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
in Case Nos. 18-5C and 17-2057, Chief Judge Margaret M. Sweeney

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SUPPLEMENTAL REPLY BRIEF

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SUMMARY OF ARGUMENT

Plaintiffs do not dispute the central premises of our supplemental brief. First, plaintiffs (and other insurers) raised premiums for silver plans sold on the Exchanges in order to cover their cost-sharing reduction ("CSR") expenses—the practice known as "silver loading." Second, by operation of law under the Patient Protection and Affordable Care Act ("ACA"), silver loading has substantially increased the premium tax credits that the government pays directly to insurers. Third, this indirect funding of CSR expenses has increased total federal payments to insurers and brought many new customers into the Exchanges. Accordingly, after being urged to consider the salutary effects of silver loading, Congress enacted legislation that explicitly protects that practice through 2021.

Plaintiffs nonetheless insist that the financial benefits they derive from silver loading should be ignored in determining whether and to what extent they have been injured by the absence of direct CSR subsidies. It is fundamental, however, that a Tucker Act remedy is limited to "compensation by the Federal Government *for the damage sustained*." *United States v. Bormes*, 568 U.S. 6, 15 (2012) (emphasis added). Ignoring the economic benefits of silver loading would not compensate insurers "for the damage sustained." *Id.* It would create an unwarranted windfall for insurers and an unjustified penalty for the taxpayers required to fund any damages awards.

A. By Raising Silver-Plan Premiums, Plaintiffs Engaged In The Two Forms Of Mitigation That They Concede Are Paradigmatic: "Stopping Performance" And "Substitute Performance"

It is "a fundamental tenet of the law of contract remedies that an injured party should not be put in a better position than had the contract been performed." *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003) (quoting 3 E. Allen Farnsworth, Farnsworth on Contracts 193 (2d ed. 1998)). This Court's predecessor applied the same principle in statutory cases, based "on an analogy to the principle of mitigation of damages." *Craft v. United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978). Plaintiffs take a narrow view of mitigation, urging (at 18) that mitigation takes only two forms: (1) "stopping performance to avoid costs" and (2) "substitute performance, which mitigates losses by replacing the breaching party's performance with someone else's." This Court has described mitigation in broader terms, reasoning that a reduction in a damages award is required as long as there is "a direct relation, in time and in subject matter, between the breach and mitigating events." *LaSalle*, 317 F.3d at 1371. In any event, plaintiffs engaged in both of the forms of mitigation that they concede are paradigmatic.

1. Plaintiffs stopped "performance" by raising premiums to cover their cost-sharing reduction expenses

The premise of plaintiffs' position, which the trial courts accepted, is that the ACA provisions that govern cost-sharing reductions set forth a "quid pro quo" between an insurer and the government. Accepting that premise for the sake of argument, it is important to be precise about the nature of the "bargain" on which plaintiffs seek to rely. Although the trial courts regarded an insurer's part of the "bargain" as reducing cost sharing for insureds, plaintiffs correctly concede (at 18) that insurers are under an unconditional legal obligation to reduce cost sharing for eligible insureds who enroll in silver plans through an Exchange. That requirement is a straightforward regulation of the business of insurance, similar to the requirement to provide certain essential health benefits.

The express purpose of the ACA's subsidies for cost-sharing reductions was not to encourage insurers to reduce cost sharing—which is mandatory—but to ensure that insurers would do so *without corresponding premium increases*. The ACA made explicit that Congress intended for advance CSR payments "to reduce the premiums" that insurers charge. ACA § 1412(a)(3). In other words, under plaintiffs' bargain analogy, in exchange for receiving cost sharing subsidies, insurers would refrain from raising premiums on account of their duty to provide CSRs to eligible silver plan enrollees.

Beginning with the final quarter of 2017, the government did not provide cost sharing subsidies, and plaintiffs, for their part, raised silver plan premiums for the 2018, 2019, and 2020 years. Thus, if the arrangement is viewed in contract terms, plaintiffs ceased to perform their part of the bargain. Plaintiffs thereby engaged in a quintessential act of mitigation: "stopping performance to avoid costs." Pl. Supp. 18. Only by disregarding the nature of the "bargain" can plaintiffs assert that they have "*fully performed* whatever requirement gives rise to the unqualified right to payment."

Pl. Supp. 20. At no time, under any theory, was there a "bargain" contemplating that insurers would recoup their cost-sharing reduction expenses twice. Plaintiffs therefore have no claim for damages for the 2018-2020 years.

2. Silver loading is an "especially favorable substitute transaction"

It is equally clear that, by silver loading, plaintiffs made an "especially favorable substitute transaction." *LaSalle*, 317 F.3d at 1372. The increased tax credits that flow from silver loading—by operation of section 1401 of the ACA—should leave plaintiffs and other insurers better off financially than they would be if the government made direct CSR payments, even taking into account the period at the end of 2017 before silver loading began.

The reasons are described in our supplemental brief. To recap, the vast majority of Exchange customers—about 87%—receive premium tax credits.[1] The structure of section 1401 generally insulates such enrollees from silver-plan premium increases because of the way the amount of the premium tax credit is calculated. If the premium increases for the benchmark plan—*i.e.*, the second-lowest-cost silver plan offered on the area's Exchange—the premium tax credit rises by a corresponding amount. That is because section 1401 sets the amount of an individual's tax credit as

[1] *See King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (87% of individuals who bought insurance on a federal Exchange in 2014 were eligible for premium tax credits); Kaiser Family Foundation, *Data Note: Changes in Enrollment in the Individual Health Insurance Market through Early 2019* (Aug. 2019) (comparable statistics for 2018 and 2019), https://perma.cc/A9XN-L9PF.

"the excess" of the benchmark premium over the relevant share of the taxpayer's household income. ACA § 1401(b)(2)(B).

The economic benefits of rising premium tax credits are magnified by section 1401's structure, as our supplemental brief explained (at 11-15). Section 1401 makes premium tax credits available to far more people than are eligible for reduced cost sharing under section 1402, and individuals can use their tax credits to purchase any "metal" level plan through an Exchange. The increased premium tax credits thus make an insurer's "bronze," "gold," and "platinum" plans significantly less expensive—and more attractive—to consumers than they would be if the government made direct CSR payments. *See, e.g.*, *California v. Trump*, 267 F. Supp. 3d 1119, 1135 (N.D. Cal. 2017) (providing concrete examples). Accordingly, the Congressional Budget Office ("CBO") projected that the total number of subsidized enrollees would significantly increase, as would total federal spending. Conversely, the RAND Corporation explained that if Congress were to fund direct CSR payments and end silver loading, federal spending would decrease and consumers enrolling in bronze, gold, or platinum plans would face higher costs. It is thus unsurprising that the insurers' trade associations neither opposed the legislation that protects silver loading through 2021, nor appeared in any of the CSR suits to support the plaintiffs.[2]

[2] By contrast, the insurers' trade associations did appear in the risk-corridors litigation to support the plaintiffs. *See, e.g.*, Amicus Brief of America's Health Insurance Plans, *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 17-1224

Plaintiffs' assertion that silver loading is "too different" to "plausibly regard as a replacement" for direct CSR payments, Pl. Supp. 20, is baseless. Congress made explicit that the advance CSR payments were intended to reduce premiums. ACA § 1412(a)(3). In other words, such subsidies were expressly designed to substitute for premiums increases. Because plaintiffs and other insurers anticipated that the subsidies would not be paid, they increased silver-plan premiums as a substitute transaction. Without question, there is "a direct relation, in time and in subject matter, between the breach and mitigating events." *LaSalle*, 317 F.3d at 1371. Plaintiffs therefore must account for the earnings generated from their mitigation efforts, *LaSalle*, 317 F.3d at 1371, in order to prevent "an impermissible double recovery," *Southern California Federal Savings & Loan Ass'n v. United States*, 422 F.3d 1319, 1332 (Fed. Cir. 2005).

B. Plaintiffs' Remaining Arguments Are Meritless

1. Cases involving the "passing-on" defense are inapposite

The "passing on" doctrine on which plaintiffs rely (at 10-12) is inapposite for reasons discussed in our supplemental brief (at 22-25). The general rule is that a plaintiff recovers its actual damages. The "passing on" doctrine is a narrow exception that was developed to promote vigorous enforcement of the antitrust laws. It holds

(Fed. Cir. Feb. 7, 2017); Amicus Brief of Blue Cross Blue Shield Association, *Moda Health Plan v. United States*, No. 17-1994 (Fed. Cir. Aug. 28, 2017).

that the wrongdoer cannot retain the fruits of its violation, simply because the purchaser may have passed an illegal overcharge along to further customers.

Here, there is no wrongdoing to punish, nor are there fruits of any illegal transaction. Congress has simply been paying insurers for reducing cost sharing indirectly, through increased premium tax credits that the CBO concluded will substantially *increase* federal spending. Plaintiffs do not identify any case that rejected a "passing on" defense where the costs (and more) were passed back to the defendant itself. Nor do plaintiffs offer any sound reason to burden the public fisc with duplicative payments.

Furthermore, the "passing on" cases rested in part on the "nearly insuperable difficulty" of determining why a particular plaintiff raised its prices. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968); *see also Hughes Communications Galaxy, Inc., v. United States*, 271 F.3d 1060, 1072 (Fed. Cir. 2001) (applying that aspect of *Hanover Shoe*'s reasoning in a contract case). As our supplemental brief explained (at 14-15, 24), that concern is absent here because plaintiffs engaged in silver loading for the specific purpose of covering their reduced cost sharing.

2. Plaintiffs' suggestion that they may have been injured by silver loading is neither before the Court nor substantiated

Although plaintiffs do not directly challenge the CBO's conclusions, they nonetheless intimate (at 27-28) that they could have lost money as a result of silver loading. Assuming *arguendo* that there is a finding of liability, plaintiffs will have the opportunity on remand to try to show that that silver loading in fact reduced their profits. Plaintiffs are thus wrong to declare (at 7, 15) that taking the benefits of silver loading into account would destroy "symmetry" between reduction and escalation of damages. If plaintiffs are able to prove that their mitigation efforts (*i.e.*, silver loading) reduced their profits, that showing would bear on the amount of damages. The government has met its burden of production by "pointing out the costs it believes the plaintiff[s] avoided." *Southern Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1304 (Fed. Cir. 2011). Assuming liability, plaintiffs will "bear the burden of persuasion" "with respect to both claimed costs and avoided costs." *Id.*

Although the issue is not before the Court, we note that the theories of injury that plaintiffs offer (at 27) are unsupported. For example, plaintiffs suggest that they might have lost money if their enrollees switched from their silver plans to their bronze and gold plans (which became especially attractive as a result of silver loading). Plaintiffs never explain this assertion. Premiums for all categories of plans typically reflect anticipated claims costs and administrative costs, plus profit. And plaintiffs do not claim to reap a greater profit from a silver plan enrollment than a bronze or gold plan enrollment. Plaintiffs' suggestion that they might have lost money if unsubsidized enrollees switched from their on-Exchange silver plans to their off-Exchange silver plans is similarly unexplained. Plaintiffs note that their customers could choose to buy plans from other insurers, but they do not claim that silver loading disadvantaged them vis-à-vis their competitors. On the contrary, plaintiffs acknowledge (at 4) that "other insurers in the relevant market" likewise engaged in silver loading. Plaintiffs also rely (at 27 n.15) on a report indicating that overall Exchange enrollments declined from 2018 to 2019, but that report did not attribute the decline to silver loading, which had already been widely implemented as of 2018. Between 2017 and 2018, Exchange enrollments increased.[3]

More generally, even if there is uncertainty as to the precise amount by which plaintiffs avoided costs and/or benefited from silver loading, that is not reason to give plaintiffs a windfall by ignoring the costs avoided and/or benefits gained that can be determined with reasonable certainty.[4]

3. Plaintiffs' 2017 damages are at issue

As explained above, there is reason to expect that plaintiffs will end up financially better off as a result of silver loading, even taking into account the period at the end of 2017 before silver loading took effect. Plaintiffs incorrectly argue (at 30) that the government forfeited this argument with respect to 2017 when it entered into the stipulations that allowed the trial court to enter appealable judgments.

There was no forfeiture. The stipulations addressed only a narrow ministerial issue: the value of an insurer's reduced cost sharing that was not compensated by

[3] *See* CMS, *Effectuated Enrollment for the First Half of 2018* (Nov. 28, 2018), https://go.usa.gov/xv2H4.

[4] Plaintiffs suggest (at 29) that regulators might require insurers to share damages awards with consumers through premium rebates, but as Common Ground recognizes (at 19-20), that approach could result in windfalls for consumers.

direct CSR payments. In Community's case, for example, the parties agreed that "the difference between (1) advanced CSR payments the Government made to [Community] during 2017 and (2) the actual CSR payments [Community] made on behalf of insureds that year is $11,174,299.10." Appx267. Accordingly, "without waiver of the Government's right to challenge [the trial court's] ruling on appeal," the parties stipulated that, "based upon plaintiff's actual reconciled 2017 CSR data, the remaining 2017 CSR payment amount due from the Government to [Community] is $11,174,299.10." *Id.*

The "without waiver" language preserved the government's ability to make any and all arguments on appeal, apart from the ministerial calculation to which the parties agreed. That is so even though the stipulation did not specifically state (as it did with respect to 2018, *see* Appx269), that such arguments may include the argument that damages should be reduced by the amount Community received as a result of its 2018 premium increases. The breadth of the reservation of appeal rights is confirmed by the final paragraph of the stipulation, in which the parties stipulated that the trial court should enter a partial final judgment in the total amount of $71,561,271.36 for the 2017 and 2018 years combined. That final paragraph stated that while the parties waived any right to dispute this amount, "this stipulation is made without prejudice to the parties' rights to make *all other arguments relating to liability and damages*," which "include[d]" but were not limited to "the arguments described" in prior sections of the stipulation. Appx270 ("Parties' Stipulation Concerning The Entry Of Judgment") (emphasis added).[5]

C. Common Ground's Separate Arguments As Amicus Are Meritless

The class action brought by Common Ground differs from plaintiffs' actions in that the class did not allege a contract claim; only a statutory claim was alleged in the complaint. Although Common Ground's statutory claim is identical to plaintiffs' statutory claims, Common Ground offers several additional arguments that plaintiffs have not made. All are meritless.

1. The Court cannot grant the class members "specific relief"

Common Ground incorrectly argues (at 5-12) that the Court could grant the class members "specific relief." As Common Ground recognizes (at 6), a suit for specific relief would be one "seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Bowen v. Massachusetts*, 487 U.S. 879,

[5] In *Maine Community*, the government stipulated to specified amounts for 2017 and 2018 "without waiving its right to appeal such a judgment[.]" Fed. Cl. No. 17-cv-2057, Dkt. 33 at 1. As in *Community*, that language preserved the right to make all arguments as to liability and damages, even though the stipulation did not specify (as it did for 2018) that the government did not waive the argument that plaintiff's ability to raise premiums to recover CSR costs through premium tax credits should preclude a claim for 2017 CSR costs. In *Common Ground*, the parties stipulated to a judgment totaling approximately $1.5 billion, "without waiver of [the government's] right to appeal this judgment." Fed. Cl. No. 17-cv-877, Dtk. 70 at 1. That stipulation did not differentiate between 2017 and 2018 amounts, and the "without waiver" language preserved all arguments apart from the ministerial calculation of the value of CSRs that had not been directly reimbursed.

900 (1988). In *Bowen*, the plaintiff brought suit to compel the Secretary of Health & Human Services ("HHS") to make payments required by the Medicaid statute.

By contrast, the Appropriations Clause would bar a court from ordering the Secretaries of HHS and the Treasury to make direct CSR payments pursuant to sections 1402 and 1412 of the ACA. It is undisputed that Congress chose not to appropriate funds for HHS and Treasury to make direct CSR payments. Contrary to Common Ground's suggestion (at 4), the government has not sought "this Court's blessing to persist in refusing to make CSR reimbursements." Congress gave the agencies no choice in the matter by withholding funding for direct CSR payments.[6]

Common Ground emphasizes (at 3) that the indirect funding of CSRs will "cost taxpayers $194 billion *more* over the next ten years." That is a policy matter for Congress, which has chosen to protect silver loading through 2021 despite the increased federal spending that flows from it.

Because a suit for specific relief would fail for want of an appropriation regardless of where the suit was filed, Common Ground's discussion (at 10-12) of which court would have jurisdiction is academic. Furthermore, Common Ground is

[6] Contrary to Common Ground's contention (at 7-8 n.3), the D.C. Circuit has consistently recognized that "the Appropriations Clause precludes a distribution of money from the Treasury unless appropriated by Congress." *America's Community Bankers v. F.D.I.C.*, 200 F.3d 822, 830 (D.C. Cir. 2000). The court found that principle inapplicable in *America's Community Bankers* because "the FDIC conceded that it had the authority to offset [the plaintiff's] members' future FICO assessments by the amount of any refund this court might order." *Id.* at 831.

also wrong (at 7) to liken the cost sharing subsidies to the provisions the Supreme Court identified as enforceable in the Court of Federal Claims under the Tucker Act. The Supreme Court explained that "[s]tatutes that have been interpreted as mandating compensation by the Federal Government for the damage sustained"—a prerequisite for Tucker Act jurisdiction—are provisions such as the Back Pay Act and a statute providing compensation to prisoners of war. *Bowen*, 487 U.S. at 905 n.42. The Court reasoned that those laws "attempt to compensate a particular class of persons for past injuries or labors," whereas "the statutory mandate of a federal grant-in-aid program directs the Secretary to pay money to the State, not as compensation for a past wrong, but to subsidize future state expenditures." *Id.* The CSR payments authorized by the ACA are not compensation for a past wrong, but subsidies designed to reduce insurers' premiums. Congress declined to fund those subsidies and instead allowed premiums to rise. There are no "past injuries or labors" to compensate. *Id.*[7]

2. Principles of sovereign immunity require that the scope of a damages remedy be narrowly construed

Common Ground alternatively argues (at 12-13) that the ACA "defines" an insurer's damages "as the CSR reimbursements themselves" and prohibits a court from considering the increased tax credits that mitigate any loss. But the ACA does not provide an express damages remedy, so the scope of any damages remedy would

[7] Common Ground's reliance (at 8-9) on contract cases involving restitution of a non-breaching party's initial payments is puzzling, because the class members neither alleged a contract claim nor made any CSR payments to the government.

be inferred from the statutory scheme as a whole. For reasons already discussed, nothing in the ACA suggests that Congress intended for insurers to recover their cost sharing expenses twice. Instead, Congress contemplated that the ACA's cost sharing subsidies would substitute for increased premiums.

Moreover, regardless of whether a remedy is express or implied, principles of sovereign immunity require that its scope be narrowly construed. *See FAA v. Cooper*, 566 U.S. 284, 291 (2012). Common Ground acknowledges (at 15) that the Court of Claims applied mitigation principles to reduce back pay awards even before the Back Pay Act was amended to add an express provision for offsets. However, Common Ground mistakenly states (at 17) that this Court treated principles of sovereign immunity as irrelevant in *Heinzelman v. Secretary of Health & Human Services*, 681 F.3d 1374 (Fed. Cir. 2012), which was decided several months after the Supreme Court's decision in *FAA v. Cooper*. In *Heinzelman*, this Court concluded that the Vaccine Act's enumerated offsets did not include social security disability benefits, and that there was "no ambiguity in the statute" that could be resolved by principles of sovereign immunity. *Id.* at 1383. Nothing in *Heinzelman* suggests that the ACA provisions addressing cost sharing subsidies may be interpreted without regard to their explicit purpose—to reduce premiums—or that premium increases and corresponding increases in premium tax credits may be ignored in determining the scope of an implied damages remedy.

3. Common Ground confuses silver loading with other rate changes

Although Common Ground admits (at 3, 4) that silver loading is expected to increase federal spending by hundreds of billions of dollars, it argues (at 24-30) that silver loading has many causes other than the absence of direct CSR payments. Common Ground confuses silver loading with rate increases in general. Silver loading is the term that Congress and HHS have used to refer to the silver-plan premium increases that insurers have made because direct CSR payments are unfunded. As HHS explained in the rule that Congress explicitly cross-referenced in the legislation protecting silver loading, "[s]ilver loading is the result of Congress not appropriating funds to pay CSRs, with the result being an increase to the premiums of benchmark plans used to calculate premium tax credits, and the federal deficit." 84 Fed. Reg. 17,454, 17,533 (Apr. 25, 2019).

Common Ground notes (at 26) that the elimination of the individual mandate penalty also affected premiums, but that has nothing to do with silver loading. Likewise, Common Ground notes (at 28 n.13) that plaintiffs' actuarial memoranda included reasons for rate changes that were distinct from the absence of CSR payments, but that does not change the fact—undisputed by plaintiffs themselves—that plaintiffs raised their silver-plan rates for the specific purpose of covering the expenses of reduced cost-sharing.[8]

[8] Common Ground's other arguments echo plaintiffs' contentions and fail for the same reasons.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the Court's order of January 10, 2020, because it is no longer than 15 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/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing supplemental reply brief 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/ Alisa B. Klein
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