Nos. 2019-1633, 2019-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

COMMUNITY HEALTH CHOICE, INC.,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims,
Case Nos. 18-5C and 17-2057, Chief Judge Margaret M. Sweeney

JOINT SUPPLEMENTAL BRIEF FOR APPELLEES

CROWELL & MORING LLP
Stephen J. McBrady
Clifton S. Elgarten
Daniel W. Wolff
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
Tel.: (202) 624-2547

Attorneys for Appellee Maine Community Health Options

FAEGRE DRINKER BIDDLE & REATH LLP
William L. Roberts
Jonathan W. Dettmann
Nicholas J. Nelson
Elizabeth M.C. Scheibel
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-7000

Attorneys for Appellee Community Health Choice, Inc.

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The Court has asked whether, "assuming liability under the appellees' statutory and/or implied-in-fact contract theories, a reduction in damages is available to the appellant if the appellees' loss was diminished as a result of increases in premiums and tax credits." The answer is "No" for both statutory and contract claims.

Damages are measured by the payments the Government owes each insurer under the Patient Protection and Affordable Care Act (ACA) §1402, but has failed to make. If a plaintiff fully performs the activities that trigger a payment obligation, well-established precedents, principles, and authorities preclude any reduction to those payments based on the kind of theories the Government proposes here. This is true both for payments mandated by statute and payments mandated by contract. The Government offers no precedent whatsoever for reducing damages for money concededly owed but unpaid, after plaintiff has fully performed whatever requirement gives rise to the right to payment.

Under long-established principles of federal damages law, damages for failure to pay money owed are determined "at the first step." Damages cannot be reduced, any more than increased, based on remote occurrences (later steps) or through collateral means. Finally, even if the broad mitigation concepts the Government cites applied in a case seeking payment of specific sums earned but unpaid, they would not reach the alternative recoveries that the Government hypothesizes here. This Court's cases, including *LaSalle Talman Bank, F.S.B v. United States*, 317 F.3d 1363 (Fed. Cir. 2003), make this explicit.

THE GOVERNMENT'S FACTUAL THEORY

The Government recounts that for insurers to keep their silver plans actuarially sound, state regulators in most states allowed (or required) them to increase their prospective silver plan premiums for benefit year 2018, often citing the need to cover the projected costs of cost-sharing reductions (CSRs) that §1402 required them to provide to certain silver plan enrollees. That need would turn on what could be absorbed under prior rates, projections of expected CSRs, and enrollment projections. The approved increases varied, insurer by insurer, plan by plan, state by state. Consumers subject to the increased premiums included silver plan enrollees not eligible for tax credits, who absorbed the increased premiums out-of-pocket, as well as enrollees who could defray the increase with tax credits available to them under §1401.

Section 1401 offers tax credits to enrollees with incomes between 100 and 400 percent of the federal poverty level, a broader group than eligible for CSRs. Eligible enrollees can use their credit to help defray the cost of any exchange plan (including bronze, gold, and platinum) they choose from whatever insurer they choose. They can have the credit paid directly to their insurer or take the credit when they pay taxes.

The size of the tax credit available to any given enrollee under §1401 varies based on factors unique to the enrollee. But the maximum for any enrollee is keyed to the premium on the second-lowest-cost silver plan in the state—the benchmark plan. When state regulators allow individual insurers to set premiums on various silver

plans, one of those plans ends up being the benchmark, and the basis for the maximum tax credit available to all eligible enrollees in the state.

The health insurance market "is driven in large part by individual decisions to purchase insurance." May 2019 CBO Report at 31. Consumers would sooner or later realize that (except for enrollees granted CSRs) the silver plan premium increase would make those plans far less attractive than the other plans whose premiums did not go up. *See* May 2018 CBO Report at 9; May 2019 CBO Report at 33-34.

According to CBO's projections, in light of the increased silver plan premiums, more enrollees would use tax credits to buy bronze and gold plans (instead of silver plans) in 2018. And many silver plan enrollees not eligible for tax credits ultimately would switch to off-exchange silver plans, which did not see premium increases (because no CSRs were required). *See* May 2018 CBO Report at 9; May 2019 CBO Report at 34. The Government emphasizes (Gov't Supp. 4) that larger tax credits are a boon for enrollees and would result in an overall increase in government costs. But because enrollees would be moving into plans whose premiums did not change, these enrollee savings and increased government costs would not translate into increased revenue for insurers. CBO did not project that overall enrollments (let alone those for a particular insurer) would increase, *see* May 2018 CBO Report at 6, but did project an increase in the number of *subsidized* enrollees. *Id.* at 9; *see* Gov't Supp. 4.

The Government argues that all of this somehow provides a basis to reduce the damages it owes Appellees for failing to make the payments to them mandated by

§1402. The Government does not limit its argument to increased premiums on silver plans, but rather extends it to projected broader market impacts, far beyond the first step of the Government's nonpayment:

- Appellees (and state regulators) responded to the CSR nonpayment by increasing silver plan premiums; other insurers in the relevant market did the same.
- Among the state-approved premium increases was an increase for the second-lowest cost silver plan in each state.
- That increase (through §1401) increased the maximum tax credits available to qualifying enrollees, including credit-eligible consumers not currently enrolled in exchange plans.
- The premium increase and increase in tax credits prompted silver plan enrollees to switch to bronze- or other metal-level plans, or to move to off-exchange plans.
- The marginal increase in the maximum tax credit enticed some number of credit-eligible consumers to enter the market and buy bronze or gold plans, including from Appellees.
- The new enrollees generated profits sufficient to overcome losses in silver plan sales, and those profits should reduce the Government's obligation to pay what it owes Appellees under §1402.

As shown below, the Government's damages reduction theories fail as a matter of law. The proper damage award here is in the amount owed but unpaid under §1402.

SUMMARY OF ARGUMENT

When the Government fails to pay a statutorily prescribed amount, the damages are the amount owed but unpaid. Just as a plaintiff may not claim consequential or expectancy damages (or even interest), and is limited to the statutory amount, so the Government cannot invoke deductions not set forth in the statute

itself. And even if courts had the authority to engraft limitations onto a statutory payment requirement, the Government has not described any recognized legal basis for doing so. Under longstanding principles of federal damages law, applicable to both statutes and contracts, damages for failure to pay are determined "at the first step." Indirect, pass-on recoveries of the type at issue here are the paradigm of those later-step recoveries deemed irrelevant in a payment case.

Other mitigation theories invoked by the Government do not help its cause. Damages deductions for the value of substitute transactions are limited to like-kind, "first-step" transactions, such as cover or substitute purchase. There is no legal replacement for failure to pay money when due. That is where the rule limiting damages to the first step is most readily applied. Similarly, a damages reduction is available only for *direct benefits* that a defendant confers on the plaintiff. There is never a benefit, and certainly no direct benefit, in not being paid what is owed. Mitigation does not reach the kinds of indirect effects that the Government hypothesizes here. This Court's cases, including *LaSalle Talman,* make this explicit.

Finally, Appellees' claims are for nonpayment, not loss of value or some expectancy like lost profits. Therefore, the claims provide no basis for the Government's assertion that Appellees' damages are to be measured by comparing each insurer's overall financial condition in light of the cessation of CSR payments to its financial condition in a hypothetical world in which the Government had made the required payments. None of the cases the Government cites addresses a situation

where, as here, the plaintiff has performed its statutory or contractual duties, and the defendant refused to pay the money it owed in return. The measure of damages in such a case is the amount owed under the statute or contract.

ARGUMENT

Appellees seek damages for the Government's failure to pay what it owes for CSRs that they provided their insureds. Whether the failure to pay arises from Congress's refusal to appropriate funds to allow an agency to make the payments, or arises from an agency's own mistaken view of the law, the analysis is the same: The damages to be awarded are the amounts earned but unpaid. The Government's arguments for a reduction of those damages based on second, third, and fourth-step events, and "indirect funding" are not legally relevant to the damages calculation.

I. Damages Are Measured by the Amount Owed but Unpaid.

The measure of damages in a case like this is the amount of money that the Government owes, but which remains unpaid. That is how the concept of debt works, whether based on contract or statute. If a statute or contract says that a discrete sum is owed for one party's completed performance, that party may bring a collection action; the unpaid amount is plaintiff's damages. *E.g.*, *United States v. Langston*, 118 U.S. 389, 394 (1886) (plaintiff awarded statutory amount).

The rationale for this basic principle is especially compelling in a statutory case where the precise amount of payment is prescribed by Congress. In such a case, a judgment for the statutory amount fulfills the explicit command of Congress as

embodied in a duly enacted law. Courts have no license to depart from what Congress, by law, has directed to be paid. At a minimum, any judicial departure from the statutory directive that adds deductions not explicitly set forth in the statute ought to rest on a well-established foundation. The novel departure from §1402 that the Government urges here is not supported by any precedent or legal foundation.

Indeed, the principle that the statutorily prescribed payment is the exclusive measure of damages reflects a fundamental premise of damages law. A plaintiff bringing a Tucker Act case under a money-mandating statute is limited to recovery of the sum owed but unpaid. A plaintiff cannot claim any form of consequential or expectancy damages. *See LCM Energy Solutions v. United States*, 107 Fed. Cl. 770, 774 (2012) (plaintiff "has not cited a single case in which consequential damages have been awarded pursuant to *any* money-mandating provision," and rejecting such a claim).

The reciprocal rule then also applies: defendant cannot claim an offset for plaintiff's secondary recoveries. *See Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1072 (Fed. Cir. 2001) ("allowing a pass-through damages reduction in a breach of contract action would destroy symmetry between reduction and escalation of damages"); *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Just as damages law on overpayment "does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss."); *see infra* §II.A. Beyond the self-evident virtue in strictly following Congress's statutory payment command, the "symmetry" demanded by damages law precludes the

Government from seeking novel deductions to reduce that payment. The Government cites no precedent at all supporting the kinds of deductions from a statutory payment directive that it proposes here.

To be sure, in computing what is due under a statute, courts must account for every element of the statutory command.[1] But here, §1402 prescribes a precisely determinable amount. Nothing in the ACA requires (or permits) payments under §1402 to be reduced based on the size of premiums charged by an insurer, an insurer's rate of return on sales, its overall profit, or any market factors.

The Government's contract theories are also unsupported. In a federal contract setting, if money is owed based on complete and unrejected performance, the plaintiff-seller is entitled "as a matter of law to recover the full unpaid contract price."[2] That is the full extent of Appellees' claims here.

The Government cites various federal contract cases, but none involve actions for non-payment of a price set by contract and owed, but unpaid, after plaintiff's full performance. Rather, they involve instances where plaintiff's own damages theory

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[1] *See also LCM Energy Sols.*, 107 Fed. Cl. at 774 (2012) (quoting *ARRA Energy Co. I v. U.S.*, 97 Fed. Cl. 12, 21 (2011)) ("This precision [in the statutory payment formula] cannot be 'fairly interpreted' as mandating the payment of anything beyond the exact amount of the full grant to which a given plaintiff may be entitled, much less the highly amorphous and subjective category of consequential damages.").

[2] R. Anderson, Damages Under the Uniform Commercial Code §2:6, "Action for Price" (Aug. 2019 ed.) ("An action for the price should always be brought when the Code permits it"). A defendant could contend that no money is due because plaintiff failed to perform or itself breached, but no such contention exists here.

requires a determination of the consequences of the Government's breach based on "hypothetical model[s]" and "but for scenarios." *See* Gov't Supp. 8 (citing *Energy Northwest v. United States*, 641 F.3d 1300 (Fed. Cir. 2011)).[3] Similarly, in the *Winstar* cases, plaintiffs pursued expectancy damages such as lost profits, which required analysis of hypothetical profit scenarios and secondary transactions. *E.g.*, *LaSalle Talman,* 317 F.3d at 1371. As demonstrated below, even if one were to deem the principles cited in such cases relevant to a nonpayment case like this, those principles would not help the Government here. *See infra* §IIC. But no case applies those principles to the nonpayment setting.

The Government erroneously insists that the task for each insurer, and the courts, is to compare each insurer's financial picture now in relation to what it hypothetically might have been if CSRs had been timely paid. *See* Gov't Supp. 11 (whether plaintiffs are "worse off financially as a result of the cessation of direct CSR payments"); *id.* at 15 (whether plaintiffs will be able "to prove that they are damaged at all by the cessation of direct payment for cost-sharing reductions, even taking into account the period in late 2017 in which plaintiffs' rates did not yet reflect the absence of direct cost-sharing reduction payments"). But that is actually no part of Appellees'

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[3] The Government is wrong to say (Gov't Supp. 8) that Appellees "must submit a hypothetical model establishing what their costs would have been in the absence of breach." *Energy Northwest.* was a contract case in which plaintiff sought to recoup costs it incurred when the Government wrongly failed to provide nuclear-waste disposal services. 641 F.3d at 1302-05.

damages claims or burden. Appellees seek only the precise amount that the statute and contract say the Government must pay. Claims limited to amounts owed, but unpaid, under the precise terms of §1402, do not require or allow the courts or parties to embark on such a hypothetical inquiry.

II. Damages for Non-Payment Are Set at the First Step; Later-Step Recoveries Are Disregarded.

The controlling rule is that damages are determined at the first step. Especially in payment cases, pass-on and other later-step or alternative recoveries are deemed irrelevant. *See infra* §II.A. The broadly worded mitigation maxims that the Government invokes are subject to that rule. *See infra* §II.B. The "first step" limitation rests on principles of proximity and symmetry that apply fully in this case, notwithstanding the Government's assertion that it indirectly bears much of the cost of the asserted pass-on. *See infra* §II.C. The specific forms of mitigation invoked by the Government do not go beyond the first step to encompass pass-on and similar indirect recoveries. *See infra* §II.D. The cases that the Government cites fall within the classic mitigation framework, and do not support the attenuated theory it espouses here. *See infra* §II.E. And the practical justifications for rejecting indirect recoveries as damages reductions apply here with special force. *See infra* §II.F.

A. Damages Here Are Determined at the First Step.

The controlling rule in this case is the one stated by Justice Holmes in *Southern Pac. Co.*, 245 U.S. at 533-34, and echoed by Justice Brandeis in *Adams v. Mill*, 286 U.S.

397, 407 (1932): A defendant cannot reduce its liability by demonstrating that plaintiff recovered all or part of the loss by passing it on to its customers.[4] That rule is especially clear where damages involve a defined overpayment or underpayment. In Justice Holmes' classic statement, the harm is complete, and damages are set, at the "first step"—in that case, on a statutory overcharge to plaintiff. Here, that first step is the statutory amount owed but not paid to plaintiffs. Damages analysis stops there:

> The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss.

Id. at 533-34. Under *Southern Pacific*, the pass-on is simply "irrelevant in assessing damages." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 490 (1968).

The "same approach prevails throughout the law." *Carter v. Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985) (applying the rule to RICO).[5] The rule reflects basic "principles of proximate cause." *Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1520 (2019); *id.* at 1526 (Gorsuch, J. dissenting) (calling it one of the "ancient rules of proximate causation"). And this Court has squarely held that the rule applies in contract cases as

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[4] "In contemplation of law, the claim for damages arose at the time the extra charge was paid. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers nor the disposition which may hereafter be made of the damages recovered is of any concern to the wrongdoers." 286 U.S. at 407.

[5] *See generally Cty. of Oakland v. City of Detroit*, 866 F.2d 839, 847 (6th Cir. 1989); *Wis. Elec. Power Co. v. United States*, 90 Fed. Cl. 714, 794 (2009); *In re Neutontin Mktg. & Sales Practices Litig.*, 799 F. Supp. 2d 110 (D. Mass. 2011).

well as statutory cases—even ones involving more than mere nonpayment of specific sums. *See Hughes*, 271 F.3d at 1072; *LaSalle Talman*, 317 F.3d at 1363, 1373 (citing *Southern Pac.*). Most recently, in *Duke Energy Progress, Inc. v. United States*, 135 Fed. Cl. 279, 295-98 (2017), the court held that "pass-on" through ratemaking was not a basis for reducing damages from the Government's breach: "Whatever prices [plaintiff] charges for the electricity it sells, or whatever prices it was allowed to charge by the state public utility commissions, are legally irrelevant to the recovery of the mitigation damages claimed in this case." *Id.* at 297.

The Supreme Court repeatedly has rejected arguments for exceptions to the first-step rule, whether case-by-case or for a class of cases, and for good reason. Allowing exceptions would force courts and parties to undertake the onerous task of examining pass-on deduction claims. *See Hanover Shoe*, 392 U.S. at 491-93 (rejecting the notion that the appropriateness of deducting for pass-on should be determined case by case); *see also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 744 (1977) ("We reject these attempts to carve out exceptions . . . for particular types of markets . . . ."). And in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216-18 (1990), the Court rejected the idea that the rule should not be applied where its economic assumptions have diminished force. The Court held that even an alleged ease of computation (because the pass-on was transmitted via state-regulated rates) did *not* justify a departure from the rule.

B. General Mitigation Concepts Do Not Override the First-Step Rule in a Non-Payment Case.

The Government relies on the "make whole" purpose of damages, and the statement that "[w]here the defendant's wrong or breach of contract has not only caused damage, but has also conferred a benefit upon plaintiff . . . , the value of this benefit must be credited to defendant in assessing the damages." *See* Gov't Supp. 7 (quoting *LaSalle Talman*, 317 F.3d at 1372; quoting Charles T. McCormick, *Handbook on the Law of Damages* 146 (1935)). But the Government offers no precedent holding that this concept reaches claims for money earned but unpaid. It is difficult to imagine how not paying money owed benefits, let alone "directly benefits," the unpaid party.

Even accepting the premise, *LaSalle Talman* held that, in application, McCormick's explanation is consistent with Justice Holmes' statement that damages are determined at the first step. 317 F.3d at 1373-74. The "benefits received" principle does not extend to remote recoveries. *Id.* Indeed, *LaSalle Talman*'s narrow application of McCormick's language is consistent with the examples cited in the treatise, which are limited to *direct* benefits resulting from the breach and forms of classic mitigation.[6] *See* McCormick at 146-48. And the more accurate and complete statement of the rule

[6] McCormick's examples are standard direct benefit: "It is a trespass [to] dig drains [on plaintiff's land] without authority, but, in arriving at damages . . . the resulting benefit will be offset against the injury." Or: if seller sues for breach of the obligation to accept goods, and the goods have not been transferred, the seller receives the price less the value of the goods retained. And the "most obvious and frequent" example: a plaintiff wrongfully dismissed, who obtains a job elsewhere, must deduct the substitute salary. All involve direct benefits from the breach and *like-kind* substitutes.

is stated in Dobbs: "The general rule is that the defendant does get a [credit for benefits to the plaintiff resulting from his acts] when the benefits are direct benefits but that the defendant does not get such a credit when the benefits are collateral benefits." 1 Dan B. Dobbs, *Law of Remedies*, §3.8 (2d ed. 1993).

The Government's failure to pay an insurer for its CSRs assuredly provides no "direct benefit" to that insurer. The "benefits" that the Government proposes are later-step recoveries from increased premiums proposed by insurers and requiring approval by state regulators, made possible by the consequences of a different statutory provision (§1401) which increased the tax credits available to eligible enrollees as a result of the increased premiums for the second-lowest-cost silver plan. Whatever these might be, they are not direct benefits of the breach—there was no direct benefit to insurers from the Government's failure to pay.

Citing *LaSalle Talman*, the Government asserts that its pass-on theories are proximate because most insurers raised silver plan premiums in response to the Government's CSR payment cut-off. *See* Gov't Supp. 14. But that is no more proximate than any other pass-on, and pass-ons go beyond the first step. The remainder of the Government's theory is even more collateral and attenuated because it does not flow from the failure to pay any particular insurer for its CSRs, but from a programmatic decision not to pay *any* insurers for CSRs—including whichever insurer provided the second-lowest-cost silver plan, which had the effect of increasing tax credits for eligible enrollees and impacted the market more broadly. Far from

proximate, these later steps are more remote than even the basic pass-on, which is itself not proximate.

C. The Rationales of the First-Step Limitation Apply Here in Full.

Holmes' classic statement of the "first step" rule in payment cases rested on two related points that provide its legal foundation: proximity and symmetry. "Proximity" is a concept that runs throughout the law in limiting remedies: "remote" recoveries cannot properly be injected into damages analysis. *See LaSalle Talman*, 317 F.3d at 1373. "Symmetry" reflects the view that just as the plaintiff is typically limited to damages at the first step, defendant's liability should not be reduced by the plaintiff's later-step (remote) recoveries. This Court has expressly cited this need for "symmetry" in rejecting the Government's pass-on reduction claims. *See Hughes*, 271 F.2d at 1072 ("allowing a pass-through damages reduction in a breach of contract action would destroy symmetry between reduction and escalation of damages."); *Southern Pac.*, 245 U.S. at 533-34 (as the law "does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss.").

These cornerstones of damages law, proximity and symmetry—as well the practical rationales that support the no-pass-on rule, *see infra* §II.F—highlight the Government's error in arguing that some different rule should be created to apply when it is the ultimate payer of some or all of the pass-on.

Judge Easterbrook's example of proximity is a useful starting point: If an employee is caught stealing funds, the employer may decide not to pay the employee a

bonus that year. Money saved on the bonus is not a legally cognizable reduction of what the employee owes; the employer still can claim the full amount as damages.[7] *Carter*, 777 F.2d at 1175. Or take a seller in the business of selling apples and oranges. A purchaser of apples accepts them and fails to pay, maybe even contesting that it was obliged to pay. But as a result, the seller charges more on the same purchaser's next orange (or even next apple) purchase. If not prohibited by contract, the extra charges do not reduce damages, even if they were prompted by the non-payment.

In this case, the proximity rule against considering second-step recoveries applies with even greater force. Here, at the "second step," insurers are alleged to have increased premiums on silver plans to offset the cost of the CSRs that they were forced to extend under §1402. That anticipated cost—not even the actual cost—was therefore passed on, at the second step, in some part, to purchasers of silver plans. It presumably would have been passed on to customers whether or not the tax credit program under §1401 existed.

And the Government's theory looks even farther down the line, focusing on increased tax credits provided to some (but not all) silver-plan purchasers. That happens, at best, at a third or even later step because those tax credits are the product of a distinct computation under §1401 based on the cost of only one insurer's

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[7] In contrast, if the employee steals $100, and the employer owes the employee $100 in back salary and does not pay, then there is a set-off. The employer cannot violate a legal duty to the employee.

premiums under one particular silver plan—the plan with the second lowest cost.[8] Then that tax credit is conferred upon eligible enrollees, who choose their plans, and can elect to take the benefit as a pure tax credit (at the end of the year), or authorize HHS to pay a portion of their insurance premiums as they come due.[9] Indeed, the Government seems to take its theory many steps further, suggesting that although there was no increase in premiums for platinum, gold, and bronze plans, Appellees may have benefitted because the larger tax credit contributed to larger enrollments.

All these mitigation theories go far beyond the "first step" and ignore the basic principle of proximity. The Government's argument here posits exactly the "type of mitigation [that] is too remote to consider." *Hughes*, 271 F.2d at 1072.

Similarly, the Government's argument violates the principle of symmetry. In cases of failure to pay under any statutory payment program—such as social security or Medicaid or veteran's benefits, or salary earned but unpaid, or any other cases involving a money-mandating statute—the plaintiff's recovery from the Government is limited to the amounts owed but unpaid. The *plaintiff* may not claim second-step

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[8] When an insurer raises premiums—for any reason—it does not know if the change will affect premium tax credits. That depends on what other insurers do. Because every insurer has a different pool of insureds with different risk and cost profiles, insurers' responses are not uniform.

[9] IRS, Premium Tax Credit: Claiming the Credit and Reconciling Advance Credit Payments, *available at* https://www.irs.gov/affordable-care-act/individuals-and-families/premium-tax-credit-claiming-the-credit-and-reconciling-advance-credit-payments.

expectancy or consequential damages resulting from the nonpayment, not even interest. The principle of "symmetry" demands the same of the *defendant*: Just as plaintiff's recovery is determined at the "first step," the Government's liability is determined at the first step. Congress could of course dictate otherwise in the statute, but it did not do so in §1402, and there is no basis for the Court to engraft a rule of limitation onto §1402 that Congress did not impose.

D. The Government's Theories Do Not Fall Under any Established Mitigation Principle, Which Draw a Line at the First Step.

The mitigation concepts that the Government invokes here have never extended to the kind of recoveries that the Government invokes here. Indeed, *LaSalle Talman* precludes the Government's damages reduction theories.

Mitigation as a means of reducing damages takes two basic forms. The first is a rule of avoidance—stopping performance to avoid costs. E. Allen Farnsworth, Farnsworth on Contracts §12.12. Here, the avoidance rule might have dictated that insurers not provide CSRs after the Government said it would not reimburse them. But that option was not available because §1402 requires insurers to provide CSRs to qualified insureds.

The second is substitute performance, which mitigates losses by replacing the breaching party's performance with someone else's.[10] *Id.* Hence, in what McCormick

[10] In contract parlance, "substitute performance" is called "cover" for buyers (UCC 2-712) and "resale" for sellers (UCC 2-706).

calls the "most obvious and frequent" instance (McCormick at 147), and Dobbs calls "the most common case":

> [P]laintiff obtains a new job when the defendant wrongfully discharges her. If the plaintiff actually obtains a job, and earns income, the defendant is entitled to a credit . . . .

1 Dobbs §3.9 at 382; 3 Dobbs §12.6(2) at 128-29, 133 (same example). Those actions avoid the harm at the first step with a substitute transaction involving the same subject matter as the original transaction. If an apple seller is told that a buyer will not pay for the apples, he cannot let his apples rot. He must make reasonable efforts to find a substitute buyer for those apples.

But there is nothing similar here. Collecting premiums approved by state regulators and charged to enrollees buying health plans, even for enrollees eligible for tax credits available under §1401, is different from obtaining the Government's direct reimbursement for CSRs that are provided to a different group of enrollees under §1402. A substitute transaction must involve the same thing.[11] That two kinds of transactions both produce revenue does not qualify them as substitutes.

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[11] In explaining the cessation of CSR payments, the Attorney General described why CSRs are not interchangeable with premium tax credits. Appx144-145. This was also the reason for the court's decision in *House of Reps. v. Burwell*, 185 F.Supp.3d 165 (D.D.C. 2016), *vacated in part due to settlement*, *House of Reps. v. Azar,* 2018 WL 8576647 (D.D.C. May 18, 2018). That reasoning carries weight not only as to whether the appropriation for §1401 tax credits could be used to make §1402 CSR payments, but also to whether tax credits substitute for CSR payments for mitigation purposes.

Moreover, these mitigation illustrations involve obligations that are still executory. They involve open performance (either apples available to another buyer, or services available to another employer). In contrast, if the purchaser accepts the apples but refuses to pay, there is no substitute performance available, or required. Or if the employee performs the work but the employer refuses to pay, there is no offset for money the employee earned from a side job.

The Government offers no case reducing damages for money concededly owed but unpaid, after plaintiff has *fully performed* whatever requirement gives rise to the unqualified right to payment. And without more, the principle that the Government must pay the precise amount due should control this case. Mitigation law does not encompass alternative methods of generating revenue when a defendant refuses to pay money owing and due. Such methods are within the rule that pass-ons do not qualify as substitute performance.

The Government's assertion that here "costs were passed back to the defendant itself" (Govt. Supp. 24) does not bring this case within standard mitigation principles. Just as the chain of events is not proximate, here, no transaction would plausibly qualify as a replacement. The transactions are too different.[12] The

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[12] As each judge below recognized, CSR payments and tax credits are not substitutes; the entitlement to CSR reimbursement is independent of premium pricing. *See Community Health Choice* JA-18 (Sweeney, C.J); *Sanford Health Plan* JA-11 (continued...)

Government does not deny that premium payments are the responsibility of the plan enrollee, or that enrollees who do not qualify for tax credits must bear the increased premium directly. The basic premise of the Government's "hydraulic connection" is that the payment cut-off prompted insurers to take steps, subject to state regulatory approval, to remain actuarially sound. Had there been no §1401, insurers presumably would have acted the same. That through another statutory provision, the Government ends up indirectly paying more than it otherwise would have if it had met its obligation under §1402 does not bring this case within any existing mitigation principle. To the contrary, the first-step principle that applies directly to actions for money owed, and principles of proximity and symmetry, control this case.

E. The Government's Case Citations Do Not Help Its Argument.

As support for its broad theory that recovery under a money mandating statute is subject to deductions of the kind it proposes, the Government relies entirely on certain unique features of cases addressing wrongful dismissal. It cites first, in passing, to the Back Pay Act. Gov't Supp. 18. That act explicitly provides for certain deductions, stating that an employee is entitled to what "the employee normally would have earned or received during the period, . . . less any amounts earned by the employee through other employment during that period." 5 U.S.C. § 5596(b)(1)(A)(i).

(continued
(Kaplan, J.); *Local Initiative Health Auth. for L.A. Cty. v. United States*, 142 Fed. Cl. 1, 13 (Wheeler, J.).

A statute prescribing deductions does not support engrafting deductions onto a money-mandating statute that does not prescribe them.[13]

The Government goes on to cite a line of cases under which the Court of Claims made deductions based on nongovernment employment in military wrongful discharge cases, asserting that the court did so without identifying explicit statutory authority for such deductions. But nothing in even that narrow line of cases suggests that courts have some overarching authority to engraft exceptions and deductions onto statutes mandating clearly-defined payments. To the contrary, the Court of Claims operated initially, both in the civilian and military arenas, on the theory that deductions were *statutorily* authorized by its power to adjudicate "set-offs," particularly authorized in the statute creating the right of recovery. *See Borak v. United States*, 110 Ct. Cl. 236, 247-48 (1948); *Motto v. United States*, 360 F.2d 643, 645-47 (Ct. Cl. 1966). But after the deduction had been established in the precedents, later cases acknowledged that "set off" was inapt to describe mitigation. At that point, they simply continued to apply that precedent as "an analog to the private contract law principle of mitigation of damages." *Laningham v. United States*, 5 Cl. Ct. 146, 158 (1984); *Motto*, 360 F.2d at 645-47 (reformulating the rule as mitigation). The unusual

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[13] A current military analog to the Back Pay Act, the Military Pay Act, 37 U.S.C. § 204, also provides that for members of reserve components who are disabled in the line of duty and thus entitled to the pay of a member of a regular component, recovery of pay for a period in which the member earned income from non-military employment, "shall be reduced by the amount of such income." 37 U.S.C. § 204(g)(2).

provenance of that line of cases does not support a general power to reduce statutory payment obligations. The Government has not identified any case suggesting that any such power exists.

But even indulging the Government's suggestion that such a general power exists, those cases cannot help the Government here. A deduction for salary earned from substitute employment is the *paradigm* of accepted mitigation, a like-kind replacement. The hornbooks call it the most obvious example of direct benefit from breach. 1 Dobbs §3.9 at 382; 3 Dobbs §12.6(2) at 128-29, 133; McCormick at 147. The wrongful discharge frees the employee to earn outside salary. If there ever was a deduction that a court could deem implicit in a statute, that would be it.

In contrast, the novel, indirect mitigation theory the Government proposes here rests on no similar or historic foundation. Even the pay cases do not suggest that where an employee performs the requisite services, and sues for salary earned but not paid, the employee's recovery is subject to any form of mitigation. Adopting the Government's theory would involve far more than engrafting a core common law principle onto a statutory command.

Finding little support elsewhere for its theory, the Government enlists sovereign immunity. Gov't Supp. 20-22. The effort is misguided. A waiver of sovereign immunity determines when and where the Government can be sued, and on what kinds of claims. Courts will not find waiver of immunity based on ambiguous statutory language. But once it is waived—as by the Tucker Act—sovereign immunity

does not rise again to change generally applicable legal principles or statutory directives, simply to reduce government payment obligations. In fact, the cases cited by the Government refute its position.[14]

For its ostensible contract-law support, the Government cites *LaSalle Talman,* but that case likewise undermines the Government's theory. In *LaSalle Talman*, this Court reaffirmed Justice Holmes' rule in *Southern Pacific* "not to go beyond the first step" in seeking out deductions from damages, and then, over the Government's objection, identified a range of transactions, the profits from which could *not* be invoked to reduce damages. 317 F.3d at 1373.

LaSalle Talman did not involve a claim for money earned, owed, but unpaid. To the contrary, the breach there involved a change to the way the Government had contractually agreed to measure book capital for a savings and loan, which threatened to put it into receivership. *Id.* at 1369. The claim was for lost profits from what could have been the end to its business caused by the change to capital requirements. A claim for lost profits or other forms of expectancy damages necessarily takes the court into second- and third-step territories.

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[14] For example, in *Heinzelman v. Secretary of Health & Human Services*, 681 F.3d 1374, 1383 (2012), this Court declined to reduce Vaccine Act damages by the value of benefits plaintiff was eligible to receive through another government program, Social Security Disability Insurance (SSDI): "Because the plain language of the statute reveals that Congress did not include SSDI benefits as an offset to compensation under the Vaccine Act, resort to sovereign immunity principles is neither necessary nor proper."

Moreover, plaintiff there declined to calculate its lost profits in the traditional way, by comparing what it actually earned with what it would have earned but for the breach. Because it had, in fact, found an alternative source of capital to substitute for the book capital loss, it proposed instead comparing two hypothetical calculations, namely, "its projected profits after the breach with its projected profits but for the breach." *Id.* at 1371, 1373. Unsurprisingly, this Court rejected those entirely hypothetical damages, holding that the "recapitalization to replace the lost goodwill is fairly viewed as . . . a substitute transaction." *Id.* at 1372. "Reduction of a loss through a substitute transaction is generally a direct mitigation of damages." *Id.* at 1373. The direct substitute transaction—at the first step—at issue in *LaSalle Talman* bears no resemblance to the alternative sources of revenue (selling silver plans at an increased premium or selling different plans at unchanged prices to different people) that the Government proposes here as mitigation for its failure to pay what §1402 requires.

F. The Practical Rationales for Rejecting Pass-On as Mitigation of Damages Apply Here With Full Force.

Courts repeatedly cite two practical considerations in support of the first step rule. Both fully apply here.

First, a court ought not lightly impose on "litigants, or upon the judicial system" the burden of disentangling damages claims that could discourage vigorous enforcement. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982) (citing *Hanover Shoe,* 392 U.S. at 493); *Illinois Brick,* 431 U.S. at 725 (avoid complicating

litigation "with attempts to trace the effects of the [harm] on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge"). Although these statements were made in an antitrust context, antitrust has no greater legal priority than other laws. This Court credited the similar burdens on the court in a contract case. *Hughes*, 271 F.3d at 1072.

Concerns about the burdens on the parties and the courts have special force here. The parties and courts would have to address the complex issues presented by the Government's theories for each and every ACA insurer, for each year of each claim. That task would be herculean and dissuade enforcement. If the law required it, then so be it. But here, there is no precedent for it.

The task in each case would involve determining how much of any premium increase for any silver plan in any year was attributable to projected CSRs. That would reflect whatever margin was previously built into those premiums and projections about CSRs and enrollments for the upcoming year. And, as the Court held in *Kansas v. Utilicorp*, in the comparative "but for" world, it would be necessary to consider the extent to which regulators would have allowed increases in the absence of the CSR cutoff. Even where regulatory filings provide relevant information, the fact of state regulation renders the inquiry more, not less, complex. *Kansas*, 497 U.S. at 210 (A "court would have to determine that the State's regulatory schemes would have barred any rate increase except for the amount reflected by cost increases. Proof of this

complex preliminary issue, one irrelevant to the liability of the defendant, would proceed on a case-by-case basis, and would turn upon the intricacies of state law.").

And the task here would be far more complex than anything faced in *Kansas*. There, the utility presumably had a captive customer base. Here, customers have choices about which plan to buy, from which insurer. Increased silver plan premiums, and many, many other factors, including insurers leaving and entering the market, affect enrollments each year. Increased silver plan premiums made those plans less economical compared to plans with no premium increase, and customers not eligible for a tax credit could switch to off-exchange silver plans. For all those switches, it would be necessary to calculate how much money an insurer lost because of CSR-induced rate hikes causing a switch to other insurers, or another plan from the same insurer. And while the Government cites increased enrollments by tax credit-eligible individuals nationwide, CBO did not project that overall enrollments increased.[15] It would, therefore, be necessary to dissect the reasons for declines. Moreover, it would be necessary to determine how much of any increased enrollment by credit-eligible consumers was attributable to the marginal increase in the credit produced by the CSR cut off—as opposed to the many other factors that affect enrollment, or even the size of the credit-

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[15] Subsequent reported data shows that enrollments generally declined in 2018 and 2019. KFF, Marketplace Enrollment, 2014-2019, *available at* https://www.kff.org/health-reform/state-indicator/marketplace-enrollment/?activeTab=graph&currentTimeframe=0&startTimeframe=5&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

eligible population. All of this would have to be analyzed for each ACA insurer and compared to a "but for" world in which the Government met its §1402 duties.

Second is the principle that the party most proximately injured is in the best position to enforce a statutory obligation and should have a clear incentive to do so. *See Hanover Shoe*, 392 U.S. at 493; *Illinois Brick*, 431 U.S. at 735 (more effective enforcement by concentrating recovery in the direct purchaser); *Carter*, 777 F.2d at 1176 ("The party with a right to recover the whole loss has the right incentives to investigate potential violations and pursue litigation[.]"). There is a public benefit in ensuring that a statute is enforced by its terms. The consequences of violating a statute are likely to radiate broadly, with unintended consequences for many, beyond those most immediately affected.[16] The Government's approach would create enormous litigation burdens that undercut incentives to enforce the statute. The lack of effective enforcement here would also undermine Congressional intent, as manifest in §1402, that the Government "shall" pay CSR costs directly to the insurer.

The Government invokes the specter of a "windfall" if insurers now receive what is owed but unpaid under §1402. But what the Government calls a windfall is simply the consequence of Congress enacting two distinct provisions, §1401 and §1402, each operating in a distinct way, benefitting an overlapping but different group

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[16] Effects are certainly felt by silver plan purchasers who receive no tax credit and therefore pay the entire premium increase out of their own pockets. Other impacts have radiated through the health insurance markets.

of consumers, each with its own unique function. Indeed, under the Government's theory, there would be a "windfall" in every case involving "passing-on," and every case in which courts reject a deduction as too remote. In any event, as the Supreme Court held in *Kansas*, the concern about windfall is greatly reduced where "state regulatory law may provide appropriate relief to consumers." 497 U.S. at 212-13. Regulators are far better positioned than courts to determine how any belated recovery of unpaid CSRs should be addressed.[17]

The Government also cites Congress's recent decision to bar HHS from prohibiting silver loading through 2021. But that only highlights that the decision how to proceed going forward rests with Congress and state regulators. Congress merely has recognized that silver loading is occurring (pending this litigation) and temporarily told HHS not to stop it. Unless Congress amends or repeals §1402, insurers remain entitled to CSR payments, and damages are measured by the amount owed.

III. 2017 Damages Are Not at Issue.

Even though there were no premium increases at all in 2017 resulting from the CSR payment cut-off, the Government asserts that it is entitled to try to demonstrate that §1402 amounts not paid for that year are outweighed by subsequent recoveries. For all the reasons described above, the Government is wrong.

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[17] The Medical Loss Ratio, ACA §1001, also independently caps profits and mandates rebates of any excess to consumers. MLR-driven rebates have occurred every year since the ACA came into effect. https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.

In any event, the Government preserved a reduction argument only for 2018, not for 2017. In No. 2019-1633, the parties devoted only two sentences of their five-page damages stipulation to 2017 damages, agreeing precisely on "the remaining 2017 CSR payment amount due from the Government." Ct. Fed. Cl. No. 18-cv-5, Dkt. 33 at 2. For 2018, by contrast, the stipulation consumed two full pages, and made clear:

> the Government does not waive and expressly reserves its right to make … the argument that any 2018 damages should be reduced by the amount that CHC received as a result of 2018 premium increases made in anticipation of the absence of CSR payments.

Id. at 3-4. The same is true in No. 2019-2102, where the parties stipulated to precise amounts for 2017 and 2018, but the Government did so "without waiving its argument that Plaintiff's ability to raise premiums to recover CSR costs through Government-paid premium tax credits should preclude a claim for *2018* CSR Costs." Ct. Fed. Cl. No. 17-cv-2057, Dkt. 33 at 1-2 (emphasis added).

CONCLUSION

The answer to the Court's question is "No."

Respectfully submitted,

/s/ Stephen J. McBrady
CROWELL & MORING LLP
Stephen J. McBrady
Clifton S. Elgarten
Daniel W. Wolff
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
Tel.: (202) 624-2547

Attorneys for Appellee Maine Community Health Options

FAEGRE DRINKER BIDDLE & REATH LLP
William L. Roberts
Jonathan W. Dettmann
Nicholas J. Nelson
Elizabeth M.C. Scheibel
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-7000

Attorneys for Appellee Community Health Choice, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, I electronically filed the foregoing Joint Supplemental Brief for Appellees with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen J. McBrady
Stephen J. McBrady

CERTIFICATE OF COMPLIANCE

This joint supplemental brief complies with the Court's order of January 10, 2020, because it is no longer than 30 pages, double-spaced. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Stephen J. McBrady
Stephen J. McBrady