IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD OF VERMONT,	)	
Plaintiff,	)	No. 18-373 C (Judge Horn)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL BRIEF

Pursuant to the Court's January 7, 2019 Order, defendant, the United States, respectfully submits this supplemental brief to address the questions posed by the Court.

I

> The parties dispute whether a recovery of damages from the Judgment Fund, codified at 31 U.S.C. § 1304(a) (2018), for an alleged violation of Section 1402 of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18071 (2018), when there has been an absence of an appropriation of funding, is recoverable in this court. Defendant argues that recovery from the Judgment Fund is not permitted, while plaintiff claims that recovery from the Judgment Fund is permitted. Both parties, however, only briefly address their respective positions in one paragraph each, and each only cite to one case. Both parties shall address more fully whether recovery from the Judgment Fund, in the absence of an appropriation by Congress, would be recoverable in the above-captioned case filed in this court.
>
> In addition, plaintiff notes that defendant's position in the above-captioned case, that recovery from the Judgment Fund is not allowed, is inconsistent with defendant's position in prior litigation involving the United States Department of Justice in *United States House of Representatives v. Burwell et al.*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016), *appeal dismissed*, Case No. 16-5202 (D.C. Cir. May 16, 2018), in which defendant argued that "the absence of an appropriation" for Section 1402 of ACA "does not necessarily preclude recovery from the Judgment Fund (31 U.S.C. § 1304) in a Tucker Act suit." Thus, the parties also

> shall address what relevance, if any, given the facts and issues raised in the case before this court, does defendant's position in *Burwell* regarding the Judgment Fund have on the above-captioned case, and in the case of the defendant, why the apparent change in position.

Assuming (1) a substantive basis for liability, then (2) the Judgment Fund would be available to pay a money judgment. These two points concern distinct issues. The first issue of liability depends on whether Congress intended to allow issuers to recover damages as a "remedy" for Congress's own refusal to fund CSR payments. The second concerns the source of payment in the event plaintiff obtains a money judgment. As we explained in our previous filings and below, it would be wrong as a substantive matter to conclude that Congress intended to give issuers a damages remedy in the circumstances of this case. If the Court were to disagree with us on liability and enter a money judgment against the United States, after exhaustion of appeals, we expect that the Judgment Fund would pay such a judgment. But the existence of the Judgment Fund as a source to pay *damages* after entry of a money judgment has no place in the Court's substantive analysis about the United States' underlying *liability*. In *OPM v. Richmond*, the Supreme Court explained this distinction: "funds may be paid out [of the Judgment Fund] only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *OPM v. Richmond*, 496 U.S. 414, 432 (1990). Thus, "[t]he general appropriation for payment of judgments, in any event, does not create an all-purpose fund for judicial disbursement. A law that identifies the source of funds is not to be confused with the conditions prescribed for their payment." *Id.*; *see also Moda Health Plan, Inc. v. United States,* 892 F.3d 1311, 1326 (Fed. Cir. 2018) ("access to the Judgment Fund presupposes liability"). The Judgment Fund itself does not support a substantive claim for payment.

Once these distinctions are understood, it should be clear that the Government has not changed its position on the Tucker Act since *House of Representatives v. Burwell*. There, the Government acknowledged that "the absence of an appropriation does not *necessarily* preclude recovery from the Judgment Fund (31 U.S.C. § 1304) in a Tucker Act suit" if the Court were to determine we were liable for damages. *See* Def. Reply at 9, *House of Representatives v. Burwell*, No. 14-1967 (D.D.C. Feb 5., 2016) (citing *Greenlee Cty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (emphasis added). But in *House of Representatives*, the parties did not confront the substantive liability issue in this case: whether Congress intended to authorize a damages remedy for its annual refusals to fund the CSR program. Indeed, the district court declined to decide whether issuers would have meritorious claims under the Tucker Act. *See House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 183 n.20 (D.D.C. 2016).

II

> Both parties cite to *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007), which states that a "mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Id*. at 877. In *Greenlee*, however, the government had allegedly under-appropriated a certain amount of funds. *See id*. at 874. In the above-captioned case, however, unlike in *Greenlee*, the government has failed to appropriate any amount of funds for Section 1402 cost-sharing reimbursement payments. The parties do not cite to any cases in their filings before this court in which a plaintiff is seeking to recover damages in the absence of a complete failure to appropriate funds. The parties, therefore, shall address whether *Greenlee* is applicable to the facts of the above-captioned case and the significance of the difference identified above.

Greenlee declared that it "has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created

by statute." *Greenlee Cty.*, 487 F.3d at 877. *Greenlee* treated, as exemplary, the Supreme Court's decision in *United States v. Langston*, 118 U.S. 389 (1886), which set forth the mode of analysis to determine whether the underfunding of a preexisting entitlement was deliberate (thus reducing the payment obligation for the period covered by the appropriations act) or inadvertent (which would leave the full entitlement in place for the period covered by the appropriations act). Based on a careful analysis of the text and context of the annual appropriations acts, the Supreme Court inferred that Congress had not intended those appropriations acts to deny the Haitian minister the full statutory salary for which he had worked. *See Langston*, 118 U.S. at 394.

To our knowledge, no court has ever found a complete failure to appropriate funds to have been inadvertent. And with respect to CSR payments in particular, there is no plausible argument that Congress's complete failure to provide funding was inadvertent. On the contrary, Congress pointedly refused to provide the appropriation for CSR payments that the prior Administration requested. *See* S. Rep. No. 113-71, at 123 (2013) (explaining that the committee recommendation "d[id] not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA"); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014) (providing no funding for CSR payments). We are unaware of any precedent for a damages award under these circumstances.

III

> Both parties also cite to *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir.), *reh'g denied*, 908 F.3d 738 (Fed. Cir. 2018), in which the United States Court of Appeals for the Federal Circuit recently found that Congress "adequately expressed" its intent to modify a statutory obligation to make certain payments when it passed appropriation bills which used language "to temporarily cap the payments required by the statute at the amount of payments in for each of the applicable years." *Moda Health*

> *Plan, Inc. v. United States*, 892 F.3d at 1323, 1325. Unlike in *Moda*, there is no evidence in the record in the above-captioned case before this court that Congress has passed any appropriation bills that could have potentially suspended or altered the payment requirement contained in Section 1402 of ACA. The parties, therefore, shall address whether *Moda* is applicable to the facts of the above-captioned case and if Congress, in fact, has enacted legislation that suspended or altered the required payment in Section 1402 of ACA. The parties also shall address whether Congress's continuing failure to appropriate funds for Section 1402 cost-reimbursement payments sufficiently evidences an intent by Congress to repeal or modify Section 1402, including citations to any supporting statutes, regulations, and/or case law.

Congress did not include an appropriation when it enacted Section 1402 and, as discussed above, the prior Administration requested an appropriation for CSR payments, which Congress refused to include in the applicable appropriations legislation. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014). Congress likewise has declined to provide funding for CSR payments in all of the relevant appropriations acts that it has enacted since then.

An appropriations act is legislation that unquestionably can suspend a preexisting payment obligation. *See United States v. Will*, 449 U.S. 200, 222 (1980) (explaining that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise'" (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). And as discussed above, there is no plausible contention that Congress's refusal to fund CSR payments was inadvertent. Thus, there is no authority to undermine the funding decisions embodied in Congress's appropriations legislation by entering a judgment against the United States so the Judgment Fund can pay monies that Congress did not otherwise appropriate.

Moreover, as our briefs explained, nothing in ACA or its legislative history suggests that Congress would have contemplated a damages remedy for issuers. And given that issuers have been able to raise premiums to recoup their CSR expenses, it is particularly unlikely that Congress intended such a remedy to exist. Finally, that the ACA was enacted against the backdrop of state insurance regulations that required (and still require) issuers to set premiums high enough to cover their costs and ensure solvency further shows that Congress did not contemplate a damages remedy. *See*, *e.g.*, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* at 3 n.3 (Dec. 1, 2015), *available at* https://go.usa.gov/xEPH8.

CONCLUSION

For these reasons, and the reasons set forth in our motion to dismiss and response to plaintiff's motion for summary judgment, we respectfully request that the Court grant the United States' motion to dismiss, deny plaintiff's cross-motion for partial summary judgment, and dismiss the complaint.

Respectfully submitted,

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