Receipt number 9998-5057644

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HARVARD PILGRIM HEALTH CARE, INC., HPHC INSURANCE COMPANY, INC., AND HARVARD PILGRIM HEALTH CARE OF NEW ENGLAND, INC., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 18-1820 C **COMPLAINT**

Harvard Pilgrim Health Care, Inc. ("HPHC Inc."), Harvard Pilgrim Health Care of New England, Inc. ("HPHC NE"), and HPHC Insurance Company, Inc. ("HPIC") (collectively, "Plaintiffs" or "Harvard Pilgrim"), by and through their undersigned counsel, bring this action against the United States ("Defendant" or "Government") seeking damages for its: (1) failure to make payments due and owing for benefit year 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 2017 benefit year.

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. 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.

5. The Act classifies plans 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.

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

[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. 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).

8. 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 payments are made directly to health insurance issuers as reimbursement for the reductions they will or have provided. *Id.* § 18082(a)(3).

9. After making such payments from the inception of the Act, and over a period of 45 months, the Government determined that it lacked an appropriation from which to make the payments. 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 reimbursed for CSRs that were due and owing for the 2017 benefit year.

10. The Government's failure to pay the required CSR reimbursements, after requiring insurers to provide cost-sharing reductions, deprives insurers of money to which they are entitled by statute for benefit year 2017. 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.

11. By this lawsuit, Plaintiffs seek full payment of the CSR payments that the Government currently owes for the 2017 benefit year. The law is clear, and the Government

[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.

must abide by its statutory obligations. Plaintiffs respectfully ask the Court to compel the Government to do so.

JURISDICTION

12. 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.

13. In the alternative, the Contract Disputes Act ("CDA"), 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.

14. This controversy 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

15. Plaintiff HPHC Inc. is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business in Wellesley, Massachusetts.

16. Plaintiff HPHC NE is a wholly-owned subsidiary of HPHC Inc. and is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business in Wellesley, Massachusetts.

17. Plaintiff HPIC is a wholly-owned subsidiary of HPHC Inc. and is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business in Wellesley, Massachusetts.

18. HPHC Inc. is a nonprofit QHP issuer with subsidiary QHP issuers, including HPIC and HPHC NE, participating in the exchanges in Massachusetts, Maine, and New Hampshire. It offers comprehensive health insurance benefits to individuals, families, and businesses. Its stated mission is to "improve the quality and value of health care for the people and communities we serve." It is the Commonwealth of Massachusetts' oldest nonprofit health maintenance organization.

19. HPHC Inc. began providing affordable, high-quality health plans in Massachusetts in 1969. Since commencing business, HPHC Inc. has expanded to three additional New England states and its health plans provide coverage for 1.3 million members.

20. HPHC Inc. has conducted and participated in countless outreach and educational sessions throughout its service area on the availability of coverage through the ACA, the mechanics of the marketplaces, and the benefit plans offered by HPHC Inc. and its subsidiaries and affiliates. HPHC Inc. funds a separate foundation whose primary purpose is to ameliorate community health standards and conditions. Created in 1980, the Harvard Pilgrim Health Care Foundation (the "Foundation") supports HPHC Inc.'s mission by providing the tools, training, and leadership to help build healthy communities. In 2015, the Foundation awarded nearly $2.3 million in grants to nonprofit organizations in the region. Since its inception, the Foundation has granted nearly $135 million in funds. HPHC Inc. has been one of the Boston area's top 10 "*Area's Largest Corporate Charitable Contributors*" eight out of the last nine years according to the Boston Business Journal's Corporate Philanthropy Summit. In 2015 and 2016, the

Foundation expanded its efforts to focus on supporting programs that help get fresh, healthy food to low- and moderate-income families.

21. In short, through its Foundation and numerous quality-of-care initiatives, HPHC Inc. has aggressively pursued the ACA's goal of connecting the people in its service area to insurance coverage opportunities with the understanding that a broader base of insured is better for the individuals within the pool and the overall functioning of the marketplaces.

22. 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

23. 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.

24. 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).

25. 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.

26. 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

[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.*

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-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

27. 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.[10] Plaintiffs timely submitted signed QHPIAs, and by doing so committed themselves to offering health insurance coverage on the exchange for benefit year

[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).

[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 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.

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, commitment to the 2017 marketplace was effectively irrevocable as of the end of September 2016.[11]

28. Plaintiffs committed themselves 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***." 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 Plaintiffs 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

29. 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.

30. 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

[11] *See* 45 C.F.R. § 147.106(b).

payment under Section 1401 of the Act, but not under 1402). No alternative appropriation was 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

31. Pursuant to the calculation methodologies in Section 155.1030(b)(3) and other applicable regulations, Plaintiffs are owed $1,159,917.59[12] in unpaid CSR reimbursements for 2017.

CLAIMS FOR RELIEF

COUNT ONE

(Violation of Statutory and Regulatory Mandate to Make Payments)

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

33. 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.

34. Plaintiffs 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, satisfied the requirements for payment from the Government under Section 1402 of the Act and Section 156.430.

[12] Harvard Pilgrim is owed $750,597.17 for unpaid CSR reimbursements provided on the Maine exchange and $409,320.42 for unpaid CSR reimbursements provided on the New Hampshire exchange.

35. 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.

36. 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 $1,159,917.59 total in damages in unpaid CSR payments for benefit year 2017 as a result of the Government's actions.

COUNT TWO

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

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

38. Plaintiffs 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.

39. 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 their 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 Plaintiffs, that agreed to participate as QHP issuers in the marketplaces. This offer evidences a clear intent by the Government to contract with Plaintiffs.

40. Plaintiffs 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. Plaintiffs satisfied and complied with their obligations and conditions that existed under their implied-in-fact contracts.

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

42. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance, and statements following Plaintiffs' acceptance of the Government's offer, and the Government's repeated assurances that full and timely CSR payments would be made.

43. The implied-in-fact contracts were also supported by mutual consideration: the CSR's reimbursement to alleviate the financial requirement 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. Plaintiffs, 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.

44. The Government induced Plaintiffs 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.

45. The Government repeatedly acknowledged its commitments to provide financial assistance to QHP issuers and its obligations to make full and timely CSR payments to qualifying issuers through its conduct and statements to the public and to Plaintiffs, made or ratified by representatives of the Government who had express or implied actual authority to bind the Government.

46. 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 $1,159,917.59 for benefit year 2017.

PRAYER FOR RELIEF

Plaintiffs request the following relief:

A. That the Court awards Plaintiffs $1,159,917.59—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 pre-judgment and post-judgment interest at the maximum rate permitted under the law;

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

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

November 27, 2018 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 27, 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.

/s/ Stephen McBrady
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