IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS OF CALIFORNIA, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Case No. 20-606 (Judge Wolski)

JOINT STATUS REPORT

Pursuant to this Court's October 23, 2020 order, ECF. No. 11, the parties respectfully submit this joint status report setting forth the parties' respective positions on how to proceed in light of the pending cross petitions for rehearing, and rehearing *en banc* that have been filed in the four cases on appeal to the Federal Circuit concerning cost-sharing reductions (CSRs): *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (2018); *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213 (2018), *appeal docketed*, No. 19-1302 (Fed. Cir. 2018); *Community Health Choice, Inc. v. United States*, 141 Fed. Cl. 744 (2019), *appeal docket*ed, No. 19-1633 (Fed. Cir. 2019); and *Maine Community Health Options v. United States*, 143 Fed. Cl. 381 (2019), *appeal docketed*, No. 19-2102 (Fed. Cir. 2019).

Plaintiffs' Position

On September 28, 2020, the plaintiffs in *Maine Community Health Options* and *Community Health Choice* filed petitions for rehearing *en banc* regarding the Federal Circuit's rulings in those cases concerning the recovery of CSR damages for 2018. On October 23, 2020, the United States filed a response to those petitions and a conditional cross petition for rehearing *en banc* on the Federal Circuit's CSR liability ruling in *Maine Community Health Options* if the Federal Circuit decides to rehear the panel's CSR damages ruling for 2018. Specifically, the

Government acknowledged that the Federal Circuit concluded there was "'no persuasive basis for distinguishing these [CSR] cases from *Maine Community,*' where the Supreme Court held the ACA's risk-corridors provision was fairly interpreted to mandate compensation for risk corridors payments that Congress declined to fund" based on the "'shall pay' language" common to the CSR and risk corridors statutory provisions. *See* Resp. in Opp. to Reh'g Pets. and Conditional Cross-Pet. for Reh'g *En Banc*, *Community Health Choice, Inc.*, No. 19-1633, ECF No. 86 at 12-13. The Government advised the Federal Circuit that it "disagree[s]" with the Federal Circuit's CSR liability ruling, but stated, "that ruling does not, by itself, warrant rehearing en banc at this juncture." *Id*. at 14. Accordingly, the Government's cross petition on CSR liability is conditional on the Federal Circuit hearing the insurer petitioners' petition challenging the 2018 CSR damages ruling.

Plaintiffs' Complaint contains separate claims for recovery of unpaid CSR amounts for separate benefit years 2017, 2018, and 2019. Plaintiffs agree that their CSR claims seeking recovery of unpaid CSR amounts for 2018 and 2019, which would be affected by the Federal Circuit's resolution of the pending petitions for rehearing filed by the insurer petitioners in *Sanford Health Plan, Montana Health Co-Op, Community Health Choice, Inc.,* and *Maine Community Health Options* relating to the 2018 CSR damages issues, should continue to be stayed until 14 days after the Federal Circuit's final ruling on those petitions.

Only the CSR claims for 2018 and 2019 involve damages issues in common with the Federal Circuit's 2018 CSR damages ruling that the insurer petitioners have challenged. Plaintiff's 2017 CSR claim seeking recovery of $31,997,701.61 in unpaid CSRs owed to Plaintiffs is not affected by the 2018 CSR damages ruling for which rehearing has been petitioned. The Government previously has agreed to stipulate to entry of final judgment on liability and damages in other CSR cases involving 2017 CSR claims. *See* Joint Mot. For Entry

of Final Judgment, *Blue Cross & Blue Shield of Vermont v. United States*, No. 1:18-cv-373, ECF No. 35; Joint Mot. To Enter Stipulated Final Judgment, *Blue Cross & Blue Shield of North Dakota v. United States*, No. 1:18-1983, ECF No. 37. If its conditional cross petition is denied, we believe the Government should similarly stipulate to entry of judgment on Plaintiffs' 2017 CSR claim. In light of the conditional nature of the Government's cross petition for rehearing as to CSR liability, should the Federal Circuit deny the Government's conditional cross petition on CSR liability, Plaintiffs propose that the stay be lifted as to the 2017 CSR claim only, and that Plaintiffs be permitted to proceed to obtain partial final judgment on their 2017 CSR claim, as the Court permitted the plaintiff to do, over the Government's objections, in *L.A. Care Health Plan v. United States*. *See* Op. and Order, No. 1:17-1542, ECF No. 46 ("The Court previously ruled that the Government has a statutory obligation to make 'full advanced [monthly] CSR payments.' Opinion and Order, Dkt. No. 32 at 9; *see also Mont. Health Co-Op v. United States*, 139 Fed. Cl. 213, 218–21 (2018). Thus, each month that the Government failed to make the CSR payments constituted a separate breach imposing distinctive injury. These amounts became final once HHS completed its reconciliation process for that benefit period. As a result, the Court rejects the Government's argument that L.A. Care has a single claim which is dependent on a final ruling for the contested damages.").

Defendant's objection below to lifting the stay based on the government's overly restrictive view of Rule 54(b) is unfounded. Rule 54(b) provides that "[w]hen an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." RCFC 54(b). *See W.L. Gore & Assocs. Inc. v. Int'l Med. Prosthetics Research Assocs. Inc.*, 975 F.2d 858, 861 (Fed. Cir. 1992) (recognizing the increasing complexity of litigation, "[i]n the interest of sound judicial

administration, Congress enacted Rule 54(b) to 'relax[] the restrictions upon what should be treated as a judicial unit for the purposes of appellate jurisdiction.'" (citation omitted)); *see also Gelboim v. Bank of Am. Corp*., 574 U.S. 405, 135 S. Ct. 897, 902 (2015) (stating that Rule 54(b) relaxes the former general practice and was adopted "to avoid the possible injustice" of "delay[ing] judgment o[n] a distinctly separate claim [pending] adjudication of the entire case.").

In this case, as Judge Wheeler recognized in *L.A. Care Health Plan v. United States,* Plaintiffs' CSR claims for 2017 are not factually or legally intertwined with their claims for unpaid CSR amounts owed for separate benefit years 2018 or 2019. The Court in *Connecticut Yankee Atomic Power Co.*, 142 Fed. Cl. 87 (2019), entered a partial final Rule 54(b) judgment finding it served the interests of justice and sound judicial case management based on circumstances similar to those in this case. There too the government argued that Rule 54(b) judgment was not appropriate because it asserted the plaintiff's complaint contained "only one claim for breach of contract" and the claims could not be separated. *Id*. at 90. The Court rightly rejected the separate claims argument, finding the government elevated form over substance. *See also Entergy Nuclear Palisades, LLC v. United States*, 122 Fed. Cl. 225, 230 (Fed. Cl. 2015) (granting Rule 54(b) partial judgment in spent nuclear fuel case over same government objections and emphasizing that absent Rule 54(b) judgment, "[t]he delay in payment is particularly problematic in this case because the plaintiff will not be able to collect interest").

The case Defendant cites below, *Houston Industries Inc. v. United States*, 78 F.3d 564, 567 (Fed. Cir. 1996), is clearly distinguishable and should not be followed because that was a tax refund case where all issues determining liability for a particular tax year had to be adjudicated together as a single, unified claim and cause of action and the government claimed certain offsets to the taxpayer's liability for that tax year. *See Entergy Nuclear Palisades LLC*, 122 Fed. Cl. at 230 n.3 (distinguishing *Houston Industries*). Moreover, if the Defendant's conditional cross

petition is denied and the Federal Circuit's CSR liability ruling is not re-heard, then the potential for multiple appeals over unpaid CSRs owed for the 2017 benefit year would not exist, contrary to the government's suggestion below.

In any event, the Court does *not* need to resolve the Rule 54(b) issue at this juncture. Plaintiffs are not asking the Court to enter partial final judgment on their 2017 unpaid CSR claim now, but only to allow Plaintiffs the opportunity to proceed and move for such relief should the Federal Circuit deny the Government's conditional cross petition on CSR liability. Given that the Federal Circuit's CSR liability determination squarely followed the Supreme Court's *Maine Community* decision holding the government liable for its statutory "shall pay" risk corridors obligations, it is highly likely that the Federal Circuit will affirm and decline to revisit its CSR liability ruling based on the similar "shall pay" ACA CSR statute. In that event, the stay should be lifted, and Plaintiffs should be permitted to proceed to recover the unpaid CSR amounts the government owes for the 2017 benefit year.

Defendant's Position

The stay in this case should continue until either the Federal Circuit's judgments in the CSR appeals become final and non-appealable, or the Supreme Court resolves any petition for a writ of *certiorari* in those cases. We propose that the parties be ordered to file a joint status report proposing further proceedings within 30 days of either event, which will control the outcome of this and the 24 other CSR cases pending in this Court. The proposed stay would conserve judicial resources and is consistent with the stay orders issued by this Court in other CSR cases, including cases, like this one, seeking CSR damages for 2017-19. *See Cigna Health & Life Ins. Co. v. United States*, No. 20-546, Order at 1-2 (Fed. Cl. Oct. 23, 2020), ECF No. 17; *Sendero Health Plans Inc. v. United States*, No. 17-2048, Order at 1-2 (Fed. Cl. Oct. 23, 2020), ECF No. 30.

Here, although plaintiffs agree that this case should be stayed pending the Federal Circuit's resolution of the parties' petitions for rehearing *en banc*, plaintiffs request that the Court lift the stay and enter partial final judgment pursuant to Rule 54(b) in the event the Federal Circuit denies the United States' conditional cross-petition.

Plaintiffs' proposal should be rejected for at least two reasons. First, if the Federal Circuit denies the United States' conditional cross-petition concerning liability, no basis exists to lift the stay of any portion of the case because the United States may file a petition for a writ of *certiorari* seeking further review of that ruling.

Second, Rule 54(b) does not permit the Court to fracture a single claim into multiple pieces for the purpose of entering partial final judgment. Rule 54(b) provides that "[w]hen an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay." RCFC 54(b). The Federal Circuit has explained, "in order for Rule 54(b) to apply, the judgment must be final with respect to one or more claims. The resolution of individual issues within a claim does not satisfy the requirements of Rule 54(b)." *Houston Indus. Inc. v. United States*, 78 F.3d 564, 567 (Fed. Cir. 1996) (citing *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976)) (emphasis in original).

Here, although plaintiffs state above that their complaint "contains separate claims for recovery of unpaid CSR amounts for separate benefit years 2017, 2018, and 2019," plaintiffs' complaint sets forth two claims seeking money damages for multiple years: breach of statutory duty (Count I); and breach of implied-in-fact contract (Count II). Plaintiffs' proposed partial final judgment would therefore only resolve an "individual issue[]" within those claims: the issue of damages for the last quarter of 2017, but not damages for 2018-19. *See Houston*, 78 F.3d at 567. The *claims* asserted in the complaint span all of the years.

In *Common Ground Healthcare Cooperative v. United States*, Judge Sweeney denied a similar request for a partial final judgment pursuant to Rule 54(b) with respect to plaintiffs' 2017 CSR claims. In reaching that determination, Judge Sweeney noted that the complaint contains a single claim encompassing multiple years. *Common Ground Healthcare Cooperative v. United States*, No. 17-877, Order at 1 (Fed. Cl. March 25, 2019), ECF No. 61. And because the underlying liability and damages rulings were on appeal, Judge Sweeney recognized that entry of a partial final judgment would simply lead to "multiple appeals, wasting the resources of the United States Court of Appeals for the Federal Circuit." *Id.*

Although as plaintiffs point out, in a different CSR case, Judge Wheeler entered partial final judgment for plaintiffs' 2017-18 CSR claims over the United States' objection, in our view, Judge Wheeler deviated from the plain language of Rule 54(b) to reach that result. *Local Initiative Health Auth. for Los Angeles Cty. v. United States*, 145 Fed. Cl. 746 (2019). In entering partial final judgment for plaintiffs' 2017 CSR claims, Judge Wheeler reasoned that it would be unjust to "deny[] [plaintiff] access to post-judgment interest[.]" *Id.* at 751. That concern, however, is at stake in any case where one party obtains a favorable damages ruling on one piece of its claim while it litigates the remaining portions. However, Rule 54(b) does not authorize entry of partial final judgments simply for the purpose of starting the clock on post-judgment interest. If it did, then the circuit courts of appeals would be routinely burdened with multiple appeals arising from a single case, which would undermine the expectation that each case will be resolved in a single, final judgment.

Finally, plaintiffs assert that the United States should voluntarily stipulate to a partial final judgment because "[t]he Government previously has agreed to stipulate to entry of final judgment on liability and damages in other CSR cases involving 2017 CSR claims[.]" *Blue Cross Blue Shield of Vt. v. United States*, No. 18-373 (Fed. Cl. Oct. 2, 2020), ECF No. 35; *Blue*

Cross Blue Shield of N.D. v. United States, No. 18-1983 (Fed. Cl. Oct. 15, 2020), ECF No. 39. We stipulated to entry of final judgments in those cases —not partial final judgments—because they raised no additional claims requiring resolution, whereas, in this case, plaintiffs' 2018-19 claims would still require resolution. In any event, those judgments were entered without prejudice to our right to appeal.

Accordingly, the United States requests that the Court continue the stay in this case until either the Federal Circuit's judgments in the CSR appeals become final and non-appealable, or the Supreme Court resolves any petition for a writ of *certiorari* in those cases. We further propose that the parties be ordered to file a joint status report proposing further proceedings within 30 days of either event.

Respectfully submitted,

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