time BCBSM filed its complaint, BCBSM understood that the issue raised in all of the above cases was whether the United States is obligated (under various statutory, constitutional and/or contractual legal theories) to pay insurers for their risk corridor losses in full after each calendar year. The focus of these claims, in BCBSM's view, was the timing of the risk corridor payments, not whether the United States is obligated to pay in full at the conclusion of the three-year risk corridor program. Since then and as set forth in the United States' Motion to Dismiss and Motion for Judgment on the Administrative Record on Count I in *Land of Lincoln* (Docket 22

at page 37) and in several other earlier-filed cases, however, the government has argued that “under the ACA’s text and statutory structure, insurers’ entitlement to risk corridors payments extends only to the extent of amounts collected under the program.” BCBSM explains that should it conclude that Congress fails to appropriate sufficient funds for the risk corridor program, BCBSM intends to amend its complaint to assert additional claims that are not based on the timing of the risk corridor payments. Accordingly, staying this case at least until the enactment of an appropriations law applicable to the final risk corridors payments cycle in 2017 will allow BCBSM to determine whether to amend its original complaint to put at issue all claims relating to the United States’ alleged obligations to make risk corridor payments.

The United States concurs that the stay will not preclude BCBSM from filing an amended complaint, but reserves all rights to challenge any amended complaint.

“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) (quoting *Landis v. N. Am. 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). Indeed, the Supreme Court has recognized that in cases of great complexity and significance, like this one, “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, decisions issued by other judges would “settle” and “simplify” the issues presented. *Landis*, 299 U.S. at 256; *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)).

The parties seek a time-limited, carefully-monitored stay pending the enactment of a further appropriation and the disposition of similar cases that are – or imminently will be – fully briefed and ripe for disposition in this Court. The parties propose that, if a stay is granted, the parties submit status reports every 45 days (or at another appropriate interval acceptable to the Court) in order to closely monitor the continued utility of the stay.

A stay will allow the Court and the parties to reduce the expenditure of substantial resources while the earlier-filed cases are further developed. In addition, the Court and the parties will benefit from the amplification of the issues through the disposition of those cases.

III. Conclusion

For these reasons, the parties request that the Court grant this joint motion and stay this case pending further development of the first-filed cases referenced above and the enactment of an appropriations law applicable to the final risk corridors payments cycle in 2017.

Respectfully submitted,

Dated: December 1, 2016

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CERTIFICATE OF SERVICE

I certify that on December 1, 2016, a copy of the attached Joint Motion to Stay Proceedings was served via the Court's CM/ECF system on Plaintiff's counsel.

/s/ Frances M. McLaughlin

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U.S. Department of Justice