IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH ALLIANCE MEDICAL PLANS, INC., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-334C Judge Campbell-Smith

PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS

Pursuant to the Court's June 28, 2018 Order and RCFC 56(c), Plaintiff hereby submits this Statement of Uncontroverted Facts. The following facts are sufficient to establish: 1) this Court's jurisdiction over Plaintiff's lawsuit; and 2) Plaintiff is entitled to judgment as a matter of law.

I. The Affordable Care Act Established a Cost-Sharing Reduction Program with Advance Payment Obligations

1. The Affordable Care Act imposed certain obligations on the federal government to help incentivize the participation of private insurers, stabilize premiums, and induce the uninsured to purchase health insurance coverage. Relevant to this dispute, the ACA established a cost-sharing reduction subsidy, paid preemptively to certain qualified insurers, to facilitate the core statutory mission of providing affordable health care to low- and moderate-income Americans.

2. Section 1402 of the Affordable Care Act, as codified at 42 U.S.C. § 18071, created the CSR program. In relevant part, that Section states:

> (a) IN GENERAL.—In the case of an eligible insured enrolled in a qualified health plan—

> (1) the Secretary shall notify the issuer of the plan of such eligibility; and
>
> (2) the issuer ***shall reduce*** the cost-sharing under the plan at the level and in the manner specified in subsection (c).
>
> [. . .]
>
> (c)(3) Methods for Reducing Cost-Sharing
>
> (A) In general. An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and *the Secretary* ***shall make*** *periodic and timely payments to the issuer equal to the value of the reductions.*

See 42 U.S.C. § 18071(emphases added).

3. HHS implemented the CSR payments in the Code of Federal Regulations at 45 C.F.R. § 156.430. In relevant part, Section 156.430 states that "[a] QHP issuer ***will receive periodic advance payments*** based on the advance payment amounts calculated in accordance with § 155.1030(b)(3) of this subchapter." (emphasis added). Section 155.1030(b)(3) and other regulations set forth the calculation methodologies applicable to CSR payments.

4. Following the ACA's implementation, the Government established a CSR reimbursement schedule under which the Government would provide the required periodic advance payments to QHP issuers. *See* 42 U.S.C. § 18082; 45 C.F.R. § 156.430(b)-(d). The reimbursements are then periodically reconciled to the actual amount of cost-sharing reductions made to enrollees and providers. 45 C.F.R. § 156.430(c). Specifically, CMS established "a payment approach under which HHS would make monthly advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts."[1] "After the close of the benefit

[1] CMS, HHS Notice of Benefit and Payment Parameters for 2014 (Mar. 11, 2013), at 7, *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/payment-notice-technical-summary-3-11-2013.pdf.

year, QHP issuers must submit to HHS information on the actual value of the cost-sharing reductions provided" and HHS "would then reconcile the advance payments and the actual cost-sharing reduction amounts."[2] Finally, the Government would reimburse the QHP issuer "any amounts necessary to reflect the CSR provided or, as appropriate, the issuer [would] be charged for excess amounts paid to it."[3]

II. QHP Issuers Participated on Exchanges and Set Prices in Reliance on the Cost-Sharing Reduction Payments

5. For QHP issuers to participate on the marketplaces for the 2017 benefit year, they had to submit their premiums to the appropriate state or federal regulatory authority during May 2016 and submit a signed Qualified Health Plan Issuer Agreement ("QHPIA") to CMS by the end of September 2016.[4] Health Alliance timely submitted a signed QHPIA, and by doing so committed itself to offering health insurance coverage on the exchange for benefit year 2017. Because the QHPIA has limited termination rights, and because terminating the QHPIA under any circumstance does not obviate the issuer's obligations under state law to continue coverage for enrollees who purchased the plan, Health Alliance's commitment to the 2017 marketplace was effectively irrevocable as of the end of September 2016.[5]

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[2] *Id.*

[3] CMS, Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015 (Mar. 16, 2016), at 28, *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf; *see also* 45 C.F.R. 156.430(e).

[4] CMS, Key Dates for Calendar Year 2016: QHP Certification in the Federally-facilitated Marketplaces; Rate Review; Risk Adjustment and Reinsurance (Dec. 23, 2015), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Final-2016-key-dates-table-April-2016.pdf.

[5] *See* 45 C.F.R. § 147.106(b).

6. Health Alliance committed itself to participating in the marketplace in 2017 with the express understanding—based on the plain text of Section 1402 and the Government's actions in previous benefit years—that, for those plans that required the issuers to reduce cost-sharing obligations of the enrollee, the Government would honor the statutory mandate, *i.e.*, "***the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions***." And in fact, in accordance with that understanding, the Government made monthly advance payments from January 2014 up and until October 2017. It was not until October 12, 2017—over a year after Health Alliance had committed itself irrevocably to the 2017 exchange—that the Government first announced that it would not make CSR payments for the remainder of the 2017 benefit year.

III. Appropriations for Cost-Sharing Reduction Reimbursements

7. Section 1401 of the ACA added a new section to the Internal Revenue Code that provided eligible insureds with premium tax credits to cover their health insurance premiums. 26 U.S.C. § 36B. The ACA also amended 31 U.S.C. § 1324, which establishes a permanent appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law," including "refunds due from" specified provisions of the tax code. 31 U.S.C. § 1324. Specifically, Section 1401 of the ACA amended the list in Section 1324 to include "refunds due from" Section 36B. 26 U.S.C. § 36B. Until October 2017, the Government relied on the appropriation in Section 1324 to pay amounts owed under both Sections 1401 and 1402.

8. In its April 2013 budget request to Congress for fiscal year 2014, the Office of Management and Budget ("OMB") included a request for a line-item appropriation designating funds for the payment of cost-sharing reductions. *See* Fiscal Year 2014 Budget of the United States Government, Appendix at 448 (Apr. 10, 2013). The same day, HHS separately submitted

its justification to Congressional Appropriations committees stating that "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014." *See* HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees at 184 (Apr. 10, 2013).

9. Congress did not provide the line-item appropriation requested by HHS. *See* S. Rep. No. 113-71, 113th Cong. at 123 (July 11, 2013). Congress never repealed or amended the CSR provision, however, and the October 2013 legislation references the existence of CSR reimbursements. *See* Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a), 127 Stat. 558, 566 (Oct. 17, 2013) (requiring HHS to certify that a program was in place to verify that applicants were eligible for "premium tax credits . . . and reductions in cost-sharing" before "making such credits and reductions available").

10. In January 2014, HHS began making monthly advance payments to reimburse QHP issuers for cost-sharing reductions,[6] relying on Section 1324 as the appropriation for these payments.[7]

IV. Legal Challenge By House of Representatives

11. On November 21, 2014, the U.S. House of Representatives (the "House") filed a complaint against HHS and the Treasury, in which it sought an injunction preventing the

[6] *See* CMS, Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015 (Mar. 16, 2016), at 27 ("Payments to issuers of estimated monthly amounts began in January 2014."), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf.

[7] *See* Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, at Responses p. 4 (May 21, 2014), ("cost-sharing subsidy payments are being made through the advance payments program and will be paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid"), *available at* http://www.cruz.senate.gov/files/documents/Letters/20140521_Burwell_Response.pdf.

executive branch from "making any further Section 1402 Offset Program payments to Insurers unless and until a law appropriating funds for such payments is enacted." *See* Compl. ¶ 27, *House v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. 1 (D.D.C. filed Nov. 21, 2014). In its complaint, the House argued that "Congress has not, and never has, appropriated any funds (whether through temporary appropriations or permanent appropriations) to make any Section 1402 Offset Program payments to Insurers." *Id.* ¶ 28. The Government moved for summary judgment, asserting that 31 U.S.C. § 1324 provided a permanent appropriation for both Section 1401 premium tax credits and Section 1402 CSR reimbursements. *See* Defs.' Mem. ISO Mot. for Summ. J., *House v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. 55-1 (D.D.C. Dec. 2, 2015) at 11.[8] The district court ruled in favor of the House and entered an injunction preventing any further reimbursements under Section 1402, but stayed the injunction pending resolution of any appeal. *House v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016).

12. The Government appealed the ruling to the D.C. Circuit. In November 2016, the House asked the Court of Appeals to hold the case in abeyance to "provide the President-Elect and his future Administration time to consider whether to continue prosecuting or to otherwise resolve this appeal." Appellee's Mot. to Hold Briefing in Abeyance, *House v. Burwell*, Case No. 16-5202, Dkt. No. 1647228 (D.C. Cir. Nov. 21, 2016) at 1-2. The D.C. Circuit granted the request and the appeal remained in abeyance until Friday, December 15, 2017, when the

[8] In its summary judgment briefing papers, the Government expressly acknowledged that the ACA "requires the government to pay cost-sharing reductions to issuers" and that "[t]he absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation." Defs.' Mem. ISO Mot. for Summ. J., *House v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. 55-1 (D.D.C. Dec. 2, 2015) at 20. Moreover, the Government acknowledged that prevailing insurers "can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund . . . . The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund." *Id*.

parties announced that they had reached a settlement providing for the parties to request that district court's decision case to be vacated. On May 16, 2018, the D.C. Circuit granted the motion for remand to vacate the Court's injunction on HHS's CSR payments. On May 16, 2018, the D.C. Circuit granted the motion for remand to vacate the district court's injunction on HHS's CSR payments, and the district court accordingly vacated its ruling two days later.

V. The Government's Newly Announced Refusal to Reimburse CSRs

13. Although the Government continued to make CSR reimbursements for most of 2017, it decided in October 2017 to stop doing so, arguing that 31 U.S.C. § 1324 could not be used to fund CSR reimbursements. The Department of Justice concluded that Section 1401 premium tax credits and Section 1402 CSR reimbursements were two distinct programs, and the permanent appropriation in Section 1324 only provided funding for the Section 1401 premium tax credits. *See* Oct. 11, 2017 Ltr. from Att. Gen. Sessions to Secretary of Treasury and Acting Secretary of HHS. The next day, HHS announced that it would stop making CSR reimbursements "until a valid appropriation exists." Oct. 12, 2017 Mem. from E. Hargan to S. Verma re Payments to Issuers for Cost-Sharing Reductions (CSRs).

VI. Plaintiff Has Suffered Substantial Harm as a Result of The Government's Refusal to Pay Amounts Owed

14. QHP issuers are required by state and federal regulations to set their ACA-related health insurance rates well before the year they become effective. These unreimbursed costs are enormous. The Congressional Budget Office ("CBO") estimates that CSR reimbursements to QHP issuers will be $7 billion in fiscal year 2017, $10 billion in 2018, and rise to $16 billion by 2027.[9] An April 2017 study analyzing the potential effect of ending CSR reimbursements

[9] *See* CBO, Federal Subsidies Under the Affordable Care Act for Health Insurance Coverage Related to the Expansion of Medicaid and Nongroup Health Insurance: Tables from CBO's
(Continued...)

predicted that "[m]any insurers might react to the end of subsidy payments by exiting the ACA marketplaces. If insurers choose to remain in the marketplaces, they would need to raise premiums to offset the loss of the payments."[10]

15. As an October 13, 2017 joint statement from America's Health Insurance Plans and Blue Cross and Blue Shield Association noted, the decision to end CSR reimbursements has "real consequences," including that "[c]osts will go up and choices will be restricted."[11] These effects are currently playing out in every major ACA exchange across the country.

16. Health Alliance is not immune to these harms, and in fact has already suffered, and will continue to suffer, their effects. Like other QHP issuers, Health Alliance was owed monthly CSR reimbursements in October 2017, November 2017, and December 2017 that have not been paid. Pursuant to the calculation methodologies in Section 155.1030(b)(3) and other applicable regulations, Health Alliance estimates that it is owed $4,823,755.49[12] in unpaid CSR reimbursements for 2017. Like other QHP issuers, Health Alliance is still required by law to provide cost-sharing reductions to eligible insureds, despite not receiving the mandated reimbursement from the Government. This has caused Health Alliance and other QHP issuers to suffer large financial losses. It also leads to instability in the insurance markets and hinders

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January 2017 Baseline at 4, *available at* https://www.cbo.gov/sites/default/files/recurringdata/51298-2017-01-healthinsurance.pdf.

[10] Larry Levitt, Cynthia Cox, and Gary Claxton, *The Effects of Ending the Affordable Care Act's Cost-Sharing Reduction Payments*, Kaiser Family Foundation, Apr. 25, 2017, *available at* https://www.kff.org/health-reform/issue-brief/the-effects-of-ending-the-affordable-care-acts-cost-sharing-reduction-payments/.

[11] Kristine Grow, *Health Plans Issue Joint Statement Regarding Funding for Cost-Sharing Reduction Benefits for Millions of Americans*, American Health Insurance Plans (AHIP), Oct. 13, 2017, *available at* https://www.ahip.org/joint-statement-regarding-funding-for-crs/.

[12] $1,624,785.72 for October 2017; $1,609,670.68 for November 2017; and $1,589,299.09 for December 2017.

Health Alliance's and other QHP issuers' ability to design and price plans effectively for the ACA exchanges.

Dated: July 13, 2018

Respectfully submitted,

/s/ Stephen McBrady
Stephen McBrady
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
SMcBrady@crowell.com

Counsel for Health Alliance Medical Plans, Inc.

OF COUNSEL:
James Regan
Daniel Wolff
Monica Sterling
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500

CERTIFICATE OF SERVICE

I certify that on July 13, 2018, a copy of the forgoing Statement of Uncontroverted Facts was filed electronically using the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant's Counsel via the Court's ECF system.

/s/ Stephen McBrady
Stephen McBrady, Esq.
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
SMcBrady@crowell.com