

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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HARVARD PILGRIM HEALTH CARE, INC.,)		
HPHC INSURANCE COMPANY, INC., AND)		
HARVARD PILGRIM HEALTH CARE OF)		
NEW ENGLAND, INC.,)		
)	Case No. 20-578	
)		
Plaintiffs,)	Judge Loren Smith	
)		
v.)		
)		
THE UNITED STATES,)		
)		
Defendant.)		
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UNOPPOSED MOTION FOR LEAVE TO FILE OUT OF TIME AND TO STAY

Pursuant to Rule 7 of the United States Court of Federal Claims, defendant, the United States, respectfully submits this motion for leave to file out of time a responsive pleading pursuant to Rule 12 of the Rules of the Court of Federal Claims in response to plaintiffs’ May 8, 2020 complaint, and to stay proceedings (including any deadline to file such a responsive pleading) pending a decision of the United States Court of Appeals for the Federal Circuit in *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (2018) (*Sanford Health Plan*); *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213 (2018), *appeal docketed*, No. 19-1302 (2018) (*Montana Health Co-Op*); *Community Health Choice, Inc. v. United States*, 141 Fed. Cl. 744 (2019), *appeal docketed*, No. 19-1633 (2019) (*Community Health Choice*). ; and *Maine Cmty. Health Options v. United States*, 143 Fed. Cl. 381 (2019), *appeal docketed*, No. 19-2102.

BACKGROUND

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 (Harvard Pilgrim) seek damages for HHS's failure to make CSR payments. In particular, on May 8, 2020, Harvard Pilgrim filed the complaint in this case, alleging that under Section 1402, it is entitled to recover unpaid CSR payments for the 2019 and 2020 plan years. *See, generally*, ECF No. 1 (Complaint). As plaintiffs' Complaint states, "this is the second action of this type brought by Harvard Pilgrim against the Government. In its first action, *Harvard Pilgrim Health Care, Inc. et al. v. United States*, No. 18-1820C, Plaintiffs seek the cost-sharing reductions payments the Government owes Harvard Pilgrim for benefit years 2017 and 2018." *Id.* at 1.

In a February 28, 2019 order, this Court reasoned that, "the facts and issues presented in this case mirror those in *Sanford Health Plan v. United States*, No. 19-1290, which is currently pending at the Court of Appeals for the Federal Circuit." *See* Fed. Cl. No. 18-1820, at ECF No. 10. The Court then stayed that Harvard Pilgrim case, ordered the parties to file a joint status report every 90 days during the pendency of the stay, and ordered the parties to "file a joint

status report seven days after the Federal Circuit issues its decision in Sanford, providing the Court with a proposed procedural schedule for resolution of this matter.” *Id.*

On January 9, 2020, oral argument was held in the consolidated CSR appeals and the companion cases. On May 19, 2020, pursuant to a Federal Circuit order, the parties filed supplemental briefs in the consolidated appeals, addressing the impact of the Supreme Court’s decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). The parties are waiting for a decision by the Federal Circuit in those appeals, and the Government thus respectfully requests that the Court stay this case pending the Federal Circuit’s resolution of *Sanford* and *Montana*, and their companion appeals.

The Government’s answer to Harvard Pilgrim’s Complaint in this case was due on July 7, 2020. While the Government filed a joint status report in Harvard Pilgrim’s first action (Fed. Cl. No. 18-1820) on June 8 (ECF No. 18), we inadvertently failed to request a stay prior to the date on which an answer was due in this case, as has been done in other CSR cases pending before this Court. This case should be stayed because the cases on appeal at the Federal Circuit will likely resolve many, if not all, of the substantial legal issues underlying this case—namely, whether insurers are entitled to recover statutorily mandated CSR payments that Congress declined to fund directly; whether they also possess a private contractual right to CSR payments; and whether any CSR payments must be offset by monies paid by the Government through insurance premium increases. Given that this case presents substantially identical legal issues, it would be appropriate for the Court to exercise its discretion to stay proceedings in this matter pending a decision from the Federal Circuit. A stay will conserve both judicial and party resources. *See UnionBanCal Corp. v. United States*, 93 Fed. Cl. 166, 167 (2010) (“The orderly course of justice and judicial economy is served when granting a stay simplifies the ‘issues,

proof, and questions of law which could be expected to result from a stay.’”) (quoting *CMAX, Inc. v. United States*, 300 F.2d 265, 268 (9th Cir. 1962)).

Given the overlapping issues between the CSR cases in this Court and the CSR cases pending in the Federal Circuit, several judges in this Court have stayed the CSR matters before them. See *Harvard Pilgrim v. United States*, Case No. 18-1820 (Judge Loren Smith), ECF No. 10 (February 28, 2019 order staying case); *Health Alliance Medical Plans, Inc. v. United States*, Case No. 18-334C (Judge Campbell-Smith), ECF No. 22 (March 28, 2019 order staying case); *Health Alliance Medical Plans, Inc. v. United States*, Case No. 20-565C (Judge Campbell-Smith), ECF No. 9 (June 12, 2020 order staying case); *EmblemHealth, Inc. Health Insurance Plan of Greater New York, Inc. et al*, Case No. 19-1164 (Judge Campbell-Smith), ECF No. 6 (October 10, 2019 order staying case); *Guidewell Mutual Holding Corp. et al. v. United States*, Case No. 18-1791, ECF No. 21; *Molina Healthcare of California, Inc. et al. v. United States*, Case No. 18-333, ECF No. 9; *Montana Health Co-Op v. United States*, Case No. 19-568, ECF No. 9; *Noridian Health Insurance Co. dba Blue Cross Blue Shield of North Dakota*, Case No. 18-1983, ECF No. 33; *Sanford Health Plan v. United States*, Case No. 19-569, ECF No. 9; *Maine Community Health Options v. United States*, Case No. 20-458 (Chief Judge Sweeney), ECF No. 8 (June 12, 2020 order staying case).

We thus respectfully request that the Court grant the Government’s request to file a pleading responsive to Harvard Pilgrim’s complaint out of time. We further request that the Court stay this case, including any such responsive pleading deadline, until the CSR appeals at the Federal Circuit are finally resolved, and propose that the parties submit a status report within seven days of a decision in those cases, proposing next steps in this litigation, as this Court ordered in Harvard Pilgrim’s first action to recover CSR payments.

Respectfully submitted,

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