

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS,)	
)	
Plaintiff,)	
)	
v.)	Case No. 17-2057C
)	Judge Margaret M. Sweeney
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	
)	

PLAINTIFF’S MOTION FOR A PRETRIAL CONFERENCE TO ESTABLISH SCHEDULE FOR THE EXPEDITED DISPOSITION OF THIS ACTION

Plaintiff Maine Community Health Options (“Plaintiff” or “Health Options”) now moves this Court pursuant to Rule 16(a)(1)-(3) and (6) to hold a pretrial conference at its earliest convenience to establish a briefing and argument schedule for the purposes of expediting the disposition of this matter, avoiding protracted procedural delays, discouraging unnecessary pretrial activities, and ruling on dispositive motions. Plaintiff is a non-profit health insurer and the requested relief could prove critical to Plaintiff’s operations.

In support of this Motion, Health Options states as follows:

1. As detailed in its Complaint and recently filed Motion for Summary Judgment, Health Options is a non-profit issuer of qualified health plans, or QHPs, under the Affordable Care Act (“ACA”). Defendant the United States of America (“Government”) owes Health

Options \$5,651,672.49 for benefit year 2017¹ under Section 1402 of the ACA (the cost-sharing reductions (“CSR”) program), codified at 42 U.S.C. 18071. Compl. ¶¶ 12-13, 30, 42-46, 48-51.

2. The CSR program and the Government’s financial obligations to Health Options arising under Section 1402 are central to Health Options’ Complaint. The Government induced Plaintiff to participate on the ACA’s newly created health insurance “exchanges” or “marketplaces” in part by promising to make the CSR payments as prescribed by Section 1402 of the ACA (as reaffirmed in the implementing regulations), through which the Government committed to make health insurers whole financially for the cost-sharing reductions that they were required to make to low-income insureds. The CSR program was designed to reduce cost sharing—the out-of-pocket costs that insureds would have to pay to their health care providers. Without these subsidies, high cost sharing would deter low-income individuals from seeking health care, directly undermining the ACA’s goal of making health insurance affordable for low- and moderate-income Americans. Thus, the CSR program requires the Government to make advance payments to insurers who would then use those subsidies to reduce cost sharing for eligible individuals upon utilization. If an insurer reduced costs for an insured greater than the advanced payment received each month, the Government was obligated to provide additional amounts to meet the full cost-sharing burdens borne by insurers. This is how the law was written, and it is how HHS originally construed, and announced it would administer—and did indeed administer—the program: the Government made its CSR payments as required for benefit years 2014, 2015, 2016, *and the first nine months of 2017*. Compl. ¶ 54.

¹ \$1,912,401.71 for October 2017; \$1,890,782.79 for November 2017; and \$1,848,487.99 for December 2017.

3. Health Options is a member-led QHP issuer on the exchange in the state of Maine. It is organized as a nonprofit under the CO-OP model and offers comprehensive health insurance benefits to individuals, families, and businesses in Maine. Its stated mission is to partner with members, employers, and providers to create affordable, high-quality benefits that promote health and well-being. Health Options is Maine's only nonprofit CO-OP insurer and the only nonprofit issuer on the marketplace that is domiciled in Maine.

4. Unlike traditional insurers, Health Options' dominant lines of business are the small group and individual markets that it accesses on the exchanges. Given its dedication to the delivery and service of individual and small group products, subject to the constraints and terms of the ACA, Health Options does not have sufficient revenue from the large group insurance market (*e.g.*, insurance sold to employers), as traditional insurers do, on which it can rely to offset the costs of operating in the exchanges. But for Health Options, there would have been only one carrier on Maine's individual marketplace in 2014 and then again in 2018. Compl. ¶ 24.

5. Since commencing business, Health Options has become the largest writer of individual health insurance in Maine. In its first year of operations, Health Options attracted over 80 percent of the exchange enrollment in the state. Currently, Health Options insures the biggest share of the individual on-exchange market in Maine, and has attracted over half of the state's individual marketplace for the 2018 benefit plan year. Compl. ¶ 24.

6. Health Options conducted and participated in over a thousand outreach and educational sessions throughout Maine, and has focused its outreach broadly across its entire service area, including many rural parts of the state. Compl. ¶ 25.

7. Consistent with the ACA’s intended mission for CO-OPs, Health Options insures individuals and groups in industries that have typically lacked insurance coverage or have been underinsured: farmers, fishermen, artists, sole proprietors and small businesses. Health Options’ 2017 enrollment also includes many people with serious illnesses, including the vast majority of all patients in Maine with HIV/AIDS who accessed marketplace coverage.

8. The assurances provided in Section 1402 of the ACA—reaffirmed by the Government’s actions in making CSR payments for 45 consecutive months, *i.e.*, benefit years 2014, 2015, 2016, and nine months of 2017— as well as the actions of agency officials with authority to bind the Government, were especially important in Health Options’ rate-setting process because they require insurers to provide “cost-sharing” reductions to eligible individuals. Without the CSR program, Health Options would have charged higher premiums to account for the massive cost-sharing reductions the Act required that it make to low-income insureds. *See* Compl. ¶ 54. But that, of course, would have defeated a main goal of the ACA: affordability of coverage for low-income Americans. For obvious reasons, the CSR program is only effective if the Government honors its financial obligations. The program would hardly be able to serve its purpose of reducing costs for eligible insureds if insurers are forced to raise premiums to account for these reductions.

9. Across the country, the vast majority of the non-profit insurers operating in the exchanges have failed. Health Options is fighting to continue to fulfill its mission of increasing the accessibility of healthcare coverage to individuals who traditionally lacked sufficient coverage, despite the Government’s withholding of funds. However, Health Options was forced to withdraw from the New Hampshire individual market beginning in 2017 and the

Government's decision not to make the CSR payments it owes to Health Options for the final three months of 2017 has added to Health Options' financial strain.

10. The Government owes Health Options \$5,651,672.49 for benefit year 2017 under Section 1402 of the ACA. The Government has explicitly stated that it will not pay these amounts.²

11. The Government's refusal to honor its CSR obligations is what prompted Health Options to file this lawsuit. Recouping the amounts due and owing from the Government under the CSR program is absolutely critical to Health Options' financial health and its ability to fulfill its statutory obligations under the ACA.

12. The Government's refusal to make its CSR payments has placed Health Options in a difficult financial position, hence its decision to file not only its Complaint but also its Motion for Summary Judgment. The facts are not in dispute, and the law is clear.

13. For the reasons stated above, Health Options now seeks the Court's assistance in establishing a schedule that will facilitate the expedited disposition of this matter and eliminate unnecessary proceedings and protracted litigation.

14. Undersigned counsel is aware that the Government has, on the same date as the filing of this motion, moved for a stay or, in lieu of that, a 60-day extension of time to respond while certain other litigation which the Government's attorneys believe may be relevant to this case (involving a separate provision of the ACA) is acted on by the Federal Circuit. Health

² 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>

Options strenuously opposes that request and will file a separate response. At issue in *this case* is the Government's obligation under Section 1402 of the ACA.³ No case pending before the Federal Circuit raises the same issue.

15. Health Options is not opposed to a modest extension of time for the Government to respond to its motion for summary judgment, but Health Options is entitled to be heard and the circumstances as alleged in the Complaint militate in favor of an expedited, not prolonged, disposition of this matter.

Dated: February 6, 2018

Respectfully submitted,

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³ Health Options' claim under Section 1402 does not implicate the central dispute being considered by the Federal Circuit in the Risk Corridors (RCP) litigation, *i.e.*, whether *later appropriations acts of Congress* retroactively negated the obligation imposed by Section 1342 of the ACA. The statutory question posed in this case concerns the meaning of Section 1402; there are no subsequent appropriations measures at issue. The Government's reference to *Common Ground Healthcare Cooperative v. United States*, No. 17-877C, misses the mark. That case (which originally related to the RCP), had already been stayed by the Court when the plaintiff subsequently added an additional claim relating to the CSR program.