No. 18-1820C
Judge Smith

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,

Defendant.

DEFENDANT'S MOTION TO DISMISS

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HARVARD PILGRIM HEALTH CARE, INC. HPHC INSURANCE COMPANY, INC., AND HARVARD PILGRIM HEALTH CARE OF NEW ENGLAND, INC.,	))))	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 18-1820C
	)	Judge Smith
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this motion to dismiss the complaint of plaintiffs Harvard Pilgrim Health Care, Inc. (HPHC Inc.), HPHC Insurance Company, Inc. (HPIC), and Harvard Pilgrim Health Care of New England, Inc. (HPHC NE). Plaintiffs' complaint fails to state a claim upon which relief can be granted.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) established two programs in the same subpart to lower the cost of health coverage offered through the Exchanges. Section 1401 of the ACA authorizes a premium tax credit for eligible taxpayers and funded the program by amending a preexisting permanent appropriation for tax credits. Section 1402 of the ACA requires insurance issuers to reduce cost sharing (such as deductibles and co-payments) for eligible insureds, and further provides that the Secretary of Health & Human Services (HHS) shall make payments to issuers equal to the value of the cost-sharing reductions issuers provide on behalf of their eligible insureds. In contrast to Section 1401, however, Section 1402 does not appropriate funds for cost-sharing reduction (CSR) payments to issuers.

Plaintiffs seek damages for HHS's failure to make CSR payments. In particular, plaintiffs argue that under Section 1402, they are entitled to recover CSR payments from benefit year 2017 that Congress declined to fund directly, regardless of whether Congress has appropriated money for those payments. In the alternative, plaintiffs allege that they have entered into binding implied-in-fact contracts that the Government allegedly breached when it declined to make CSR payments. Neither claim has merit.

Plaintiffs' statutory claim must fail because Section 1402 does not provide a damages remedy. As the Supreme Court has explained, the controlling legal question is whether Congress intended a cause of action that it did not expressly provide. *See Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). Here, there is no basis to conclude that Congress intended to provide a damages cause of action for issuers that do not receive CSR payments as the direct result of Congress's decision not to fund such payments. Indeed, the contrast between Section 1401 and Section 1402 of the ACA shows that Congress deliberately chose not to provide a permanent appropriation for CSR payments, and instead opted to leave those payments to the annual appropriations process. Given that clear congressional choice, plaintiffs cannot plausibly claim that Congress nonetheless intended to permanently fund the CSR payments through the cumbersome backdoor method of authorizing issuers to seek damages as a "remedy" for Congress's own decision not to fund CSR payments in annual appropriations bills. If Congress had intended to permanently fund CSR payments, it would have simply done so.

Although Congress did not fund CSR payments, the structure of the ACA does allow issuers to recoup their CSR expenses by raising premiums. Such premium increases, in turn, enable issuers to receive increased advance payments of the premium tax credits. Indeed, for 2018, the Government is expected to pay more as a result of increased premium tax credits than the amounts foregone in CSR payments. *See California v. Trump*, 267 F. Supp. 3d 1119, 1139 (N.D. Cal. 2017). Any contention that Congress intended the Government to pay issuers more than double an amount for which it has never appropriated any money—once in the form of increased advance payments of the premium tax credits and again in the form of damages—defies common sense and would undermine Congress's constitutional control over appropriations.

Plaintiffs' implied-in-fact contract claim is equally unavailing. Absent clear indication to the contrary, a statute may not be read to bind the Government in contract. Section 1402 does not use the language of contract, so plaintiffs' attempt to derive a contract from the statutory text fails. HHS does not have authority to enter into contracts for CSR payments and did not purport to do so.

Because plaintiffs' statutory and contract claims fail as a matter of law, the Court should dismiss the complaint.[1]

QUESTIONS PRESENTED

1. Whether plaintiffs' statutory claim fails as a matter of law because Congress did not intend for issuers to receive damages as compensation for CSR payments that Congress declined to fund.

2. Whether plaintiffs' implied-in-fact contract claim fails as a matter of law because Congress did not create private contractual rights to CSR payments or authorize HHS to do so.

[1] Plaintiffs argue that they are entitled to $1,159,917.59 in unpaid CSR payments for benefit year 2017. Complaint (Compl.) ¶ 36. Although the Government contends that the complaint should be dismissed, even were plaintiffs to prevail, the precise amount of damages that they could recover would still need to be determined.

STATEMENT OF THE CASE

I. The Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the ACA), which enables individuals and small businesses to purchase health insurance through marketplaces called Exchanges. Each state and the District of Columbia has an Exchange on which health insurance issuers offer qualified health plans (QHPs) in the individual and small group markets.

The ACA classifies plans offered on the Exchanges into four "metal" levels based on how much of the expected cost of medical care the issuer will bear. 42 U.S.C. § 18022(d).[2] A "silver" plan is structured so that the issuer on average is expected to pay 70 percent of an enrollee's health care expenses for essential health benefits, leaving the enrollee expected to be responsible for the other 30 percent through cost-sharing charges such as co-payments, coinsurance, and deductibles. *Id.* In a "gold" or "platinum" plan, the issuer will bear a greater portion of health care expenses, while the issuer will be responsible for a lower portion of the enrollee's expenses in a "bronze" plan. *Id.*

The ACA establishes in the same subpart, two programs to lower the cost to insureds of qualified health plans offered through the Exchanges. The first is a premium tax credit. In Section 1401 of the ACA, Congress added a new provision to the Internal Revenue Code authorizing a refundable tax credit to subsidize health insurance premiums for eligible taxpayers with household incomes between 100 and 400 percent of the Federal poverty level. *See* 26

[2] "Catastrophic plans," which do not have a specified level of the expected cost of medical care the issuer will bear, are also available to certain consumers in the individual market Exchanges.

U.S.C. § 36B. The amount of the premium tax credit generally is based on the price of the second-lowest-cost silver plan available to the taxpayer on the Exchange, as well as on his or her household income. *See id.* Thus, if premiums for the second-lowest-cost silver plans increase, the premium tax credits increase by a corresponding amount. And in Section 1401, Congress also amended the permanent appropriation for tax refunds to extend to § 36B's premium tax credit, thus ensuring this program would always be funded. *See* 31 U.S.C. § 1324(b)(2).

The second program Congress enacted was the CSR requirement for issuers. Section 1402 of the ACA requires issuers to reduce the amount of co-payments, deductibles, and other cost-sharing requirements for eligible insureds who are enrolled in "silver-level" health plans in the individual market on ACA Exchanges. *See* ACA § 1402 (*codified at* 42 U.S.C. § 18071). Section 1402 also authorizes the Government to make payments to issuers for these amounts, stating that the Secretary of HHS "shall make periodic and timely payments to the issuer equal to the value of the reductions." *Id.* § 1402(c)(3)(A). Unlike its treatment of premium tax credits, however, the ACA does not appropriate funds to make CSR payments to issuers.

It is the issuer's responsibility to "ensure that an individual . . . pays only the cost sharing required," and the reduction "must be applied when the cost sharing is collected" from the individual. 45 C.F.R. § 156.410(a). Assuming the CSR program is funded, CSR payments are claimed by and paid to the issuers directly. The regulations provide that issuers will receive periodic advance payments to cover projected CSR amounts, 45 C.F.R. § 156.430(b).

Although CSRs and premium tax credits are funded differently, the requirement that issuers reduce cost sharing for eligible insureds can impact premiums (and thus premium tax credits). As noted above, plans listed on an Exchange are grouped into metal levels based on the actuarial value of the plan. The actuarial value in this context refers to the percentage of health care costs on average for which the issuer is expected to be responsible, with the insured expected to be responsible for the remaining costs. The actuarial value of the plan determines the plan's metal level on the Exchange. For instance, silver plans have an actuarial value of 70 percent, meaning that those plans cover on average 70 percent of an eligible insured's expected health care costs.

Under the ACA, the amount of premium tax credits is based on the price of the second-lowest-priced silver plan available to the insured, *i.e.*, the second-lowest-priced plan designed to cover 70 percent of his or her expected health care costs. *See* 26 U.S.C. § 36B. Cost-sharing reductions provided by issuers for eligible insureds increase the actuarial value of silver plans. *See* ACA § 1402(c) (*codified at* 42 U.S.C. § 18071(c)); 45 C.F.R. § 156.420(a). For instance, as a result of reduced cost sharing, an eligible insured with a household income between 100 and 150 percent of the Federal poverty level will see the issuer's share of his or her expected health care costs under a silver plan increase from 70 percent up to 94 percent, leaving the individual expected to pay 6 percent of his or her costs.[3] *See* 45 C.F.R. § 156.420(a)(1). An eligible insured with household income between 150 and 200 percent of the Federal poverty level will be able to obtain a silver plan under which the reduced cost sharing will increase the actuarial value of those plans from 70 to 87 percent, leaving the individual expected to pay 13 percent of his or her costs. *Id.* at § 156.420(a)(2).

II. The ACA Permanently Appropriated Funding For Premium Tax Credits But Did Not Permanently Appropriate Funding For CSR Payments

Although the ACA authorizes both the premium tax credit program and the CSR program (as well as advance payment of amounts arising from these programs under Section 1412 of the

[3] In other words, the CSRs increase the actuarial value of the plan from 70 to 94 percent.

ACA), it only provides funding for the premium tax credits. A provision that long predates the ACA provides a permanent appropriation to Treasury "for refunding internal revenue collections," including refunds due from certain enumerated tax credits. *See* 31 U.S.C. § 1324. The ACA amends this provision by adding a reference to Internal Revenue Code § 36B—ACA § 1401's tax credit—to the list of tax expenditures for which this provision permanently appropriates funding. *See* Pub. L. 111-148, 124 Stat. 119, 213 (2010); 31 U.S.C. § 1324(b)(2).

The ACA does not, however, add the CSR program (which is not a tax program) to that permanent appropriation for tax refunds, or otherwise appropriate money for the CSR program. Instead, it leaves CSR payments (like most Government programs) to be funded via the regular appropriations process through which Congress generally funds (or does not fund) Government programs in annual appropriations acts.

The prior Administration requested an appropriation in the annual appropriations act for CSR payments for fiscal year 2014, the first year of the CSR program, but Congress did not provide one. *See United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 173-74 (D.D.C. 2016). In January 2014, the Government nonetheless began making monthly advance CSR payments to issuers out of Section 1324's permanent appropriation for tax refunds. That prompted a lawsuit by the House of Representatives seeking to enjoin CSR payments on the ground that the ACA did not appropriate money for those payments. In May 2016, the district court ruled in favor of the House and held that the ACA had not appropriated funding for CSR payments. The court enjoined further payments but stayed the injunction pending appeal. *See House of Representatives*, 185 F. Supp. 3d at 189.

The current Administration subsequently determined that no appropriation exists for CSR payments. In October 2017, in response to an inquiry from the Departments of Treasury and HHS, the Attorney General concluded "that the best interpretation of the law is that the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, cannot be used to fund the CSR payments to issuers authorized by 42 U.S.C. § 18071." Attorney General Letter at 1 (Oct. 11, 2017). The Attorney General explained in his letter that it would make little sense to conclude that the permanent appropriation for tax refunds could be used to fund a non-tax program like CSRs:

> [W]hile the two payment provisions [premium tax credits and CSRs] appear sequentially within the ACA, only the section 1401 tax credits are included in the Internal Revenue Code (consistent with their status as tax credits for taxpayers). It is logical that the permanent appropriation in 31 U.S.C. § 1324—which funds a variety of tax expenditures—would fund the ACA's tax credits. But it would make little sense for a provision that appropriates funds for "refunding internal revenue collections," 31 U.S.C. § 1324(a), to also (and without saying so) permanently fund a non-tax program that provides payments to insurers.

Id.

The next day, October 12, HHS sent a memorandum to its Centers for Medicare & Medicaid Services (CMS) explaining that "CSR payments are prohibited unless and until a valid appropriation exists." Memorandum from Acting Sec'y of HHS Eric Hargan to Adm'r of CMS Seema Verma, Payments to Issuers for Cost-Sharing Reductions (CSRs), at 1 (Oct. 12, 2017).[4] Accordingly, the Government ceased making CSR payments to issuers.[5]

[4] The Attorney General's letter, and the subsequent memorandum from the Acting HHS Secretary are available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.

[5] The district court has since vacated its injunction pursuant to a settlement agreement. *See United States House of Representatives v. Azar*, No. 14-1967 (D.D.C. May 18, 2018).

III. Issuers Increase Premiums To Offset The Absence Of CSR Payments

In 2017, some states began working with issuers to permit them to recoup the value of the CSR payments that they anticipated might be discontinued. These states permitted issuers to increase Exchange plan premiums for 2018 to try to offset the costs of maintaining the actuarial values of the silver plans without CSR payments from the Government. Because premium tax credits are benchmarked to the cost of the second-lowest-priced silver plan, if the premiums for those plans increase, then the premium tax credits increase generally.[6] Thus, in calculating premiums for the silver plans that set the benchmark for premium tax credits across all metal levels, certain states permitted issuers to factor in their anticipated unreimbursed cost of providing CSRs to their insureds, in an effort to offset their CSR costs indirectly through increased advance payments of the premium tax credits. And because premium tax credits—which are available to many more people than CSRs[7]—are benchmarked to the cost of the second-lowest silver plan, increasing premiums for silver plans caused premium tax credits to increase for all eligible taxpayers, not just the smaller pool of taxpayers eligible for CSRs.

Consistent with this strategy, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See California*, 267 F. Supp. 3d at 1136. After HHS ceased making CSR payments in October 2017, additional states

[6] To the extent issuers raise the premiums of the second-lowest-priced silver plans on the Exchanges, the amount of premium tax credits (which, again, Congress funded through a permanent appropriation) increase for all qualified health plans, permitting eligible insureds to purchase not only silver plans, but also to have greater purchasing power to purchase other metal-level plans for which premiums did not increase as much as silver plan premiums did, such as bronze plans with lower out-of-pocket costs, or gold plans that provide higher actuarial value.

[7] To be eligible for CSRs, an insured must not only satisfy the criteria for premium tax credits, but must also meet additional income-eligibility requirements. ACA § 1402 (*codified at* 42 U.S.C. § 18071).

permitted issuers to rerate their 2018 premiums to account for the cessation of CSR payments. *Id.*

IV. States Bring Suit Under The APA To Compel HHS To Resume CSR Payments

Shortly after the Government announced its decision to cease making CSR payments, 17 states and the District of Columbia filed suit in district court under the Administrative Procedure Act seeking declaratory and injunctive relief to compel HHS to resume making CSR payments. The district court denied the states' motion for a preliminary injunction. *See id.* at 1140. The court observed that at that initial stage of the proceedings, it appeared that the Federal Government had the stronger position on the merits as to whether Congress had appropriated funds for CSR payments. *See id.* at 1127-33. The court further concluded that the states had not shown irreparable harm because issuers had used the premium increase strategy described above to offset the non-payment of CSRs by the Government. The court explained that issuers generally had responded to the unavailability of CSR payments by increasing their silver-plan premiums for 2018, which in turn would increase the advance payments of premium tax credits that the issuers would receive. *See id.* at 1133-39. The court observed that "the widespread increase in silver plan premiums will qualify many people for higher tax credits," and "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *See id.* at 1139.

On July 16, 2018, the states that sued the Federal Government in district court filed a motion to stay that litigation or in the alternative to dismiss it without prejudice. *See* Motion For Order Staying Proceedings, *California v. Trump*, No. 3:17-cv-05895-VC (N.D. Cal. July 16, 2018), ECF No. 102. In their motion, the states represented that because of the strategy described by the court "premiums [have become] lower for many low-income Americans than they would have been, had CSR payments continued in the ordinary course." *Id.* at 6. Thus, the states noted that "it is not clear, at present, that the public interest would be served by entering an injunction requiring resumption of CSR payments." *Id.* at 8. On July 18, 2018, the district court dismissed the complaint without prejudice.

V. Plaintiffs Seek Damages For HHS's Failure To Make CSR Payments

Plaintiff HPHC Inc. along with its two subsidiaries, HPIC and HPHC NE, are issuers that provides coverage through the ACA Exchanges in Massachusetts, Maine and New Hampshire, including silver plans subject to the CSR program. *See* Compl. ¶ 18. In this suit, plaintiffs seek damages for HHS's failure to make CSR payments during the 2017 benefit year. *Id.* ¶¶ 36, 46. Plaintiffs contend that they are entitled to recover CSR payments—regardless of whether Congress appropriated funds for those payments—and also allege entitlement to those payments via implied-in-fact contracts with the Government. *Id.* Other issuers have filed similar Tucker Act suits, including a certified class action, that seek damages for HHS's failure to make CSR payments in 2018 as well as in the last quarter of 2017.[8]

In regards to the other CSR cases pending in the Court of Federal Claims, on September 4, 2018, Judge Kaplan denied the Government's motion to dismiss and granted Montana Health's motion for partial summary judgment on liability, holding that Section 1402 created a

[8] *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, C.J.) (class action); *Local Initiative Health Auth. v. United States*, No. 17-1542C (Wheeler, J.); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, C.J.); *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C (Horn, J.); *Noridian Mutual Ins. Co. v. United States*, No. 18-1983C (Horn, J.); *see also Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, C.J.) (damages for 2017 only); *Montana Health Co-op v. United States*, No. 18-143C (Kaplan, J.) (same); *Sanford Health Plan v. United States*, No. 18-136C (Kaplan, J.) (same); *Molina Healthcare of Cal. v. United States*, No. 18-333C (Wheeler, J.) (same); *Guidewell Mutual Holding Corp. v. United States*, No. 18-1791C (Griggsby, J.) (damages for 2015, 2016 and 2017).

mandatory obligation on the Government's part to make CSR payments notwithstanding Congress's funding choices. *See Montana Health Co-Op*, 139 Fed. Cl. 213, 221 (2018), *appeal docketed*, No. 19-1302 (Fed. Cir. Dec. 12, 2018). On October 11, 2018, Judge Kaplan similarly granted Sanford Health Plan's motion for summary judgment on liability. *See Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (Fed. Cir. Dec. 11, 2018). In her decisions, Judge Kaplan relied upon the same statutory arguments that plaintiffs make here. For the reasons set forth below, we respectfully disagree with Judge Kaplan's rulings. Further, we have appealed both decisions, which are now consolidated before the Federal Circuit.

In addition, on February 14, 2019, Judge Wheeler granted summary judgment in favor of Local Initiative Health Authority on both its statutory and its implied-in-fact contract claims. *See Local Initiative Health Auth. v. United States*, No. 17-1542C, ECF No. 32. On February 15, 2019, Chief Judge Sweeney also ruled in favor of plaintiffs on their statutory claims in the following CSR cases: (1) *Common Ground Healthcare Coop. v. United States*, No. 17-877C, ECF No. 48; (2) *Maine Cmty. Health Options v. United States*, No. 17-2057C, ECF No. 20; and (3) *Community Health Choice, Inc. v. United States*, No. 18-5C, ECF No. 28. Further, the Court ruled in plaintiffs' favor on their implied-in-fact contract claims in the latter two cases. For the reasons set forth below, we also respectfully disagree with Chief Judge Sweeney's and Judge Wheeler's rulings.

ARGUMENT

I. Standard Of Review

Plaintiffs' complaint should be dismissed under Rule 12(b)(6) for failure to state a claim. To avoid dismissal, a plaintiff must "provide the grounds of [its] entitle[ment] to relief" in more than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A "formulaic recitation of the elements of a cause of action" is insufficient. *Twombly*, 550 U.S. at 555. Rather, the complaint must "plead factual allegations that support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). The Court must dismiss a claim "when the facts asserted by the claimant do not entitle [it] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

II. Plaintiffs' Statutory Claim Fails Because Congress Did Not Authorize A Damages Remedy For HHS's Failure To Fund CSR Payments

A. Congress Has Plenary Power Over Federal Spending

The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Courts have long recognized that Congress's control over Federal expenditures is "absolute"; that Congress "is responsible for its exercise of this great power only to the people"; and that Congress "can refuse to appropriate for any or all classes of claims." *Admin'r v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886); *see also United States Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (citing *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977)).

Congress's exclusive constitutional authority over the use of public funds—and its corresponding accountability to the public for its exercise of that authority—is a bedrock feature of the Constitution's separation of powers. *See Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (*en banc*); *see generally* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1352-63 (1988). By reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM v. Richmond*, 496 U.S. 414, 427-28 (1990). Congressional control over appropriations is "a bulwark of the Constitution's separation of powers" because, without it, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *United States Dep't of the Navy*, 665 F.3d at 1347 (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)).[9]

B. The Structure Of The ACA Demonstrates That Congress Did Not Intend To Fund CSRs

In enacting the ACA, Congress established the Section 1401 premium tax credit program and the Section 1402 CSR program. Congress permanently appropriated funding for the premium tax credits but, in the immediately adjacent section of the ACA, did not permanently appropriate any funding for CSR payments. Congress also has not provided funding for CSR payments in any subsequent annual appropriations bills. Accordingly, HHS is legally barred from making those payments. *See* 31 U.S.C. § 1341(a)(1)(A) (prohibiting any officer or employee of the Federal Government from making or authorizing an expenditure for which there is no available appropriation).

Plaintiffs do not appear to seriously dispute any of this. *See generally* Compl. Further, they do not seek to compel HHS to resume making CSR payments. Instead, plaintiffs contend

[9] Congress must, of course, exercise its appropriations power in a manner consistent with the other provisions of the Constitution. For example, restrictions on appropriations may be invalid if "they encroach on the powers reserved to another branch of the Federal Government." *Richmond*, 496 U.S. at 435 (White, J., concurring); *see id.* (rejecting the suggestion "that Congress could impair the President's pardon power by denying him appropriations for pen and paper"). But no such concern is present here.

that they are entitled to damages for HHS's failure to make CSR payments even though that failure is the necessary legal consequence of Congress's decision not to appropriate funding for those payments. Their claim fails because Section 1402 does not give insurers either an express cause of action for damages or a damages remedy. The "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen*, 487 U.S. at 905 n.42. And there is no basis to conclude that Congress intended to provide a damages cause of action for issuers whose inability to receive CSR payments flows from Congress's own decision not to fund such payments.

In sequential provisions of the ACA, Congress provided permanent funding for premium tax credits, but not for CSR payments. That contrast shows that the decision not to provide permanent funding for CSR payments was an integral part of the ACA itself. Instead of permanently funding CSR payments (as Congress did for premium tax credits), Congress instead chose to leave CSR funding to the annual appropriations process, to be decided by future Congresses.

The damages remedy that plaintiffs asks this Court to infer from Section 1402 would provide the very permanent funding for CSR payments that Congress itself declined to enact—just through the more cumbersome means of damages suits rather than a direct appropriation. Having deliberately left CSR funding to the annual appropriations process, Congress could not have plausibly intended to *also* authorize damages awards to "remedy" its own future decisions not to fund CSR payments. If Congress had wished to provide permanent funding for CSR payments in Section 1402, it would have done so directly—as it did for premium tax credits in the immediately preceding provision of the statute.

Moreover, although Congress did not enact a permanent appropriation for CSR payments, Congress structured the ACA in a manner that allows issuers to account for the absence of CSR payments by increasing their premiums. Increased premiums, in turn, increase the amounts that issuers receive as advance payments of premium tax credits. *See* 26 U.S.C. § 36B(b). In rejecting the states' motion for a preliminary injunction that would have compelled HHS to resume CSR payments, the district court noted that, for 2018, "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *California*, 267 F. Supp. 3d at 1139.

Given issuers' ability to offset CSR expenses by raising premiums, it is particularly implausible to conclude that Congress also intended to grant issuers a damages remedy. That argument rests on the untenable premise that Congress, in declining to permanently appropriate funds for CSR payments in the ACA, intended that in the event of an absence of annual appropriations, issuers would be allowed to collect full payments via damages, while also potentially recouping CSR costs through higher premiums and premium tax credits. It defies common sense to conclude Congress intended to provide a potential double payment of amounts that it never appropriated for in the first place.

C. The Federal Circuit's Reasoning In *Moda Health Plan, Inc. v. United States* Supports This Conclusion

As the Court is aware, in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018), and the companion case, *Land of Lincoln Mutual Health Insurance Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018), the Federal Circuit rejected the contention that issuers are owed additional payments under the risk-corridors program established by Section 1342 of the ACA. The Court disagreed with the Government's contention that Section 1342 was originally intended to be budget neutral, but ruled for the Government in light of subsequent appropriations legislation that kept the program budget neutral for the three years that it was in effect.

In *Moda*, the "central issue" and touchstone for the Federal Circuit's inquiry into whether issuers were entitled to collect risk corridor payments was congressional intent. *Moda*, 892 F.3d at 1320-22. Here, too, the touchstone of the inquiry must be congressional intent: issuers cannot collect CSR payments from the Government unless Congress intended to allow them to do so. The framework of the ACA, and in particular the single subpart in which Congress elected to permanently fund one section (premium tax credits) and to not fund the other section (CSRs), demonstrates that Congress did not intend for the Government to expend funds for CSRs absent a subsequent annual appropriation.

It is axiomatic that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (holding that had Congress meant to give two adjacent subsections the same meaning, it would not have placed restrictions in one subsection that it did not in the other)). The Supreme Court recently reiterated this point by observing that "when Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018). Contrary to the Supreme Court's guidance, plaintiffs' reading of the ACA would make Congress's choice to fund Section 1401, and not to fund Section 1402, meaningless.

We recognize that in *Moda*, the Federal Circuit concluded that the language in Section 1342 stating that the Secretary "shall pay" certain amounts in accordance with a statutory formula initially created an obligation to make full risk-corridors payments without regard to appropriations or budget authority.[10] But the Federal Circuit confirmed in *Moda* that the touchstone of the inquiry is congressional intent (as is true in any statutory interpretation case). Although the Court first concluded that Congress did not originally intend in enacting Section 1342 for the risk-corridors program to be budget neutral, the Court continued its analysis and gave effect to subsequent appropriations legislation that reflected Congress's intent to have the program operate in a budget neutral manner. *Moda*, 892 F.3d at 1320-22.

Importantly, the Court in *Moda* ruled in favor of the Government and held that "[t]he central issue on Moda's statutory claim, therefore, is whether the appropriations riders adequately expressed *Congress's intent* to suspend payments on the risk corridors program beyond the sum of payments in. We conclude the answer is yes." *Id*. at 1323 (emphasis added). *See also id.* at 1328 ("The question is what intent was communicated by Congress's enactments in the appropriations bills for FY 2015–2017."). The Court further observed, "[w]hat else could Congress have intended? It clearly did not intend to consign risk corridors payments 'to the fiscal limbo of an account due but not payable.'" *Id*. at 1325 (quoting *United States v. Will*, 449 U.S. 200, 224 (1980)).

In reaching the conclusion in the earlier part of its opinion that a statutory obligation can exist independent of an appropriation, the *Moda* Court relied upon the Supreme Court's 1886 decision in *United States v. Langston* for the proposition that "in certain circumstances," the United States "may incur a debt independent of an appropriation to satisfy that debt." *See id*. at 1321 (citing *Langston*, 118 U.S. 389 (1886)). However, the Federal Circuit also relied upon

[10] We respectfully disagree with this aspect of *Moda*'s reasoning and preserve the issue for further review.

Belknap v. United States, 150 U.S. 588, 594-95 (1893), where the Supreme Court itself explained that *Langston* "expresses the limit" for recognizing liability in a case in which "mere failure to appropriate . . . was not, in and of itself alone sufficient to repeal the prior act . . . ." As the Federal Circuit explained, *Langston* "is an extreme example of a mere failure to appropriate." *Moda*, 892 F.3d at 1323.

Section 1402 of the ACA is far from "an extreme example of a mere failure to appropriate" and altogether different factually from the salary of a single ambassador at issue in *Langston.* Section 1402 is found in title 1, subtitle E, part I, subpart A, which is entitled "Premium Tax Credits and Cost-Sharing Reductions." The *only other* section located in that subpart is Section 1401, the premium tax credit provision. Congress *did* appropriate funds for that subpart, however, it chose only to fund the portion of that subpart that called for the payment of the premium tax credit. Congress conspicuously declined to provide funding for the only other section in that subpart—the CSR program. *See Digital Realty Trust, Inc.*, 138 S. Ct. at 777 ("When Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning.") (quoting *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014)). This distinction is all the more compelling considering the structural features of the Premium Tax Credits and Cost-Sharing Reductions subpart, which allow issuers to use advance payments of premium tax credits to recoup unfunded CSR costs.

It is also important to recognize that *Moda* entered no judgment against the United States based upon its statements regarding the text of the risk corridors statute, because the Federal Circuit ruled in the Government's favor on other grounds. Moreover, in *Langston,* which predated the Judgment Fund, an Act of Congress was required to pay the judgment. *See* Act of

August 4, 1886, 24 Stat. 256, 281-82 (1886) (authorizing payment of the judgment entered for Langston).

Furthermore, in a footnote, the *Moda* Court stated that a statute is "money-mandating for jurisdictional purposes" if "it 'can fairly be interpreted' to require payment of damages, or if it is 'reasonably amenable' to such a reading, which does not require the plaintiff to have a successful claim on the merits." *Moda*, 892 F.3d at 1320 n.2 (citing *Greenlee County v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007)). The precedent on which *Moda* relied, *Greenlee County*, in turn recognized that "'[t]he Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.'" *Greenlee County*, 487 F.3d at 875 (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)). *Greenlee County* did not award any damages because, as in *Moda*, the Federal Circuit ruled in the Government's favor on the merits.

Ultimately, as we understand this Circuit precedent, it does not allow liability to be imposed on the Government unless the substantive statute is *correctly* interpreted to provide a cause of action for damages. In any statutory case, congressional intent is dispositive, and Government liability cannot be premised on a statutory interpretation that is incorrect (even if that interpretation is reasonable). Accordingly, plaintiffs cannot recover unless they demonstrate that Congress, in enacting Section 1402, "confer[red] a substantive right to recover money damages from the United States." *United States v. Testan*, 424 U.S. 392, 398 (1976). And for the reasons given above, it did not. Given the text and structure of the ACA, it is implausible to infer that Congress intended for issuers to collect as damages the very CSR payments that Congress chose not to fund.

Finally, any reliance on the Judgment Fund as a stand-in appropriation for CSR payments is misplaced for the reasons discussed in *Moda*. *See Moda*, 892 F.3d at 1326. As the Federal Circuit recognized, the Judgment Fund is a permanent appropriation available to pay final judgments against the United States. *Id.*; 31 U.S.C. § 1304(a)(1). The existence of that litigation-contingency fund has no bearing on whether a judgment may be entered in the first place. The Judgment Fund is not a catch-all appropriation for programs that Congress decides against funding. *See Moda*, 892 F.3d at 1326 ("The Judgment Fund 'does not create an all-purpose fund for judicial disbursement.'") (quoting *Richmond*, 496 U.S. at 431).

III. Plaintiffs' Contract Claim Fails Because Section 1402 Establishes A Benefits Program, Not An Implied-In-Fact Contract

Plaintiffs' contention that they have an implied-in-fact contract for CSR payments also fails. *See* Compl. ¶¶ 37-46. To allege a binding implied-in-fact contract, a plaintiff must allege facts demonstrating: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) actual authority of the government's representative whose conduct is relied upon to bind the government. *Moda*, 892 F.3d at 1329. The ACA did not bind the Government in contract to make CSR payments or authorize HHS to enter into such contracts.

A. The ACA Did Not Establish Implied-In-Fact Contracts For CSR Payments

Controlling precedent forecloses plaintiffs' attempt to derive an implied-in-fact contract from the ACA provisions authorizing CSR payments. "The Supreme Court 'has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)); *accord Moda*, 892 F.3d at 1329. "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Brooks*, 702 F.3d at 630 (quoting *Atchison*, 470 U.S. at 466); *accord Moda*, 892 F.3d at 1329. Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Brooks*, 702 F.3d at 630-31 (quoting *Atchison*, 470 U.S. at 466); *see also Baker v. United States*, 50 Fed. Cl. 483, 489 (2001) ("[T]he United States cannot be contractually bound merely by invoking the cited statute and regulation.").

The Federal Circuit has consistently held that where the language in the applicable statute does not evince an intent on the part of Congress to create contractual rights, no contract will be found to have arisen from the statute. The Federal Circuit's recent *Moda* decision rejected a similar implied-in-fact argument made by issuers with regard to the ACA's risk-corridors program. "Moda contend[ed] that . . . the statute, its implementing regulations, and HHS's conduct all evinced the government's intent to induce insurers to offer plans in the exchanges[.]" *Moda*, 892 F.3d at 1330. Because "the statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program," the Federal Circuit held that Moda had failed to state a contract claim. *Id.*

Like the issuer in *Moda*, plaintiffs here allege that the ACA, its implementing regulations, and HHS's conduct all evidenced an intent by the Government to establish contracts. *See* Compl. ¶ 39. And like the issuer in *Moda*, plaintiffs claim that they were induced into offering plans on an Exchange by the statute, regulations, and HHS's conduct, thus resulting in an implied-in-fact contract. *See id.* ¶ 44. The Federal Circuit rejected those arguments in reasoning that applies equally here. Because the "statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program," plaintiff "cannot overcome the 'well-established presumption' that Congress and HHS never intended to form a contract by enacting the legislation and regulation at issue here." *Moda*, 892 F.3d at 1330; *accord Brooks*, 702 F.3d at 631-32; *Hanlin v. United States*, 316 F.3d 1325, 1328-30 (Fed. Cir. 2003); *Bay View, Inc. v. United States*, 278 F.3d 1259, 1266 (Fed. Cir. 2001).

When courts have found an intent to contract with program participants, the statutes at issue clearly expressed Congress's intent for the Government to enter into contracts. *See, e.g.*, *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) (finding an implied-in-fact contract where statute provided that the "Secretary shall offer to enter into a contract"), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966) (explaining that "Congress recognized the contract nature of the subsidy payments" by titling its enactment "Payments to Air Carriers (Liquidation of Contract Authorization)"); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) (opining that agency regulation could give rise to implied contract where it stated that "[u]pon receipt of an offer" the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his acceptance").

In contrast to the statutes referenced in *Grav*, *New York Airways*, and *Radium Mine*s—and similar to the ACA provision at issue in *Moda*—Section 1402 of the ACA contains no contract language. Plaintiffs' attempt to derive a contract from the text of Section 1402 is thus unavailing.

B. HHS Does Not Have Authority To Enter Into Contracts For CSR Payments And Did Not Purport To Do So

Plaintiffs' claim that HHS's regulations, conduct, and statements sufficed to create an implied-in-fact contract (*see*, *e.g.,* Compl. ¶¶ 42-45) must be rejected for an additional reason: HHS has no authority to enter into contracts for CSR payments and, unsurprisingly, HHS did not purport to do so.

An implied-in-fact contract cannot arise without "actual authority" on the part of the Government's representative to bind the Government. *Schism,* 316 F.3d at 1288. "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms." *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000).

Moreover, budget authority is a prerequisite to contract formation with the United States. Except as authorized by law, the Anti-Deficiency Act "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation." *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)); 31 U.S.C. § 1341(a)(1)(B). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 643 (2005). Thus, in *Schism*, the Federal Circuit held that promises of free lifetime medical care made by military recruiters did not bind the Government because the "[t]he recruiters lacked actual authority, meaning the parties never formed a valid, binding contract." *Schism*, 316 F.3d at 1284. The Court emphasized that even the President, as Commander-in-Chief, "does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding." *Id.* at 1288.

These principles preclude plaintiffs' claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with contracting authority. And as explained above, Congress did not provide an appropriation for CSR payments. Thus, no valid contract for the payment of CSRs could have been formed.

In any event, HHS did not purport to enter into contracts for CSR payments. Plaintiffs cite the implementing regulation, 45 C.F.R. § 156.430 (*see*, *e.g.*, Compl. ¶ 35), but that regulation tracks the statute and contains no contractual language. Accordingly, plaintiffs' claim for breach of an implied-in-fact contract must be dismissed.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court dismiss plaintiffs' complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 22nd day of February, 2019, a copy of the foregoing "DEFENDANT'S MOTION TO DISMISS" was filed electronically. Service upon plaintiffs' counsel was thus effected by operation of the Court's CM/ECF system.

s/Veronica N. Onyema
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