

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH)	
OPTIONS,)	
)	No. 17-2057C
Plaintiff,)	(Chief Judge Sweeney)
)	
v.)	
)	
THE UNITED STATES,)	
)	
Defendant.)	

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION FOR LEAVE TO AMEND COMPLAINT

Pursuant to Rule 15 of the Rules of the United States Court of Federal Claims, Defendant, the United States, respectfully submits this response to the motion for leave to amend complaint filed by plaintiff, Maine Community Health Options.

On December 28, 2017, plaintiff filed a complaint in this Court seeking alleged damages for HHS’s failure to make cost-sharing reduction (CSR) payments during the fourth quarter of the 2017 benefit year. Complaint, ¶¶ 51, 61. Plaintiff contended that for 2017 it was entitled to damages under Section 1402 of the Affordable Care Act (ACA) and, alternatively, for a breach of an implied-in fact contract. *Id.* Plaintiff subsequently moved for partial summary judgment as to liability on these 2017 claims. The Government opposed plaintiff’s motion and cross-moved to dismiss the complaint. On February 14, 2019, this Court heard oral argument on the parties’ respective motions. At the same hearing, the Court entertained argument regarding motions in two other cases involving claims for CSR costs. In those other two cases, *Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, C.J.) (class action); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, C.J.), plaintiffs sought damages for both 2017 and 2018 CSR costs.

On February 15, 2019, the Court issued decisions in all three cases, ruling in favor of plaintiffs on their statutory claims in all three cases, and on plaintiff's implied-in-fact contract claims in the present case and in *Community Health Choice, Inc.* In the *Common Ground* class action and in *Community Health Choice, Inc.*, the Court ruled specifically with regards to the plaintiffs' claims for 2018 CSR costs that:

With respect to 2018, defendant contends—as discussed above, albeit in the course of arguing that the structure of the Affordable Care Act reflects a congressional intent to preclude cost-sharing reduction payments absent an appropriation for that purpose—that plaintiff's ability to increase the premiums for its silver-level qualified health plans to obtain greater premium tax credit payments precludes recovery under the Act's cost-sharing reduction provision. Specifically, defendant asserts that the statutory scheme enacted by Congress permits insurers to make up any lost cost-sharing reduction payments by increasing silver-level plan premiums, which would prevent monetary injury to insurers. Defendant also expresses concern that allowing insurers to both obtain greater premium tax credits and obtain a judgment for their lost cost-sharing reduction payments would provide an unwarranted windfall for insurers. As noted above, the court is not convinced by defendant's arguments. Accordingly, it finds that plaintiff may recover the cost-sharing reduction payments that the government did not make for 2018.

Common Ground, 2019 WL 642892, at *13 (Fed. Cl. Feb. 15, 2019); *Community Health Choice, Inc.*, 2019 WL 643011, at *14 (Fed. Cl. Feb. 15, 2019).

In the present case, because plaintiffs did not make a claim for 2018 CSR costs, the Court did not make a ruling with regards to plaintiff's entitlement to recover such costs, or address the effect that plaintiff's ability to raise premiums to recover CSR costs through Government-paid premium tax credits would have on a claim for 2018 CSR costs. *See Maine Community*, 2019 WL 642968, at *18 (Fed. Cl. Feb. 15, 2019) (“In addition, if plaintiff intends to pursue a claim for unpaid cost-sharing reduction reimbursements for 2018, the parties shall indicate what, if any, further proceedings may be required.”). Yet, plaintiff's current motion seeks to add those

claims to the case, more than a year after their original complaint was filed, and after the Court has already issued an opinion.¹

In the interest of preserving the Court's and the parties' resources, the Government does not oppose plaintiff's motion to amend its complaint. However, to the extent the Court intends to direct the entry of a judgment awarding plaintiff 2017 and 2018 CSR costs, the Government respectfully requests that the Court expressly set forth its reasons for doing so, as the Court did in *Common Ground* and *Community Health Choice, Inc.* The Government also asks that all arguments that it made in those two other cases—whether written or oral—as to why plaintiff's ability to raise premiums to recover CSR costs through Government-paid premium tax credits should preclude a claim for 2018 CSR costs, be deemed part of the record in this case. The Government respectfully makes these requests out of an abundance of caution to ensure that its ability to challenge any award of such 2018 costs on appeal is not prejudiced by its decision not to oppose plaintiff's motion to amend.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

¹ Plaintiff's motion was filed the day after the Court announced its decisions from the bench and less than an hour after the Court issued its written opinions.

OF COUNSEL:

ALBERT S. IAROSI
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
Civil Division
U.S. Department of Justice

s/Christopher J. Carney
CHRISTOPHER J. CARNEY
Senior Litigation Counsel
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7597
Facsimile: (202) 307-2503
Email: Chris.Carney@usdoj.gov

Attorneys for Defendant

March 1, 2019