Nos. 2019-1633, 2019-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

COMMUNITY HEALTH CHOICE, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims
in Case Nos. 18-5C and 17-2057, Chief Judge Margaret M. Sweeney

---

SUPPLEMENTAL BRIEF FOR APPELLANT

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Administrative materials:

Other Authorities:

Pursuant to the Court's order, the government respectfully submits this supplemental brief to address in more detail the question of whether, "assuming liability under the appellees' statutory and/or implied-in-fact contract theories, a reduction in damages is available to the appellant if the appellees' loss was diminished as a result of increases in premiums and tax credits." 1/10/2020 Order. For the reasons discussed below, such a reduction in damages is available and required.

BACKGROUND RELEVANT TO DAMAGES

I. The Government's Indirect Funding Of Cost-Sharing Reduction Subsidies

Section 1402 of the Patient Protection and Affordable Care Act ("ACA") requires insurers to reduce cost sharing for certain lower income individuals who purchase silver plans through an Exchange. That mandate is not contingent on government subsidies. *See, e.g.*, *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 171 (D.D.C. 2016) ("Nor does Section 1402 condition the insurers' obligations to reduce cost sharing on the receipt of offsetting payments.").

Congress understood that, without direct payments from the government, insurers would raise premiums to account for the reduced cost sharing mandated by section 1402. Accordingly, "to reduce the premiums," ACA § 1412(a)(3), the ACA directed the government to make advance payments to insurers equal to the value of the cost-sharing reductions ("CSRs"), ACA §§ 1402(c)(3), 1412(a)(3), just as it provided for advance payment of tax credits, ACA §§ 1401, 1412(a)(3). It is

undisputed, however, that Congress did not provide funding for these direct CSR payments in either the ACA or in subsequent appropriations acts.

Although the government made direct payments for cost-sharing reductions for several years, the government announced in October 2017 that it would not continue to do so without an appropriation for that purpose. The economic consequences of the cessation of direct payments for cost-sharing reductions have been described in reports issued by the Congressional Budget Office ("CBO") and other sources. In a May 2018 report, the CBO explained that, "[b]ecause insurers are still required to offer CSRs and to bear their costs even without a direct payment from the government, most have covered those costs by explicitly increasing premiums for silver plans offered through the marketplaces [*i.e.,* the Exchanges] for the 2018 plan year," and the CBO expected "all insurers to do so beginning in 2019." Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 8 (May 23, 2018) (May 2018 CBO Report), https://go.usa.gov/xdBQa.[1]

[1] The CBO noted that, even in the few States in which insurers did not explicitly increase their 2018 silver-plan premiums to account for unreimbursed cost-sharing reductions, some insurers raised premiums substantially for reasons not fully specified, and the CBO attributed part of such increases to unreimbursed cost-sharing reductions. May 2018 CBO Report at 8 n.2. Other insurers in those States did not raise premiums by much or at all, but the CBO concluded on the basis of information provided by those insurers that their premiums were sufficient to cover the cost of the cost-sharing reductions. *Id.*

The CBO further explained that, as a result of these silver-plan premium increases—known as "silver-loading"—cost-sharing reductions are "being funded through higher premiums and larger premium tax credit subsidies instead of a direct [CSR] payment." May 2018 CBO Report at 8. Under the ACA, "[t]he size of premium tax credits is linked to the premiums for the second-lowest-cost silver plans offered" through the Exchanges. *Id.* at 9. The CBO explained that the structure of the premium tax credit largely insulates subsidized enrollees from silver-plan premium increases, because the premium tax credits go up when silver-plan premiums rise. *Id.*

Furthermore, the CBO explained, because individuals can use their premium tax credits to purchase any "metal" level plan—such as a bronze or gold plan—the increased tax credits have made insurers' bronze and gold plans less expensive for consumers than they would have been if Congress had funded cost-sharing reductions directly. May 2018 CBO Report at 9. The CBO found that, as a result of silver loading, "more people are able to use their higher premium tax credits to obtain bronze plans . . . for free or for very low out-of-pocket payments for premiums." *Id.* Others "can purchase gold plans, which cover a greater share of benefits than do silver plans, with similar or lower premiums after tax credits." *Id.*[2] *See also*

[2] The CBO explained that the relatively small percentage of Exchange customers who are ineligible for premium tax credits generally can avoid silver-plan premium increases by buying a different metal level plan in an Exchange or an "unloaded" silver plan off an Exchange. May 2018 CBO Report at 9. To assist such consumers, HHS has "encourage[ed] states to allow Exchange issuers to offer

Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2019-2020*, at 31-32, 33-34 (May 2019) (May 2019 CBO Report), https://go.usa.gov/xdB82 (similar).

The CBO concluded that, as a consequence of silver-loading, "in most years, between 2 million and 3 million more people are estimated to purchase subsidized plans in the marketplaces than would have if the federal government had directly reimbursed insurers for the costs of CSRs." May 2018 CBO Report at 9. The CBO also projected that federal spending would increase by $194 billion between 2017 and 2026 if cost-sharing reductions were not paid directly. Congressional Budget Office, *The Effects of Terminating Payments for Cost-Sharing Reductions* at 2 (Aug. 15, 2017) (August 2017 CBO Report), https://go.usa.gov/xdZQ8. In other words, the CBO projected that the indirect funding of cost-sharing reductions, through increased premium tax credits, will substantially increase both federal spending and enrollment in the Exchanges.

Similarly, a June 2019 RAND Corporation report emphasized that a return to direct payments for cost-sharing reductions would "decrease both federal spending and health insurance enrollment." Prethi Rao and Sarah Nowak, *Effects of Alternative Insurer Responses to Discontinued Federal Cost-Sharing Reduction Payments* 14 (2019) (RAND

---

individual market plans that do not include this [silver] load, and that will only be available outside the Exchange." Memorandum from HHS's Centers for Medicare & Medicaid Services, Center for Consumer Information and Insurance Oversight (Aug. 3, 2018), https://go.usa.gov/xdDH3.

Corporation Report), https://www.rand.org/pubs/research_reports/RR2963.html. The RAND Corporation explained that if Congress were to fund cost-sharing reductions directly, "those who purchase bronze, gold, or platinum plans would face higher premiums and lower subsidies simultaneously and would need to spend more to maintain enrollment in those plans." *Id.* at 13. The RAND Corporation argued that "[p]olicymakers should consider these impacts when contemplating changes to CSR funding and rules related to silver loading." *Id.* at 14.

II. Recent Legislation Enacted To Protect Silver Loading

In recent legislation, Congress enacted a provision that protects the practice of silver loading. *See* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. N, § 609, 133 Stat. 2534, 3130 (Dec. 19, 2019) ("Protection Of Silver Loading Practice") (some capitalization omitted). HHS previously had solicited comment on ways to address silver loading, to begin no sooner than the 2021 plan year. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2020, 84 Fed. Reg. 17,454, 17,533 (Apr. 25, 2019). In the preamble to this rule, HHS explained that "[s]ilver loading is the result of Congress not appropriating funds to pay CSRs, with the result being an increase to the premiums of benchmark plans used to calculate premium tax credits, and the federal deficit." *Id.* HHS further indicated that the Administration "supports a legislative solution that would appropriate CSR payments and end silver loading," and that, "[i]n the absence of Congressional action," HHS was seeking comment "on ways in which HHS might

address silver loading, for potential action in future rulemaking applicable not sooner than plan year 2021." *Id.*

In section 609 of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Congress prohibited HHS from taking such action. Section 609, which is titled "Protection Of Silver Loading Practice," provides:

> With respect to plan year 2021, the Secretary of Health and Human Services may not take any action to prohibit or otherwise restrict the practice commonly known as "silver loading" (as described in the rule entitled "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2020" published on April 25, 2019 (84 Fed. Reg. 17533)).

133 Stat. 3130. Congress thus approved and extended through 2021 the silver-loading practice that has been in effect since the 2018 plan year. The new legislation thereby maintains through 2021 the indirect funding of CSRs—through increased premium tax credits rather than direct CSR payments.

ARGUMENT

I. A Reduction In Any Damages Award Is Required Under Plaintiffs' Implied-In-Fact Contract Theory.

A. A Remedy For Breach Of Contract May Not Put The Non-Breaching Party In A Better Position Than It Would Have Occupied Had The Contract Been Performed.

We begin with plaintiffs' contract theory because, as discussed in Part II, the most apposite statutory precedents relied by analogy on principles that govern breach-of-contract remedies. Assuming *arguendo* that Congress's determinations about how to fund cost-sharing subsidies may be regarded as a breach of an implied-in-fact contract

between insurers and the federal government, a damages award may be no greater than necessary to put an insurer in the position it would have occupied if Congress had funded direct payments for cost-sharing reductions.

It is "a fundamental tenet of the law of contract remedies that an injured party should not be put in a better position than had the contract been performed." *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003) (quoting 3 E. Allen Farnsworth, Farnsworth on Contracts 193 (2d ed. 1998)). The "non-breaching party is not entitled, through the award of damages, to achieve a position superior to the one it would reasonably have occupied had the breach not occurred." *Id.* Accordingly, "[w]here the defendant's wrong or breach of contract has not only caused damage, but has also conferred a benefit upon plaintiff . . . which he would not otherwise have reaped, the value of this benefit must be credited to defendant in assessing the damages." *Id.* at 1372 (quoting Charles T. McCormick, *Handbook on the Law of Damages* 146 (1935)); *see also id.* (explaining that when the non-breaching party "makes an especially favorable substitute transaction, so that he sustains a smaller loss than might have been expected, his damages are reduced by the loss avoided as a result of that transaction") (quoting Restatement (Second) of Contracts § 347 cmt. e). Furthermore, the non-breaching party has a duty to mitigate, and "cannot recover damages for loss that [it] could have avoided by reasonable efforts." *Robinson v. United States*, 305 F.3d 1330, 1333 (Fed. Cir. 2002) (quoting Restatement (Second) Contracts § 350 cmt. b (1981)) (emphasis omitted).

A "plaintiff seeking damages must submit a hypothetical model establishing what its costs would have been in the absence of breach." *Energy Northwest v. United States*, 641 F.3d 1300, 1305 (Fed. Cir. 2011). "It is only by comparing this hypothetical 'but-for' scenario with the parties' actual conduct that a court can determine what costs were actually caused by the breach, as opposed to costs that would have been incurred anyway." *Id.* Likewise, a plaintiff must account for earnings generated from its mitigation efforts. *LaSalle*, 317 F.3d at 1371. Requiring the plaintiff to incorporate these benefits in its actual-damages calculation ensures that any damages award reflects the plaintiff's real-world financial state resulting from the breach, and thus guards against "an impermissible double recovery." *Southern California Federal Savings & Loan Ass'n v. United States*, 422 F.3d 1319, 1332 (Fed. Cir. 2005); *see also Citizens Federal Bank, FSB v. United States*, 59 Fed. Cl. 507, 526 (2004) ("[T]he burden is on [plaintiff] to consider the beneficial effects of mitigation in its damages calculation."); *Precision Pine & Timber, Inc. v. United States*, 63 Fed. Cl. 122, 133 (2004) ("If such a deduction is required, the burden is on plaintiff to establish the quantum of damages.").

The analysis in *LaSalle*, a *Winstar* case, illustrates these principles. In *United States v. Winstar Corporation*, 518 U.S. 839 (1996), the Supreme Court held that Congress's enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") caused the federal government to breach contracts with savings and loan institutions ("thrifts") by changing the accounting

rules for meeting capital reserve requirements that previously had been set by federal regulators. In *LaSalle*, this Court held that the damages due to the plaintiff thrift must be reduced by the benefits the thrift received as a result of the actions it took in response to the FIRREA-induced breach of contract. Specifically, the plaintiff thrift had arranged to be acquired by a Netherlands bank, which gave the thrift the $300 million cash payment it needed to come into compliance with FIRREA's capital reserve requirements and thus avoid receivership. *See LaSalle*, 317 F.3d 1368-69. This Court held that the plaintiff's damages should be reduced by the profits attributable to that $300 million private investment—which mitigated the thrift's damages—because there was "a direct relation, in time and in subject matter, between the breach and mitigating events." *Id.* at 1371. This Court so held even though the thrift's survival was due to "its own management skills and herculean efforts," and the government would have suffered a large liability to the thrift's depositors if the thrift had not taken that initiative. *Id.* at 1372.

This Court rejected the plaintiff's reliance on "the collateral source rule," which provides that "collateral benefits received by the injured party do not reduce the damages owed by the wrongdoer." *LaSalle*, 317 F.3d at 1372. The Court explained that the collateral source rule "arises primarily in connection with tort damages, and presupposes some wrongful act by the breaching party." *Id.* The Court noted that the collateral source rule "has been applied in connection with breach of contract, when there is a tortious or negligence component to the breach, or when the equitable

balance is such that any windfall should not benefit the wrongdoer." *Id.* The Court did not "deem the collateral source rule to be applicable" in *LaSalle*, "where the breach of contract was due to an Act of Congress." *Id.* The Court explained that "[t]he purpose of the FIRREA legislation was to make a fundamental change in savings and loan regulatory policy and procedure, for the greater public benefit," and that "[n]either bad faith nor misconduct nor negligence can be attributed to the governmental actions that produced the FIRREA-based breach of contract." *Id.* at 1372-73. The Court reasoned that "Government liability for the abrogation of contracts flows from the government's obligations to those with whom it deals, and is rarely subject to encumbrance by wrongdoing." *Id.* at 1373.

Accordingly, this Court concluded that "the Court of Federal Claims correctly held that benefits achieved by [the plaintiff] after the breach should be included in mitigation of damages," which included the profits attributable to the $300 million private investment that the thrift obtained to come into compliance with FIRREA. *LaSalle*, 317 F.3d at 1373. The Court concluded that this principle did not extend to later capital investments by the Netherlands bank, which were "for purposes unrelated to the [FIRREA-induced] breach and its mitigation." *Id.* (noting that it was "not disputed that this additional capital was not required by, and was not a product of, the FIRREA-induced breach"). In so ruling, the Court applied the "general rule" that "unrelated events and remote consequences do not reduce the liability of the wrongdoer for the losses caused by the wrong." *Id.*

B. These Fundamental Principles Require That Any Damages Award Be Reduced Here.

These tenets of contract law preclude an insurer from recovering a damages award beyond the amount necessary to put the insurer in the position it would have occupied if Congress had chosen to fund cost-sharing reduction payments directly. For the reasons described in the CBO's reports, we expect that plaintiffs will be unable to show that they are worse off financially as a result of the cessation of direct CSR payments. On the contrary, the cessation of direct CSR payments should make plaintiffs (and other insurers) better off financially.

As the CBO has explained in its reports, by operation of the ACA itself, the increased premium tax credits that the government is paying insurers as a result of silver loading should exceed the amount that the government would have paid insurers if it had made direct cost-sharing reduction payments. That is because section 1401 of the ACA pegs the amount of the premium tax credit to the premium charged for the second-lowest-cost silver plan offered in the area's Exchange (referred to as the "benchmark plan"). Accordingly, if the benchmark plan's premium increases, the premium tax credit increases by a corresponding amount. *See, e.g.*, CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* at 20 (Nov. 30, 2009), https://go.usa.gov/xpfCH (advising Congress while the ACA was under consideration that, as a result of the ACA's structure, "higher premiums resulting from adverse selection would not translate into higher amounts paid by

those enrollees" and, instead, "federal subsidy payments would have to rise to make up the difference").

The rising premium tax credit insulates subsidized enrollees from the effect of the silver-plan premium increases. Furthermore, as a result of the statutory structure, the economic benefits of rising premium tax credits are magnified. Section 1401 makes premium tax credits available to far more people than are eligible for reduced cost sharing under section 1402, and consumers can use premium tax credits to purchase any "metal" level plan. The increased premium tax credits make an insurer's "bronze," "gold," and "platinum" plans less expensive—and therefore more attractive—to consumers than they would be if the government paid for cost-sharing reductions directly.

This phenomenon was illustrated by the district court in *California v. Trump*, 267 F. Supp. 3d 1119 (N.D. Cal. 2017). The court explained that, for a 50–year-old single person at 300% of the federal poverty level living in San Jose, the area's most popular bronze plan would have cost her $134 per month in 2017, but the same bronze plan, with her increased tax credit, would cost her only $53 per month in 2018. *See id.* at 1135. In other words, the bronze plan cost her $81 less per month because of the increased tax credits attributable to silver loading. Similarly, whereas the same person would have had to pay $354 per month in 2017 for the area's most popular gold plan, she would pay only $267 per month for that gold plan in 2018. *Id.* Thus, the price of

the gold plan (which covers a greater share of benefits than a silver plan or bronze plan) fell by $87 per month.

Describing this phenomenon more generally, the CBO emphasized that, as a result of silver loading, "more people are able to use their higher premium tax credits to obtain bronze plans . . . for free or for very low out-of-pocket payments for premiums." May 2018 CBO Report at 9. Others "can purchase gold plans, which cover a greater share of benefits than do silver plans, with similar or lower premiums after tax credits." *Id.*

The CBO concluded that, as a consequence of silver-loading, "in most years, between *2 million and 3 million more people* are estimated to purchase subsidized plans in the marketplaces than would have if the federal government had directly reimbursed insurers for the costs of CSRs." May 2018 CBO Report at 9 (emphasis added). The CBO projected that the indirect funding of CSRs (through increased premium tax credits) will increase federal spending by *$194 billion* between 2017 and 2026. *See* August 2017 CBO Report at 2. Conversely, the RAND Corporation cautioned that a return to direct payments for cost-sharing reductions would "decrease both federal spending and health insurance enrollment." RAND Corporation Report at 14.[3]

[3] Two years before direct CSR payments ended, HHS anticipated the economic consequences that would flow from a cessation of such direct payments. *See* Office of the Assistant Secretary for Planning and Evaluation (ASPE), HHS, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* (Dec. 2015), https://go.usa.gov/xyjS2.

Plaintiffs do not and cannot deny that they raised their silver-plan premiums to account for the absence of direct reimbursement for cost-sharing reductions. The actuarial memorandum prepared for Community Health Choice specified that Community raised its 2018 rates on the assumption that "CSRs will not continue to be reimbursed." Milliman, *Part III Actuarial Memorandum (Redacted), Community Health Choice Individual Rate Filing Effective January 1, 2018*, at 3 (Sept. 18, 2017), https://go.usa.gov/xEFjG. Likewise, the actuarial memorandum prepared for Maine Community Health Options assumed "no funding of CSR subsidies in 2018" and presented the rates that Maine Community intended "to use in 2018 if CSR reimbursements terminate." Milliman, *Part III Actuarial Memorandum, Maine Community Health Options Individual Rate Filing Effective January 1, 2018* at 2, 3 (rev. Sept. 5, 2017), https://go.usa.gov/xdruZ. Plaintiffs made the same assumption in justifying their 2019 and 2020 rates. For example, Maine Community's actuarial memorandum for 2019 indicated that the "premium rates developed and supported by this Actuarial Memorandum assume that Cost Share Reductions (CSR) will continue not to be funded." Milliman, *Part III Actuarial Memorandum, Maine Community Health Options Individual Alternate Rate Filing Effective January 1, 2019* at 2 (rev. July 25, 2018), https://go.usa.gov/xdruk. It explained that "the unreimbursed CSR subsidies are loaded on the Silver plans offered on the Exchange only," and that "this methodology

is consistent with the way [Maine Community's] 2018 individual rates were developed." *Id.*[4]

For the reasons described in the CBO's reports, the economic benefits that flow from such silver-plan premium increases should exceed the losses attributable to the cessation of direct payments for cost-sharing reductions. We therefore expect that plaintiffs will be unable to prove that they are damaged at all by the cessation of direct payments for cost-sharing reductions, even taking into account the period in late 2017 in which plaintiffs' rates did not yet reflect the absence of direct cost-sharing reduction payments.

C. There Is No Reason To Ignore The Benefits That Insurers Receive From Silver Loading.

There is no plausible reason to disregard the economic benefits that plaintiffs receive from silver loading. As in *LaSalle*, there is "a direct relation, in time and in subject matter, between the [putative] breach and mitigating events." 317 F.3d at 1371. Plaintiffs' actuarial memoranda made explicit that they raised their silver-plan premiums because they anticipated that direct CSR payments would not be made.

[4] *See also* Milliman, *Part III Actuarial Memorandum, Maine Community Health Options, Individual Rate Filing Effective January 1, 2020* (rev. Aug. 14, 2019), https://go.usa.gov/xdru9; Milliman, *Part III Actuarial Memorandum (Redacted), Community Health Choice Individual Rate Filing Effective January 1, 2019* (July 19, 2018), https://go.usa.gov/xyjS3; Milliman, *Part III Actuarial Memorandum (Redacted), Community Health Choice Individual Rate Filing Effective January 1, 2020* (July 23, 2019), https://go.usa.gov/xdrun.

And the direct relation between cost-sharing reduction payments, premiums, and premium tax credits is established by the text and structure of the ACA, which authorized advance payments equal to the value of cost-sharing reductions in order "to reduce the premiums payable by individuals" who are eligible for premium tax credits. ACA § 1412(a)(3). Because those direct CSR payments were not funded, plaintiffs (and other insurers) raised premiums. As *amici* have emphasized, "there is unquestionably a *direct* relationship between the amount of an issuer's unpaid costs and its premiums." Common Ground Amicus Br. 4, *Sanford Health Plan v. United States*, No. 19-1290 (Fed. Cir. May 5, 2019). "Higher costs equal higher premiums." *Id.* And by operation of section 1401 of the ACA, higher benchmark premiums trigger higher premium tax credits.[5]

As in *LaSalle*, there is no basis to apply the "collateral source rule." As an initial matter, the increased premium tax credits that flow from silver loading do not come from a "collateral" source. They are paid by the government itself, pursuant to statutorily integrated provisions of the ACA. Indeed, they are paid from the same account—the permanent appropriation for tax credits—that was used to make direct payments for cost-sharing reductions between January 2014 and October 2017.

[5] Mitigation is not limited to those insurers that raised premiums for the explicit purpose of accounting for the absence of CSR payments. As noted above, the CBO found evidence of mitigation even in the absence of such explicit statements. *See supra* p. 2 n.1. Moreover, an insurer cannot recover damages for losses that it could have avoided by reasonable efforts. *Robinson*, 305 F.3d at 1333.

Furthermore, as in *LaSalle*, the (putative) breach of contract is not attributable to any government wrongdoing. Plaintiffs have not argued that the Department of Health & Human Services ("HHS") has funds available from which to make direct payments for cost-sharing reductions. As we have previously explained (without contradiction), the Anti-Deficiency Act prohibits HHS from making direct payments for cost-sharing reductions because Congress has not provided funding for such direct payments. Nor can Congress's decision to fund cost-sharing reductions indirectly, through increased premium tax credits, be plausibly characterized as wrongdoing. As discussed above, that indirect funding mechanism—which Congress maintained through the 2021 benefit year in the recent legislation protecting silver loading—is expected to increase federal spending significantly and to boost enrollment in the Exchanges by millions of people each year.[6]

II. A Reduction In Any Damages Award Is Required Under Plaintiffs' Statutory Theory.

Assuming *arguendo* that section 1402 of the ACA may be interpreted to give plaintiffs an implied damages remedy for direct cost-sharing reduction payments that Congress declined to fund, such a remedy is limited to "compensation by the Federal Government for the damages sustained." *United States v. Bormes*, 568 U.S. 6, 15 (2012).

[6] To our knowledge, the trade associations that represent insurers (such as America's Health Insurance Plans and the Blue Cross Blue Shield Association) did not oppose the recent legislation protecting silver loading or urge Congress instead to provide direct funding for cost-sharing reduction payments.

Any damages award for the (putative) statutory violation therefore may be no greater than necessary to put an insurer in the position it would have occupied if Congress had funded the cost-sharing reduction payments directly.

A. In Statutory Cases Involving An Implied Damages Remedy, The Court Of Claims Reduced Damages By Analogy To The Contract Principle Of Mitigation Of Damages.

This principle is reflected in the precedents involving claims for back pay, which are instructive because the Supreme Court has identified the Back Pay Act as the type of statute that may fairly be interpreted to provide an implied damages remedy. *See Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). In a long line of back pay cases, the Court of Claims routinely reduced the amount of back pay owed to a government employee, based "on an analogy to the principle of mitigation of damages." *Craft v. United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978).[7] The Court "held uniformly that outside earnings are to be deducted from backpay in cases where reinstatement is ordered after an erroneous separation." *Id.* "Unless there is a regulation or a statute that provides otherwise, cases in this court routinely require the deduction of civilian earnings on an analogy to the principle of mitigation of damages." *Id.*

[7] In *Craft*, the Court of Claims "fully agree[d] with the trial judge and adopt[ed] his opinion," which the Court of Claims appended "as the basis for its judgment in this case." 589 F.2d at 1058. The Court of Claims followed a similar procedure in other cases, and when applicable we refer to a trial judge's opinion as the decision of the Court of Claims.

In *Craft*, for example, the claimant's outside earnings during the period of his illegal separation from the government exceeded the amount he was owed in back pay. 589 F.2d at 1058. Thus, the Court of Claims affirmed the judgment that the claimant was not entitled to any recovery. *See id.*

Similarly, in *Motto v. United States*, 360 F.2d 643 (Ct. Cl. 1966), the plaintiff "was illegally deprived of $56,973.19 in military pay," but his "civilian earnings amounted to $35,012.21 during the period of his illegal separation." *Id.* at 647. The Court held that "[t]he latter sum must be set off against the lost military pay, mitigating the recovery in accordance with precedent." *Id.* As a consequence, the plaintiff was entitled to judgment "in the net amount of $21,960.98." *Id.*

The Court in *Motto* noted that the same principle was applied in *Borak v. United States*, 78 F. Supp. 123 (Ct. Cl. 236 1948), where the back pay owed to a wrongfully terminated Immigration and Naturalization Service examiner was reduced by his earnings as a lawyer in private practice during the period of wrongful separation. *See Motto*, 360 F.2d at 646-47. The Court explained that "the rationale of these cases has been consistently applied in the military pay area as well." *Id.* at 869 (discussing *Egan v. United States*, 141 Ct. Cl. 1 (1958); *Clackum v. United States*, 161 Ct. Cl. 34 (1963); and *Garner v. United States*, 161 Ct. Cl. 73 (1963)). *Cf. Bates v. United States*, 453 F.2d 1382, 1385 (Ct. Cl. 1972) (acknowledging this general rule but concluding that it had been superseded by an Air Force regulation).

For the reasons discussed above in Part I, it is equally appropriate to reduce any damages award to plaintiffs to account for the financial benefits they receive from silver loading and the resulting increased premium tax credits. Those financial benefits reduce (and likely eliminate) the harm attributable to the (putative) statutory violation. A remedy that ignores these economic benefits would not compensate an insurer "for the damage sustained," *Bormes*, 568 U.S. at 15, but would give the insurer a windfall, while imposing an unjustifiable penalty on the public fisc.

B. Even When A Statute Provides An Express Monetary Remedy, Its Contours Are Interpreted Narrowly.

The windfall sought by plaintiffs also contravenes the principle that the contours of a statutory remedy must be narrowly construed even when—unlike here—a statute provides the claimant with an express damages remedy. That requirement follows from "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign," and "not enlarge[d] ... beyond what the language requires." *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (quotation marks omitted).

In *Nordic Village*, for example, the Supreme Court recognized that sections 106(a) and 106(b) of the Bankruptcy Code impose monetary liability on the government, but concluded that there were "plausible" readings of section 106(c) that would not impose monetary liability. 503 U.S. at 37. The Court held that the existence of such plausible readings was "enough to establish that a reading imposing

monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Id.*

This Court likewise has recognized that it could "not enlarge the waiver beyond the purview of the statutory language" of the substantive statute that underlies a Tucker Act claim, and that the Court's "task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." *RadioShack Corp. v. United States*, 566 F.3d 1358, 1360 (Fed. Cir. 2009). Applying that principle in *RadioShack*, the Court held the particular excise tax at issue was the type of tax for which a refund claim must be filed with the Internal Revenue Service, and that the claimant's refund claim was thus time-barred. *Id.* at 1363.

The principle that a waiver of sovereign immunity must be unambiguous applies to the scope of the available remedy. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). "Thus, the waiver for sovereign immunity for interest must be distinct from a general waiver of immunity for the cause of action resulting in the damages award against the United States." *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1126-27 (Fed. Cir. 2004). Similarly, it is "[o]nly when the source of the substantive right for which the Tucker Act supplies jurisdiction provides for attorney's fees over and above the amount of damages" that "attorney's fees" should "be added to the amount of damages claimed in calculating the amount in controversy." *Graham v. Henegar*, 640 F.2d 732, 735-36 (5th Cir. 1981). Likewise, this Court has recognized that a statutory preclusion of a particular type of damages offset must be unambiguous. *See*

Heinzelman v. Secretary of Health & Human Servs., 681 F.3d 1374, 1383 (Fed. Cir. 2012) ("Because the plain language of the statute reveals that Congress did not include SSDI benefits as an offset to compensation under the Vaccine Act, resort to sovereign immunity principles is neither necessary nor proper."). Background principles of sovereign immunity thus confirm that the ACA may not be interpreted to give insurers a windfall.

III. Plaintiffs' Reliance On Case Law Involving The "Passing On" Defense Is Misplaced.

In prior briefing, Community sought to rely on cases rejecting the "passing on" defense. *See* Community Br. 47-49.[8] That case law is inapposite for several reasons. The doctrine applicable to the "passing on" defense, which was developed primarily in the context of antitrust law, generally holds that a wrongdoer may not reduce damages simply because the victim may have passed on an illegal overcharge to its customers. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court identified two principal reasons for rejecting this "passing on" defense in the antitrust context. First, the Court noted "the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." *Id.* at 493. Second, the Court emphasized that recognizing a "passing

[8] Maine Community did not file a separate brief but instead rested on the briefs filed in the lead appeals.

on" defense would undercut the deterrent effect of the antitrust statute's treble damages remedy. The Court explained that the "ultimate consumers"—which in *Hanover Shoe* were "the buyers of single pairs of shoes"—"would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Id.* at 494. "In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." *Id.* "Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." *Id.*; *see also Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019) (explaining that the "direct purchaser" rule "is grounded on the 'belief that simplified administration improves antitrust enforcement'" (quoting 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, *Antitrust Law* ¶ 346e, p.194 (4th ed. 2014)).

Other cases cited by Community (Br. 47-49) likewise emphasized these concerns. *See, e.g.*, *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 215 (1990) (explaining that reliance "on indirect purchaser actions in utility cases might fail to promote antitrust enforcement"); *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 534 (1918) (concluding in a railroad overcharge case that "[t]he carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum"); *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (Easterbrook, J.) (explaining that "RICO was designed to make life hard for repeat violators of the criminal law," that it

"must be generously construed to promote the goal of deterrence," and that "concentrating the entire right to recover in the hands of the directly injured party promotes deterrence"); *In re Neurontin Mktg. & Sales Practices Litig.*, 799 F. Supp. 2d 110, 118-20 (D. Mass. 2011) (agreeing with the Seventh Circuit that *Hanover Shoe*'s reasoning extends to RICO claims), *aff'd*, 712 F.3d 21 (1st Cir. 2013). Similarly, in *Hughes Communications Galaxy, Inc., v. United States*, 271 F.3d 1060 (Fed. Cir. 2001), which Community did not cite, this Court determined that *Hanover Shoe*'s reasoning "applies to this breach of contract action" because "a standard for pass-through reductions would entail extremely difficult burdens for the trial court." *Id.* at 1072.

As an overarching matter, none of this case law is relevant here, because the government is not urging that plaintiffs' damages should be reduced merely because plaintiffs passed on their cost-sharing reduction expenses to customers. The crucial point is that plaintiffs (and other insurers) passed these expenses on *to the government itself*, which by virtue of the ACA's structure is paying the cost-sharing reduction expenses (and much more) in the form of higher premium tax credits. Plaintiffs cite no case in which a "passing on" defense was rejected even though costs were passed back to the defendant itself.

Nor are the subsidiary concerns raised in the "passing on" cases present here. There is no "insuperable difficulty" in determining whether plaintiffs accounted for the absence of cost-sharing subsidies when they set premiums. *Hanover Shoe*, 392 U.S. at 493. On the contrary, plaintiffs' actuarial memoranda made that point explicit. *See*

supra, pp. 13-15. Nor is there any claim that reducing a damages award will enable the government to "retain the fruits of [an] illegality." *Hanover Shoe*, 392 U.S. at 494. Congress's judgment about how to fund cost-sharing reductions is not an "illegality," and in any event that funding decision is expected to increase federal spending. *See supra* pp. 11-13.

CONCLUSION

Assuming liability under plaintiffs' implied-in-fact contract and/or statutory theories, any damages award must be reduced to the extent that plaintiffs' loss is diminished as a result of increases in premiums and premium tax credits.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN

/s/ Alisa B. Klein
ALISA B. KLEIN
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597
alisa.klein@usdoj.gov

February 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, I electronically filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the Court's order of January 10, 2020, because it is no longer than 30 pages, double-spaced. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Alisa B. Klein
Alisa B. Klein