Receipt number 9998-5049226

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GUIDEWELL MUTUAL HOLDING CORPORATION, BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., FLORIDA HEALTH CARE PLAN, INC., AND HEALTH OPTIONS, INC. Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-1791 C **COMPLAINT**

GuideWell Mutual Holding Corporation ("GuideWell") and its three operating subsidiaries (collectively, "Plaintiffs") bring this action against the United States ("Defendant" or "Government") seeking damages for its: (1) failure to make payments due and owing for benefit years 2015, 2016, and 2017 as required by Section 1402 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18071, which requires insurers to provide reductions in costs for certain health insurance sold and requires the Government to reimburse the insurer for those reductions; and (2) breach of its payment obligations under implied-in-fact contracts requiring such payments to be made. In support of this action, Plaintiffs state and allege as follows:

NATURE OF ACTION

1. Plaintiffs seek payment of statutorily mandated reimbursements under Section 1402 that the Government failed to pay for the 2015, 2016, and 2017 benefit years.

2. In March 2010, Congress enacted the Patient Protection and Affordable Care Act[1] and the Health Care and Education Reconciliation Act[2] (collectively, the "Act" or "ACA"). That Act implemented a series of requirements affecting the private health insurance industry.

3. Among other things, the Act provided for the establishment of state-run health insurance exchanges or, in the absence of a state-run exchange, an exchange run by the federal government (commonly known as "Healthcare.gov"). These exchanges are online marketplaces where individuals and small employer groups may purchase health insurance.

4. Individuals and small employer groups in the state of Florida must access the federally-run exchange through HealthCare.gov to purchase and enroll in on-exchange health insurance products.

5. Health insurance issuers selling insurance on the exchanges are required to offer qualified health plans in the individual and small group markets. A qualified health plan ("QHP") is a health plan that meets certain standards established by the Centers for Medicare & Medicaid Services ("CMS") in order to be sold to consumers through the exchanges.

6. The Act classifies each plan offered on the exchanges into one of four "metal" levels—silver, gold, platinum, and bronze—based on the actuarial value of the plan. 45 C.F.R. § 156.140. The actuarial value of a plan is determined by "cost sharing," *i.e.*, the share of health costs covered, on average, by the plan, taking into account the plan's deductibles, copayments, coinsurance, and out-of-pocket maximums in a given benefit year.[3] 45 C.F.R. § 156.135; *see also* CBO, *Key Issues in Analyzing Major Health Insurance Proposals* at 15-17 (Dec. 2008), *available at* www.cbo.gov/publication/41746.

[1] Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010).
[2] Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010).
[3] A "benefit year" is "a calendar year for which a health plan provides coverage for health benefits." 45 C.F.R. § 155.20.

7. A "silver" plan is a plan structured such that the insurer pays approximately 70% of the average enrollee's health care costs, and the enrollee is responsible for the remaining 30%. 42 U.S.C. § 18022(d).

8. Section 1402 of the Act requires insurers to provide cost-sharing reductions—CSRs—to individuals enrolled in a silver plan whose household income is below 250% of the federal poverty level. 42 U.S.C. §§ 18071(c)(2), (f)(2).

9. The Act then requires that the Secretaries of Health and Human Services ("HHS") and the Treasury "***shall make*** periodic and timely payments to the [QHP] issuer equal to the value of the [CSR] reductions." 42 U.S.C. § 18071 (emphasis added). These statutorily mandated payments are made directly to health insurance issuers as reimbursement for the reductions they will provide or have provided. *Id.* § 18082(a)(3).

10. Section 1324 of the Act establishes a permanent appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law."

11. In October 2017—after making the mandated CSR payments for a period of 45 months dating back to the inception of the Act—Government determined that Section 1324 appropriation could not be used for CSR payments after all and identified no alternative appropriation from which to fulfill its statutory obligation. Without a source of funds from which to make the required CSR payments, HHS could not make the required payments. Thus, in an October 12, 2017 memorandum, HHS Acting Secretary Eric Hargan stated that "CSR payments to issuers must stop, effective immediately."[4] As a result, Plaintiffs were not paid mandated CSR reimbursements that were due and owing for the 2015, 2016, and 2017 benefit years.

[4] Oct. 12, 2017 Mem. from E. Hargan to S. Verma re Payments to Issuers for Cost-Sharing Reductions (CSRs), *available at* https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.

12. The Government's failure to pay the required CSR reimbursements, after requiring insurers to provide cost-sharing reductions, denies insurers reimbursements for benefit years 2015, 2016, and 2017 they are statutorily required to be paid. Regardless of whether Congress appropriated sufficient funds to HHS to make the CSR payments, the Government was statutorily obliged to make such payments after requiring the insurers to provide the reductions.

13. By this lawsuit, Plaintiffs seek full payment of the CSR reimbursements that the Government currently owes for the 2015, 2016, and 2017 benefit years. The law is clear, and the Government must abide by its statutory obligations. Plaintiffs respectfully ask the Court to compel the Government to do so.

JURISDICTION

14. This Court has jurisdiction over the subject matter of this action pursuant to the Tucker Act, 28 U.S.C. § 1491. The statutory cause of action giving rise to this Court's Tucker Act jurisdiction is Section 1402, a money-mandating statute that requires payment from the federal government to QHP issuers that satisfy certain criteria. Section 156.430 of Title 45, Code of Federal Regulations, is a money-mandating regulation that implements Section 1402 and thus also obligates payment from the federal government to QHP issuers that satisfy certain criteria. *See* 45 C.F.R. § 156.430.

15. In the alternative, the Contract Disputes Act, 41 U.S.C. §§ 7101 *et seq.*, a money-mandating statute, provides Plaintiffs a cause of action that gives rise to this Court's jurisdiction pursuant to the Tucker Act.

16. This dispute is ripe because HHS has refused to pay Plaintiffs the amounts owed for CSRs as required by Section 1402, Section 156.430, and the parties' implied-in-fact contracts.

PARTIES

17. GuideWell Mutual Holding Corporation is a corporation organized under the laws of Florida, with its principal place of business in Jacksonville, Florida.

18. GuideWell's operating subsidiaries—Blue Cross and Blue Shield of Florida, Inc. d/b/a "Florida Blue", Health Options, Inc. d/b/a "Florida Blue HMO," and Florida Health Care Plan, Inc.—are also corporations organized under the laws of Florida. Blue Cross and Blue Shield of Florida, Inc. and Health Options, Inc. have principal places of business in Jacksonville, Florida. Florida Health Care Plan, Inc. has its principal place of business in Holly Hill, Florida. All three subsidiaries are QHP issuers on the federal exchange in Florida and offer comprehensive, high-quality, and affordable health insurance benefits to individuals, families, and businesses in industries that have typically lacked insurance coverage or have been underinsured.

19. From the outset of the passage of the Act, GuideWell's operating subsidiaries committed to serving Florida's consumers by offering high quality affordable health insurance products through the federal exchange. This commitment was evidenced by the consistent increases in individual enrollment in QHPs beginning in 2014. For example, by the end of the 2016 open enrollment season, Florida Blue had approximately 715,000 individual members. By the end of the open enrollment season on January 31, 2017, Florida Blue had approximately 940,000 enrolled individual QHP members

20. In total, GuideWell's subsidiaries collectively provided insurance coverage to over 1.5 million individuals in all of Florida's 67 counties during benefit years 2014 through 2017. Those subsidiaries provided CSRs to enrollees in during the same period, and each subsidiary is eligible for, and entitled to, CSR payments for the benefit years.

21. The Defendant is the Government, acting through the Centers for Medicare & Medicaid Services—which administers various programs under the Act—or CMS' parent agency HHS. Unless otherwise noted, references in this Complaint to CMS include HHS where applicable.

FACTUAL ALLEGATIONS

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

22. In enacting the Affordable Care Act, Congress imposed certain obligations on participating insurers and provided payments to insurers in order to compensate them in connection with those obligations.

23. Specifically, Section 1402 of the Act, 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).

24. HHS implemented the CSR payment requirements 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.

25. Following the Act'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). 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."[5] "After the close of the benefit 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."[6] 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."[7] This reconciliation process also permitted a supplemental reconciliation by which QHP issuers recalculate and restate "all claims for the associated policy as necessary using the standard CMS methodology and associated guidance prior to a final re-

[5] 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.
[6] *Id.*
[7] 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).

adjudication of such claims for reconciliation."[8] Upon completion of a supplemental reconciliation process, the Government would reimburse QHP issuers or charge issuers excess amounts paid to them for prior years, as appropriate.[9]

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

26. For QHP issuers to participate on the marketplaces for the 2015, 2016, and 2017 benefit years, they had to submit their premiums to the appropriate state or federal regulatory authority during May 2014, May 2015, and May 2016, respectively, and submit a signed Qualified Health Plan Issuer Agreement ("QHPIA") to CMS by the end of September 2014, September 2015, and September 2016, respectively.[10] GuideWell's subsidiaries timely submitted signed QHPIAs, and by doing so committed themselves to offering health insurance coverage on the exchange for benefit years 2015, 2016, and 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

[8] CMS, Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Year 2017 (March 29, 2018), at 9, *available at* https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Final-CSR-Reconciliation-Guidance-BY2017.pdf.

[9] 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).

[10] CMS, Key Dates in 2015: QHP Certification in the Federally-facilitated Marketplaces; Rate Review; Risk Adjustment and Reinsurance (Apr. 14, 2015), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-Key-Dates-QHP-Certification-in-the-FFM-Rate-Review-and-3Rs-final.pdf; 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.

the plan, commitment to the 2015, 2016, and 2017 marketplaces was effectively irrevocable as of the end of September 2014, September 2015, and September 2016, respectively.[11]

27. GuideWell's subsidiaries committed themselves to participating in the marketplace in 2015, 2016, and 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***." In fact, 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 GuideWell's subsidiaries had committed themselves 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.

C. Appropriations for Cost-Sharing Reduction Reimbursements

28. Beginning in January 2014, and until October 2017, the Government used appropriations made pursuant to 31 U.S.C. § 1324, which establishes a permanent appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law," *id.*, to make the CSR payments required by Section 1402.

29. On or about October 11, 2017, the Department of Justice concluded that it was improper to utilize the appropriation in Section 1324 to make the CSR payments required by Section 1402. *See* Oct. 11, 2017 Ltr. from Att. Gen. Sessions to Secretary of Treasury and Acting Secretary of HHS (explaining that Section 1324 appropriations could be used to make payment under Section 1401 of the Act, but not under 1402). No alternative appropriation was

[11] *See* 45 C.F.R. § 147.106(b).

identified from which to make the required CSR payments. 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).

D. Plaintiffs Have Suffered Substantial Harm as a Result of The Government's Refusal to Pay Amounts Owed

30. Pursuant to the calculation methodologies in Section 155.1030(b)(3) and other applicable regulations, Plaintiffs are owed $215,065,886.87[12] in unpaid CSR reimbursements for 2017. In addition, after its decision to end CSR reimbursements, the Government failed to allow any supplemental reconciliation for benefit year 2016, and failed to pay the fully reconciled difference in payments owed to Plaintiffs for benefit year 2015. Plaintiffs are owed an additional $8,087,216.02[13] in unreconciled CSR reimbursements for the 2016 benefit year, and an additional $78,567.63[14] in reconciled CSR reimbursements for the 2015 benefit year.

CLAIMS FOR RELIEF

COUNT ONE

(Violation of Statutory and Regulatory Mandate to Make Payments)

31. Plaintiffs reallege and incorporate the above paragraphs 1-30 as if fully set forth herein.

32. As part of its obligations under Section 1402 of the Act and/or its obligations under Section 156.430, the Government is required to pay any eligible QHP the applicable cost-sharing reductions mandated by the Act.

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[12] $132,754,985.38 for Blue Cross and Blue Shield of Florida, Inc.; $6,071,600.66 for Florida Health Care Plan, Inc.; and $76,239,300.83 for Health Options, Inc.

13 $4,788,608.65 for Blue Cross and Blue Shield of Florida, Inc. and $3,298,607.37 for Health Options, Inc.

14 $62,870.24 for Blue Cross and Blue Shield of Florida, Inc. and $15,697.39 for Health Options, Inc.

33. GuideWell's subsidiaries are eligible QHP issuers under the Act and, based on their adherence to the Act and their notification of cost-sharing reduction amounts to CMS, they satisfied the requirements for payment by the Government under Section 1402 of the Act and Section 156.430.

34. The Government has failed to perform as it is obligated under Section 1402 of the Act and Section 156.430 and has affirmatively stated that it will not satisfy those obligations as required by the statute.

35. The Government's failure to provide timely payments to Plaintiffs is a violation of Section 1402 of the Act and Section 156.430, and Plaintiffs have suffered $215,065,886.87 total in damages in unpaid CSR payments for benefit year 2017, $8,087,216.02 in unreconciled CSR reimbursements for benefit year 2016, and $78,567.63 in reconciled CSR reimbursements for the 2015 benefit year as a result of the Government's actions.

COUNT TWO

(Breach of Implied-In-Fact Contract to Make Payments)

36. Plaintiffs reallege and incorporate the above paragraphs 1-35 as if fully set forth herein.

37. GuideWell's subsidiaries entered into valid implied-in-fact contracts with the Government regarding the Government's obligation to make full and timely CSR payments to them in exchange for their agreement to become QHP issuers and participate in the health care exchanges.

38. At least four facts or actions—Section 1402 of the Act; HHS' implementing regulations; the Government's actions in making CSR payments for benefit years 2014, 2015, 2016, and nine months of 2017; and the actions of agency officials with authority to bind the

Government regarding its obligation to make CSR payments—constitute a clear and unambiguous offer by the Government to make full and timely CSR payments to health insurers, including GuideWell's subsidiaries, that agreed to participate as QHP issuers in the marketplaces. This offer evidences a clear intent by the Government to contract with GuideWell's subsidiaries.

39. GuideWell's subsidiaries accepted the Government's offer by agreeing to become QHP issuers, accepting the obligations, responsibilities, and conditions the Government imposed on QHP issuers under the Act, and proceeding to provide health insurance on the health care exchanges. GuideWell's subsidiaries satisfied and complied with their obligations and conditions that existed under their implied-in-fact contracts.

40. The Government's agreement to make full and timely CSR payments was a significant factor material to GuideWell's subsidiaries' decision to participate on the health care exchanges.

41. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance, and statements following GuideWell's subsidiaries' acceptance of the Government's offer.

42. The implied-in-fact contracts were also supported by mutual consideration: Government reimbursement of CSRs to alleviate the financial requirements that QHP issuers were forced to bear under the Act was a critical consideration that significantly influenced Plaintiffs' decisions to become QHP issuers and participate in the exchanges. GuideWell's subsidiaries, in turn, provided a real benefit to the Government by agreeing to become QHP issuers and participating in the exchanges, as adequate insurer participation was crucial to the Government achieving the overarching goal of the exchange programs under the Act—to

guarantee the availability of affordable, high-quality health insurance coverage for all Americans by protecting consumers from increases in premiums.

43. The Government induced GuideWell's subsidiaries to participate in the health care exchanges in part by including the CSR payments in Section 1402 of the Act and its implementing regulations, by which the Government committed to make health insurers whole financially for the mandated cost-sharing reductions.

44. The Government's failure to make full and timely CSR payments to Plaintiffs is a material breach of their implied-in-fact contracts, and Plaintiffs have suffered damages totaling $215,065,886.87 for benefit year 2017. Plaintiffs have suffered additional damages of $8,087,216.02 in unreconciled CSR reimbursements for the 2016 benefit year, and $78,567.63 in reconciled CSR reimbursements for the 2015 benefit year.

PRAYER FOR RELIEF

Plaintiffs request the following relief:

A. That the Court awards Plaintiffs $215,065,886.87—$132,754,985.38 for Blue Cross and Blue Shield of Florida, Inc.; $6,071,600.66 for Florida Health Care Plan, Inc.; and $76,239,300.83 for Health Options, Inc.—the amount to which Plaintiffs are entitled for benefit year 2017 under Section 1402 of the Act and Section 156.430;

B. That the Court awards Plaintiffs $8,087,216.02—$4,788,608.65 for Blue Cross and Blue Shield of Florida, Inc. and $3,298,607.37 for Health Options, Inc.—the amount to which Plaintiffs are entitled for unreconciled CSR reimbursements for benefit year 2016;

C. That the Court awards Plaintiffs an additional $78,567.63—$62,870.24 for Blue Cross and Blue Shield of Florida, Inc. and $15,697.39 for Health Options, Inc.—the amount to which Plaintiffs are entitled for reconciled CSR reimbursements for benefit year 2015.

D. That the Court awards pre-judgment and post-judgment interest at the maximum rate permitted under the law;

E. That the Court awards such court costs, litigation expenses, and attorneys' fees as are available under applicable law; and

F. That the Court awards such other and further relief as the Court deems proper and just.

November 20, 2018

Respectfully submitted,

/s/ Stephen McBrady

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CERTIFICATE OF SERVICE

I certify that on November 20, 2018, a copy of the forgoing Complaint 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.

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