IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of its cross-motion to dismiss. Because plaintiff's complaint fails to state a claim upon which relief can be granted, it should be dismissed.

INTRODUCTION

Plaintiff's entire response to our motion to dismiss rests on the mistaken premise that whether or not Congress decides to appropriate funds for a statutory program that includes a payment directive, the Government must pay. In other words, in plaintiff's view, congressional appropriations decisions are irrelevant to how the Government's funds are expended. Not only does such a notion defy the Constitution—in particular the Appropriations Clause (U.S. Const. art. I, § 9, cl. 7.)—it defies common sense.

Plaintiff argues that it should recover in damages the precise amount of cost-sharing reduction (CSR) payments that Congress declined to appropriate. But, congressional intent controls plaintiff's entitlement to CSR payments. Congress already signaled its intent in the Affordable Care Act (ACA) by appropriating permanent funding for Section 1401 (Premium Tax Credits) while leaving its companion provision, Section 1402 (Cost-Sharing Reductions) to the

annual appropriations process. Congress did not fund CSRs when it enacted the ACA and it has not funded CSRs since then. And Congress did not authorize an ACA damages remedy so issuers could recover in Court the precise CSR payments for which Congress declined to appropriate funds. Because plaintiff's claim would circumvent Congress's intent to not fund CSR payments, the Court should grant the United States' cross-motion to dismiss.

ARGUMENT

I. Plaintiff Fails To Demonstrate That Congress Intended To Make CSR Payments In The Absence Of An Appropriation

A. Congress Controls Whether Funding Is Available Under A Statute

Plaintiff claims entitlement to CSR payments, notwithstanding the lack of an appropriation from which the Executive Branch can make such payments, based on the Federal Circuit's decision in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018). *See* Pl. Resp. at 2-3, 7-12. In *Moda*, the Federal Circuit ruled that Congress's decision to restrict funding to make risk-corridors payments under the ACA limited the United States' obligation to make such payments to those funds that were collected from insurers. 892 F.3d at 1328-29. As we explained in our motion to dismiss, plaintiff's reliance on *Moda* is misplaced because the Federal Circuit recognized that congressional intent is dispositive, and the Court ultimately gave effect to subsequent appropriations legislation that reflected Congress's intent to have the risk-corridors program operate in a budget neutral manner. *See* Gov't Mot. at 14-17.

Plaintiff relies heavily upon language in *Moda* in which the Court stated that an "unambiguously mandatory" statutory provision that the United States "shall pay" money, standing alone, creates "an obligation of the government to pay participants." *Moda*, 892 at 1320, 1322 (quoted in Plaintiff's Reply at 7-8). However, these statements by the Federal Circuit do not control the question of whether a party with such a claim is entitled to an

enforceable judgment against the United States. As we explain below, read in whole, *Moda* itself recognizes the fundamental limitations on the award of damages against the United States.

First, the Court in *Moda* did not enter judgment against the United States and no Federal Circuit case in similar circumstances has done so. Second, the authority upon which *Moda*—and in turn plaintiff—relies regarding the absence of an appropriation, *U.S. v. Langston*, 118 U.S. 389, 393-94 (1886), did not hold that a command to pay, standing alone, creates an obligation that the United States had to pay. Payment in *Langston* could not occur absent Congress' exercise of its power under the Appropriations Clause. *See* Act of August 4, 1886, 24 Stat. 256, 281-82 (1886) (Authorizing payment to Langston following Supreme Court's decision). Indeed, the Supreme Court has never disregarded Congress' constitutional power pursuant to the Appropriations Clause or ignored its intent with regards to funding decisions.

In *Langston*, after reviewing all of Congress' legislation related to the question of what salary Congress intended to pay the then-ambassador to Haiti, the Supreme Court held that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law." 118 U.S. at 394. *Moda* itself affirms that "[t]he jurisprudence in the century and a half since *Langston* has cemented that decision's place as an extreme example of a mere failure to appropriate." *Moda*, 892 F.3d at 1323. Thus, plaintiff's reliance on *Langston*, and other 19th century cases, for its assertion that "the Government's position runs up against more than a century of precedent establishing that the absence of an appropriation does not negate the

Government's underlying obligation to make payment" (Pl. Resp. at 7), is particularly unfounded.

Indeed, prior to and since *Langston* the Supreme Court has consistently recognized the importance of Congress's funding choices and given effect to appropriations limitations in determining that there was no substantive grounds for liability on the part of the Government. In *United States v. Mitchell*, 109 U.S. 146, 149-50 (1883), for example, the Supreme Court concluded that, by appropriating salaries at the rate of $300 per year for five consecutive years instead of the $400 provided in permanent legislation, Congress "reveal[ed] a change in the policy" with the "purpose" "to suspend the law fixing the salaries . . . at $400 per annum." The Court in *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), held that Congress's repeated restriction on the use of appropriated funds to pay reenlistment bonuses, notwithstanding permanent legislation providing for such bonuses, evinced an intent to suspend payment of them. And, in *Will v. United States*, 449 U.S. 200, 222-24 (1980), which involved four differently-phrased appropriations restrictions in four different years, the Supreme Court had no trouble concluding that each restriction expressed the same congressional intent not to raise judicial pay.

Likewise, the Federal Circuit has consistently drawn a connection between Congress's appropriations choices and substantive liability—contrary to plaintiff's contention that payment obligations and appropriations are "separate question[s]." Pl. Resp. at 6. Indeed, in *Moda* the Federal Circuit gave effect to Congress's decision to restrict the appropriations from which risk-corridors payments could be made and held that the Government was not substantively liable for risk-corridors payments beyond those amounts paid into the program by issuers. *See* 892 F.3d at 1323, 1327. The Court observed, "what else could Congress have intended? It clearly did not intend to consign risk corridors payments 'to the fiscal limbo of an account due but not

payable.'" *Id*. at 1325 (quoting *Will*, 449 U.S. at 224); *see also Prairie Cty., Mont. v. United States*, 782 F.3d 685, 686 (Fed. Cir. 2015) (limiting liability under "shall pay" statute to amounts appropriated by Congress); *Greenlee County, Ariz. v. United States*, 487 F.3d 871, 877-80 (Fed. Cir. 2007) (same); *Star-Glo Associates, L.P., v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (concluding that Congress intended to restrict payments due under "shall pay" statute to amounts appropriated); *Highland Falls-Fort Montgomery School Dist. v. United States*, 48 F.3d 1166, 1171-72 (Fed. Cir. 1995) (holding that Congressional earmarks limited Government's liability to amounts appropriated under a "shall pay" statute).

In *OPM v. Richmond*, the Supreme Court explained that by reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." 496 U.S. 414, 427-28 (1990). And the Court further explained that "[i]t follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." *Id*. at 424.

The Supreme Court reaffirmed the significance of the Appropriation Clause limitation in *Salazar v, Ramah Navajo*, 567 U.S. 182, 198 n. 9 (2012). There, the Court explained:

> In *Richmond*, we held that the Appropriations Clause does not permit plaintiffs to recover money for Government-caused injuries for which Congress "appropriated no money.". . . . *Richmond*, however, indicated that the Appropriations Clause is no bar to recovery in a case like this one, in which "the express terms of a specific statute" establish "a substantive right to compensation" from the Judgment Fund.[1]

[1] The statute at issue in *Ramah Navajo*—unlike the one here—provided expressly that claimants denied payment could bring claims for money damages under the Contract Disputes Act, thereby explicitly identifying the Judgment Fund as source of payment.

Id. (quoting *Richmond*, 496 U.S. at 424, 432).

No term of the Affordable Care Act expressly provides a "substantive right to compensation" from the Judgment Fund and Congress made no appropriation for CSR payments. In these circumstances, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272 (1851)). Accordingly, the Court should reject plaintiff's argument that "the existence of a statutory payment obligation under Section 1402 is a separate question from the question of whether an appropriation has been made." Pl. Resp. at 6.

B. Section 1402 Reflects No Congressional Intent To Make CSR Payments In The Absence Of An Appropriation

Plaintiff appears to acknowledge that congressional intent controls whether the ACA requires the United States to make CSR payments. *See e.g.*, Pl. Resp. at 10-13. However, plaintiff labors under the misimpression that Congress only signals its intent through a *subsequent* repeal or modification of an existing, substantive law. *See id.* at 10-11 (citing *Moda*, 892 F.3d at 1322-23). As we demonstrated in our moving brief, no subsequent repeal or modification is necessary given that the ACA's structure already reflects Congress's intent. The relevant ACA subpart—Title 1, subtitle E, part I, subpart A (Premium Tax Credits and Cost-Sharing Reductions)— contains two sections: Section 1401 (Premium Tax Credits) and Section 1402 (Cost-Sharing Reductions). Section 1401 amended the tax code to provide a permanent appropriation to fund Section 1401. *See* 26 U.S.C. § 36B. In contrast, Congress provided no permanent appropriation to fund Section 1402, leaving CSR funding to the annual appropriations process. This structural difference is dispositive because "[when Congress includes particular

language in one section of a statute but omits it in another[,] . . . th[e] Court presumes that Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (citations omitted). Yet, plaintiff never addresses this statutory construction canon in its response and instead unconvincingly rationalizes why Congress chose to fund Section 1401, but not Section 1402. *See* Pl. Resp. at 12-13.

Moreover, plaintiff's reliance on *Moda* to suggest that Congress could only have indicated its intent to not fund CSR payments through "*subsequent* legislation in the form of appropriations riders," is misplaced. Pl. Resp. at 9 (citing *Moda*, 892 F.3d at 1322-23 (emphasis in original). Whether Congress reflects its intent through restrictions in subsequent appropriations, as in *Moda*, or through the structure of the statute itself, as in this case, that congressional intent is still controlling. Of course, courts routinely look to the substantive statute at issue—not just subsequent enactments—to determine congressional intent. *See, e.g.*, *Consol. Edison Co. of N.Y. v. O'Leary*, 117 F.3d 538, 543-44 (Fed. Cir. 1997) (examining substantive statute to determine whether congress intended to provide a private remedy); *see also Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004) (same).

In this case, the ACA itself reflects Congress's intent to permanently fund Section 1401 (Premium Tax Credits) while leaving Section 1402 (Cost-Sharing Reductions) funding to future Congresses. And because Congress elected not to appropriate funds for CSR payments either in the ACA itself or in subsequent appropriations legislation, plaintiff cannot establish as a matter of law its entitlement to CSR payments in the absence of such appropriations.

C. The ACA's Structure Permits Issuers To Account For The Absence Of CSR Payments Through Premium Increases, And Plaintiff's Arguments To The Contrary Are Unavailing

In our motion we also explained how the ACA's structure permits issuers to raise premiums to account for a lack of CSR appropriations, and thus it is implausible to conclude that Congress intended issuers to recover through litigation the amounts Congress deliberately chose not to appropriate, while also potentially recouping CSR costs through higher premiums and advanced payment of premium tax credits. Gov't Mot. at 6-7, 20. Given issuers' ability to offset CSR expenses by raising premiums, it is not credible to conclude that Congress also intended to grant issuers a damages remedy. It defies common sense to conclude Congress intended to provide a potential double payment of amounts that it never appropriated in the first place.

In response, plaintiff argues that there is no indication Congress "ever actually conceived, considered, or 'intended' such a possible mechanism." Pl. Resp. at 13-14. Yet, there is likewise no indication that Congress ever conceived that its decision not to fund CSRs would result in dollar for dollar funding of CSRs through litigation in this Court. The "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). There is simply no basis to conclude that Congress intended to provide a damages cause of action for issuers whose inability to receive CSR payments flows from Congress's own decision not to fund such payments.[2]

Moreover, in debating whether Congress anticipated the workaround that issuers developed to recoup CSR costs, plaintiff does not dispute that such a mechanism exists. Instead,

[2] Furthermore, state health insurance regulations generally require state regulators to review insurance premiums to ensure that premiums are set high enough to cover costs and ensure solvency. Thus, there is no reason to suggest that Congress would not have been aware of the potential actuarial consequences of not funding CSR payments directly.

plaintiff argues that it was not able to make use of that mechanism in the fourth quarter of 2017. *See* Pl. Resp. at 15. In so doing, plaintiff misconstrues our structural argument. As discussed above, the controlling question is whether Congress intended to give issuers a damages cause of action that it did not explicitly provide. *See Bowen*, 487 U.S. at 905 n.42. Whether plaintiff was able to adjust its premiums for that particular time period sheds no light on whether *Congress* intended to give issuers a damages remedy. For the reasons discussed above, the structure of the ACA demonstrates no such intention on the part of Congress.

II. Plaintiff's Implied-In-Fact Contract Claim Fails Because The ACA Reflects No Intent To Bind In Contract The United States And Plaintiff

In our motion to dismiss, we demonstrated that congressional intent controls whether a statute vests a private party with contract rights against the United States. *See* Gov't Mot. at 22-24. Given the "well-established presumption" that the Government does not intend to form a contract through legislation or regulation, *see Moda*, 892 F.3d at 1330, absent statutory or regulatory language identifying both (1) a contract and (2) "the contours of any contractual obligation," courts routinely reject allegations that a statutory and regulatory scheme comprises an implied contract between the United States and private party. *Brooks v. Dunlop, Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012).

Recognizing that *Moda* forecloses plaintiff's implied contract claim, plaintiff attempts to distinguish the implied contract claim at issue in *Moda* from its claim here by focusing on the Government's "conduct" as it relates to CSRs. *See* Pl. Resp. at 19-20. Yet, the only conduct to which plaintiff points is that the Government made CSR payments in accordance with Section 1402, before concluding that no valid appropriation existed for such payments. Plaintiff's argument that the Government entered into an implied-in-fact contract by making Section 1402 payments, because such payments are contractual in nature, simply begs the question.

Plaintiff next argues that the QHP Agreements entered into by plaintiff and other ACA issuers do not constitute express contracts that would preclude finding an implied-in-fact contract covering CSR payments. *See* Pl. Resp. at 20-22. Yet, the Government never asserted that it entered into an express contract with issuers governing the payment of CSRs, precisely because the CSR program is statutory—not contractual—in nature. Instead, we were responding to the argument in plaintiff's opening brief that the QHP Agreements somehow created a contract for the payment of CSRs and that "the parties' offer and acceptance were unambiguously evidenced by entering into the [QHP Agreements], which included the cost-sharing requirement." *See* Plaintiff's Motion for Summary Judgment at 21-23 ("The QHP certification process, along with the ultimate [QHP Agreement], evidences the mutual intent of Health Alliance and CMS to enter into a bilateral implied-in-fact agreement, where the parties would perform their respective obligations pursuant to Section 1402 of the ACA.").

Now, plaintiff instead claims that the QHP Agreements "do not contain any essential contract terms regarding payment, delivery, quantity, or performance. While they purport to be agreements, they do not contain any indicia of the Government's reciprocal obligations or consideration." Pl. Resp. at 20. The Government agrees with plaintiff that the QHP Agreements do not establish a contract for the payment of CSRs. However, for all the reasons explained in our motion to dismiss, the express QHP Agreements—which covered narrow topics such as data transmission and security requirements—cannot form the basis of an implied-in-fact contract obligating the Government to make CSR payments. *See* Gov't Mot. at 25-26

CONCLUSION

For the foregoing reasons and those contained in our opening brief, we respectfully request that the Court grant the United States' cross-motion to dismiss the complaint.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

OF COUNSEL:

CHRISTOPHER J. CARNEY
Senior Litigation Counsel

ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
Civil Division
U.S. Department of Justice

October 26, 2018

s/ALBERT S. IAROSSI
ALBERT S. IAROSSI
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-3755
Facsimile: (202) 305-7644
Email: Albert.S.Iarossi@usdoj.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 26th day of October, 2018, a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS" was filed electronically. Service upon plaintiff's counsel was thus effected by operation of the Court's CM/ECF system.

s/Albert S. Iarossi
ALBERT S. IAROSSI