IN THE UNITED STATES COURT OF FEDERAL CLAIMS

17-877C
(Judge Sweeney)

COMMON GROUND HEALTHCARE COOPERATIVE,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION OF COST-SHARING REDUCTION CLASS

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

OF COUNSEL:

CLAUDIA BURKE
CHRISTOPHER J. CARNEY
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA

KIRK T. MANHARDT
Deputy Director

MARC S. SACKS
FRANCES M. MCLAUGHLIN
TERRENCE A. MEBANE
L. MISHA PREHEIM
United States Department of Justice
Civil Division, Commercial Litigation Branch Telephone: (202) 307-1104
Facsimile: (202) 514-9163
marcus.s.sacks@usdoj.gov

February 20, 2018

Attorneys for the United States of America

TABLE OF CONTENT

PAGE

TABLE OF AUTHORITIES

CASES PAGE(S)

UNITED STATES CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE,	)	
Plaintiff,	)	**No. 17-877C**
v.	)	
THE UNITED STATES OF AMERICA,	)	**Judge Sweeney**
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION OF COST-SHARING REDUCTION CLASS

Defendant, the United States, respectfully submits its opposition to the motion for certification of a cost-sharing reduction (CSR) class, filed by plaintiff Common Ground Healthcare Cooperative (Common Ground).[1]

INTRODUCTION

Class actions are the exception in civil procedure, not the rule. In order to invoke this procedural exception, plaintiffs must satisfy a rigorous analysis to prove that the requirements for maintaining a class have been met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citing *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Here, the Court should deny Common Ground's motion for class certification of a proposed CSR class because Common Ground has not carried its burden under Rule 23 of the Rules of the Court of Federal Claims (RCFC) to demonstrate that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(3). Common Ground has failed to

[1] This Court granted Common Ground's request to certify a risk corridors class, without objection from the Government. *See* Jan. 8, 2018 Order (ECF No. 17). This opposition concerns only Common Ground's request to certify a CSR class.

establish that "the several other methods of adjudicating the claims of multiple individuals arising from the same course of conduct," which the Court has at its disposal, are not superior to litigating this case through a class action. *Brown v. United States*, 126 Fed. Cl. 571, 587-88 & n.13 (2016) ("In sum, the court cannot conclude that a class action would be a superior method of litigating this case.").

The "principal purpose" of a class action is to advance "the efficiency and economy of litigation." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). In this regard, class actions, whether under Rule 23 or RCFC 23, were created as a management tool to make litigation easier—faster and more efficient. Here, class certification may have the opposite effect, leading to multiple-complex mini-suits each requiring individual damages determinations. Consolidation, rather than certification would be at least as effective as certification.

Even assuming potential class members are successful on their CSR claims—which may be affected by pending proceedings in the United States Court of Appeals for the Federal Circuit concerning similar appropriations law issues involving risk corridors payments—many issuers may have suffered little to no harm because their CSR liabilities are being offset by 2018 premiums that were raised in connection with the cessation of CSR payments. This has resulted in *increased* premium tax credit payments from the government in 2018 that are *larger* than the CSR payments to which these issuers were supposedly entitled. *California v. Trump*, 267 F. Supp. 3d 1119, 1139 (N.D. Cal. Oct. 25, 2017) ("[T]he widespread increase in silver plan premiums will qualify many people for higher tax credits, and . . . the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments."). In this circumstance—one in which every class member may require its

own complex damages proceeding, even if the class prevails on the similar legal issue presently before the Federal Circuit—a class action is not superior to other mechanisms at the Court's disposal. The Court should decline to take that unwieldy and impractical course.

BACKGROUND

I. The Affordable Care Act And CSR Payments

In 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the ACA), which enabled individuals and small businesses to purchase health insurance through state-based marketplaces called Affordable Insurance Exchanges. The ACA established two premium assistance programs to lower the cost to insureds of qualified health plans offered through the exchanges.

The first is a tax credit. In section 1401 of the ACA, Congress added a new provision to the Internal Revenue Code authorizing a refundable tax credit to subsidize health insurance premiums for applicable taxpayers with household incomes between 100 percent and 400 percent of the federal poverty level. *See* 26 U.S.C. § 36B. Like other refundable tax credits, the premium tax credit reduces a taxpayer's tax liability. *See* 26 U.S.C. §§ 6401(b)(1), 6402(a); 31 U.S.C. § 1324(b)(2).

The second program consists of a CSR mandate imposed upon issuers participating in ACA exchanges, and associated payments to issuers. Section 1402 of the ACA requires issuers to make CSRs that limit the out-of-pocket health care costs (such as co-payments) for eligible insureds who have household incomes between 100 percent and 250 percent of the Federal poverty level, and who are enrolled in "silver-level" health plans in the individual market on

ACA exchanges. *See* 42 U.S.C. § 18071.[2] To address the cost of these reductions to each issuer, this provision also states that the Secretary of Health and Human Services (HHS) "shall make periodic and timely payments to the issuer equal to the value of the reductions." *Id*. § 18071(c)(3)(A). The CSR program is administered primarily by HHS and is not codified in the Internal Revenue Code.

II. Congress Declines To Appropriate Funds For CSR Payments

While the ACA authorized both the premium tax credit program and the CSR program, the ACA provided permanent funding for the tax credits only. A provision that long predates the ACA provides a permanent appropriation to Treasury "for refunding internal revenue collections," including refunds due from certain enumerated tax credits. *See* 31 U.S.C. § 1324. The ACA amended this provision by adding Internal Revenue Code § 36B — ACA § 1401's premium tax credit — to the list of tax expenditures for which this provision permanently appropriates funding. *See* 124 Stat. 213 (2010); 31 U.S.C. § 1324(b)(2).

Congress did not, however, add the CSR program to that permanent appropriation, or otherwise appropriate money for that program in the ACA itself. Instead, it left CSR payments (like most government programs) to be funded in the regular appropriations process, wherein Congress generally funds the government via annual appropriations acts. However, Congress did not provide an appropriation. In Fiscal Year 2014, Treasury instead began making monthly advance CSR payments to issuers out of § 1324's permanent appropriation for tax refunds.

[2] The ACA classifies plans offered on the exchanges into four "metal" levels based on their cost-sharing requirements. 42 U.S.C. § 18022(d). A "silver" plan is structured so that the insurer pays 70 percent of the average enrollee's health care costs, leaving the enrollee responsible for the other 30 percent through cost sharing. *Id.* In a "gold" or "platinum" plan, the insurer will bear a greater portion of health care costs, while the insurer will be responsible for a lower portion in a "bronze" plan. *Id.*

After the CSR payments began, the House of Representatives sued the Secretaries of the Treasury and HHS in the United States District Court for the District of Columbia, alleging that the CSR payments violated Article I of the Constitution. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). In 2016, the district court ruled for the House and enjoined further payments "until a valid appropriation is in place," though it stayed its injunction pending appeal. *See U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 189 (D.D.C. 2016). In July 2016, the previous Administration appealed to the United States Court of Appeals for the District of Columbia Circuit. [3]

III. After The Administration Concludes That Congress Has Not Appropriated Funds For CSR Payments And Discontinues Those Payments, The States Sue

On October 11, 2017, in response to a request from the Departments of the Treasury and HHS for a legal opinion, the Attorney General concluded "that the best interpretation of the law is that the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, cannot be used to fund the CSR payments to insurers authorized by 42 U.S.C. § 18071." Attorney General Letter at 1 (Oct. 11, 2017). The next day, October 12, HHS sent a memorandum to CMS explaining that "CSR payments are prohibited unless and until a valid appropriation exists." Memorandum from Acting Sec'y of HHS Eric Hargan to Adm'r of CMS Seema Verma, Payments to Issuers for Cost-Sharing Reductions (CSRs), at 1 (Oct. 12, 2017). [4]

[3] The parties to the *U.S. House of Representatives* litigation have since reached a conditional settlement. *See* Joint Status Report, No. 16-5202 (D.C. Cir. Dec. 17, 2017); Joint Motion for Remand, No. 16-5202 (D.C. Cir. Jan. 19, 2018).

[4] The Attorney General's letter, and the subsequent memorandum from the Acting HHS Secretary are available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.

Shortly after the Government announced its decision to cease paying CSRs, seventeen states and the District of Columbia filed suit in district court seeking declaratory and injunctive relief to compel the United States to resume making CSR payments. On October 25, 2017, the court denied the states' motion for a preliminary injunction. *See California*, 267 F. Supp. 3d at 1140 (N.D. Cal. Oct. 25, 2017). The court held that while it would not decide the merits, for purposes of preliminary injunctive relief, the Government had the stronger argument that Congress had not appropriated funds for CSR payments, and that the states had not shown irreparable harm, because many insurers had devised workarounds for the termination of CSR payments, which actually increased health care coverage available to consumers. *See id*. at 1127-33.

Judge Chhabria explained that the structure of the ACA contemplates this result—allowing insurers to obtain equivalent or even greater payments from the Government by increasing the premiums charged for silver plans offered on exchanges. *Id*. at 1133-38. Those premium increases, in turn, cause the Government's tax credits to increase, and the increased tax credits will compensate insurers for the cost-sharing reductions they make on behalf of insureds. *See id*. at 1138.

Indeed, even before the cessation of CSR payments to issuers was announced in October 2017, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving insurers' 2018 premium rates. *See id.* at 1136. After the Government's announcement was made, even more states permitted insurers to rerate their 2018 premiums to account for the cessation of CSR payments. *Id*. As Judge Chhabria emphasized, "the widespread increase in silver plan premiums will qualify many people for higher tax credits," and "the increased federal expenditure for tax credits will be far more significant than the

decreased federal expenditure for CSR payments." *See id*. at 1139. Thus, Judge Chhabria found that insurers and consumers were not likely to be harmed by the cessation of CSR payments for 2018. *Id*. Indeed, no insurers or consumers joined the *California* lawsuit, which was filed by a coalition of states.

That litigation is still pending, and the district court has scheduled a hearing for July 12, 2018 on the parties' anticipated dispositive cross-motions.

IV. CSR Complaints In This Court

In November 2017, Common Ground amended its complaint to add a Tucker Act claim that the Government owes it CSR payments. Common Ground's amended complaint presents the first CSR claim filed in this Court.

Maine Community Health Options (Fed. Cl. 17-2057), Sanford Health Plan (Fed. Cl. No. 18-136), and Montana Health CO-OP (Fed. Cl. No. 18-143) have since filed Tucker Act suits in this Court, alleging that they are entitled to CSR payments from the Judgment Fund regardless of whether Congress appropriated funds for such payments. In addition, Local Initiative Health Authority (Fed. Cl. 17-1542) recently amended its risk corridors complaint to add CSR claims.

Common Ground has moved to certify a class of insurers it alleges are entitled to CSR payments. Common Ground's proposed "CSR Class" is defined as:

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2017 or 2018 benefit year, and who made cost-sharing reductions for eligible insureds pursuant to Section 1402 of the Patient Protection and Affordable Care Act, but did not receive a "timely and periodic" payment from the Government of an amount "equal to the value of the reductions" provided to its insureds. Excluded from the Class is

> the Defendant and its members, agencies, divisions, departments, and employees.

Motion for Class Certification at 2 (ECF No. 13).

ARGUMENT

I. Standard For Certifying A Class Action

RCFC 23 governs class actions in this Court. RCFC 23. The criteria set forth in Rule 23 subparts (a) and (b) can be grouped into five general categories: numerosity, commonality, typicality, adequacy, and superiority. *See Rasmuson v. United States*, 91 Fed. Cl. 204, 210 (2010). Specifically, under subpart (a), plaintiffs seeking to certify a class must establish four conditions: (1) "the class is so numerous that joinder of all members is impracticable;" (2) "there are questions of law or fact common to the class;" (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class;" and (4) "the representative parties will fairly and adequately protect the interests of the class." RCFC 23(a)(1)-(4).

Under subpart (b), plaintiffs must further establish that: (1) "the United States has acted or refused to act on grounds generally applicable to the class"; (2) "the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (3) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(2)-(3).

Plaintiffs bear the burden of establishing these criteria by a preponderance of the evidence and cannot rely on bare allegations to meet this burden. *Rasmuson*, 91 Fed. Cl. at 210. Failure to satisfy any of the requirements of Rule 23 "is fatal to class certification." *Filosa v. United States*, 70 Fed. Cl. 609, 615 (2006); *see also Bell v. United States*, 123 Fed. Cl. 390, 395 (2015) ("These requirements are conjunctive; the failure to satisfy any single requirement will

defeat class certification."); 7A Charles Alan Wright *et al.*, Federal Practice & Procedure § 1759 (April 2017 Update) ("The party who is invoking Rule 23 has the burden of showing that all of the prerequisites to utilizing the class-action procedure have been satisfied.").

Rule 23 requires the Court to engage in a rigorous analysis before certifying a class. *See Wal-Mart Stores, Inc.*, 564 U.S. at 350-51 ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.")[5]; *accord Comcast Corp*, 569 U.S. at 33. This rigorous analysis is necessary because "the class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Id*. (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To invoke this exception, the party seeking class certification "must affirmatively demonstrate his compliance" with Rule 23. *Id.* (citing *Wal–Mart*, 564 U.S. at 350-51).

II. Common Ground Has Not Demonstrated That A Class Action Is "Superior To Other Available Methods For Fairly And Efficiently Adjudicating The Controversy"

"The second prong of RCFC 23(b)(2) provides that a class action is properly maintained only after the court finds 'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" *Jaynes v. United States*, 69 Fed. Cl. 450, 459 (2006) (quoting RCFC 23(b)(2)). "In making this assessment, the court must consider what alternative procedures are available for disposing of the dispute and compare the possible alternatives to determine whether Rule 23 will be sufficiently effective to justify the class action approach." *Id*. (citing 7A Charles Alan Wright, *et. al*., Federal Practice and Procedure § 1779 (3d ed. 2005)).

[5] "Because the language of RCFC 23 and [Federal Rule of Civil Procedure 23] are practically identical, other federal cases applying [Federal Rule of Civil Procedure 23] are helpful in interpreting RCFC 23." *King v. United States*, 84 Fed. Cl. 120, 122 n.2 (2008).

Common Ground's motion to certify an opt-in CSR class action should be denied because it has not met its burden of proving that a class action is superior to other methods of adjudication available to the Court. *See id*. at 460 ("Plaintiff has not established that a class action would provide any discernible advantages over the available alternative methods of adjudication."). In particular, Common Ground has not shown that RCFC 42, which authorizes the Court to consolidate matters involving common issues, is a less effective mechanism for considering CSR claims. *See* RCFC 42.[6] To the extent the Court believes it prudent to jointly consider CSR claims brought by different insurers, Rule 42's consolidation procedures are superior to a class action because those procedures will allow the Court to consider the common issues shared by the plaintiffs, while also allowing the Court to assess whether the cessation of CSR payments operated to an individual plaintiff's detriment in a particular case. As Judge Chhabria noted, many insurers have been able to recoup CSR payments for 2018 by raising premiums to account for the non-payment of CSRs and those higher premium costs are then paid for by the Government through increased premium tax credits. *California*, 267 F. Supp. 3d at 1137-38.

Rule 42(a) provides that "if actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." RCFC 42(a). Additionally, Rule 42(b) authorizes the Court to order separate trials of separate issues and claims that arise in consolidated matters. *See* RCFC 42(b). Thus, Rule 42 permits the Court flexibility to address common issues arising in different cases, while maintaining the

[6] RCFC 40.2 also provides the Court mechanisms for coordinating proceedings in related cases.

ability to address the separate issues that arise in those individual cases. Such flexibility is particularly warranted given that Common Ground is the first plaintiff to bring a CSR claim against the United States and the case is in its infancy.

"The court has broad discretion to consolidate related actions." *Stroughter v. United States*, 89 Fed. Cl. 755, 760 (2009) (citing *Hornback v. United States*, No. 03–5108, 03–5111, 2004 WL 68511, at *4 (Fed. Cir. Jan.13, 2004) (unreported case); *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 32 (2004)). Consolidation can be ordered despite opposition by the parties. *Cienega Gardens*, 62 Fed. Cl. at 32 (citations omitted) (ordering consolidation for trial over objection by both parties). When considering the propriety of consolidation, "the court must weigh the interest of judicial economy against the potential for delay, confusion, and prejudice that may result from consolidation." *Id.* at 31. Moreover, "[w]here common questions of law or fact are involved and consolidation would avoid unnecessary costs, consolidation is encouraged." *Id*. at 32.

A core premise of this suit is that Congress's decision not to appropriate funding for CSR payments is legally irrelevant because, in Common Ground's view, the Government is still obligated to make those payments in the absence of an appropriation. *See, e.g.*, First Amended Complaint at para. 92 (describing common question of law as "whether the Government's failure to appropriate funds sufficient to make cost sharing reduction reimbursements to Plaintiff and the CSR Class absolves it of its statutory obligation."). As we recently stated in our request to stay the parallel Maine Community Health Options suit, a similar premise underlies the insurers' claims for risk corridors payments. *Maine Community Health Options v. United States* (Fed. Cl. 17-2057), Motion for Stay (ECF No. 7) (filed Feb. 6, 2018). Indeed, Common Ground's allegation regarding risk corridors payments parallels its allegation regarding CSR payments.

See First Amended Complaint at para 83 (describing common question of law as "whether the Government's failure to appropriate funds sufficient to make risk corridors payments to Plaintiff and the Risk Corridors Class absolves it of its statutory obligations"). If the Federal Circuit rejects the insurers' premise in the risk corridors appeals, its reasoning may foreclose the CSR claims as well. But assuming that the CSR claims survive the Federal Circuit's decision, they may present individualized questions not present in the risk corridors context, because many insurers will not have been injured because their CSR liabilities will have been offset by premiums that were raised in connection with the cessation of CSR payments, resulting in increased premium tax credit payments from the government. *See California*, 267 F. Supp. 3d at 1133-38, 1139 ("the widespread increase in silver plan premiums will qualify many people for higher tax credits, and . . . the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments."). The class action mechanism would make adjudicating these individualized questions impracticable. Common Ground has thus failed to carry its burden to demonstrate to the Court that, given the potential need to adjudicate individual issues relating to each insurer claiming an entitlement to CSR payments, a class action is superior to other mechanisms at the Court's disposal for considering cases presenting some common legal and factual issues. *See Brown*, 128 Fed Cl. at 588. This failure is fatal to its request for class certification as it relates to CSR claims.[7]

[7] It is also worth noting that insurers' ability to effectively recoup 2018 CSR payments from the Government, through the receipt of higher premium tax credits, raises a practical question as to how many putative class members will be inclined to join a class action.

III. Alternatively, The Court Should Defer A Ruling On Class-Certification

In the alternative, we respectfully request that the Court defer ruling on the certification of the proposed CSR class until there is further clarity regarding the legal and factual issues raised by Common Ground's CSR claims. *See Gross v. United States*, 106 Fed. Cl. 369, 384 (2012) ("Given the uncertainties regarding how this case will proceed upon resolution of the threshold legal issue, it is not possible to determine at this time whether a class action is the superior means of resolving the claims of plaintiff."). For instance, the guidance provided by the Federal Circuit in *Land of Lincoln* and/or *Moda* may go far toward resolving the common legal question as to whether an insurer can recover CSR payments absent an appropriation by Congress. Additionally, the Administrative Procedure Act challenge being litigated in the *California* lawsuit might provide persuasive guidance regarding the availability of appropriations for CSR payments, or the lack thereof, and might assist the Court in resolving questions as to how the statutory scheme is intended to apply given the unique interplay between CSRs and tax credits. In the meantime, insurers that are interested in joining Common Ground's case can file a notice of indirectly related case pursuant to RCFC 40.2(b) along with their complaint, at which point "the judge in the earliest-filed case will call a meeting of all of the assigned judges to determine what action, if any, is appropriate." RCFC 40.2(b)(4).

CONCLUSION

For these reasons, we respectfully request that the Court deny Common Ground's motion for class certification of the proposed CSR class.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ MARC S. SACKS
MARC S. SACKS
FRANCES M. MCLAUGHLIN
TERRANCE A. MEBANE
L. MISHA PREHEIM
United States Department of Justice
Civil Division, Commercial Litigation Branch Telephone: (202) 307-1104
Facsimile: (202) 514-9163
marcus.s.sacks@usdoj.gov

Attorneys for the United States of America

OF COUNSEL:

CLAUDIA BURKE
CHRISTOPHER J. CARNEY
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA

February 20, 2018