

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD)	
OF VERMONT,)	
Plaintiff,)	
)	Case No. 1:18-CV-00373-MBH
v.)	
)	
UNITED STATES OF AMERICA,)	
Defendant.)	

JOINT STATUS REPORT REGARDING FEDERAL CIRCUIT CSR DECISIONS

Pursuant to the Court’s September 25, 2019 order, ECF No. 32, the parties submit the following joint status report. The Court’s September 25 order stayed this matter pending decisions by the United States Court of Appeals for the Federal Circuit in four appeals involving claims for cost-sharing reduction (CSR) payments: *Sanford Health Plan v. United States*, No. 19-1290; *Montana Health Co-Op v. United States*, No. 19-1302; *Community Health Choice, Inc. v. United States*, No. 19-1633; and, *Maine Community Health Options*, No. 19-2102. Those cases were consolidated for argument before the same merits panel. On August 14, 2020, the Federal Circuit issued two rulings in those appeals.

The first decision, *Sanford Health Plan v. United States*, No. 2019-1290, 2020 WL 4723703 (Fed. Cir. Aug. 14, 2020), concerned 2017 CSR claims. The Federal Circuit held that the Tucker Act provides a remedy for the Government’s failure to make the CSR payments required under the Affordable Care Act (ACA). The Court ruled that the Supreme Court’s recent risk corridors decision, *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), addressing a different payment-obligation provision of the ACA, “makes clear that the cost-sharing-reduction reimbursement provision imposes an unambiguous obligation on the government to pay money and that the obligation is enforceable through a damages action in the Court of Federal Claims under the Tucker Act.” *Sanford Health Plan*, 2020 WL 4723703, *1. The

Court rejected the Government's contention that the ACA's premium tax credit mechanism displaces the Tucker Act remedy. The Court explained that there is a separate body of law—the law of damages—that more precisely addresses the problem the Government identifies, by dealing in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries.

In the second ruling, *Community Health Choice, Inc. v. United States*, No. 2019-1633, 2020 WL 4723757 (Fed. Cir. Aug. 14, 2020), the Federal Circuit followed its ruling in *Sanford* with respect to liability and proceeded to address the quantum of damages. The Court concluded that the Government is not entitled to a reduction in damages with respect to CSRs not paid in 2017 but that, as to 2018, “the Claims Court must reduce the insurers’ damages by the amount of additional premium tax credit payments that each insurer received as a result of the government’s termination of cost-sharing reduction payments.” *Community Health Choice, Inc.*, 2020 WL 4723757, *1. The Court remanded *Community Health* and its companion case *Maine Community Health Options* to the Court of Federal Claims for further proceedings related to the calculation of the silver loading offset.

The parties submit their respective positions on the next steps in this litigation:

Plaintiff's Position

As described above, the Federal Circuit's decisions in *Sanford* and *Community Health* hold that the Government is liable for unpaid 2017 and 2018 CSR payments and that, for insurers who engaged in silver loading in 2018, the trial courts should determine whether a damages offset based on additional premium tax credits received by the insurers is appropriate. Given that this Court stayed this case “pending the issuance of a decision” from the Federal Circuit, ECF No. 32, the issuance of the Federal Circuit decisions obviates the need for and lifts the stay.

As BCBSVT has alleged in its Complaint and explained consistently throughout its filings before this Court, BCBSVT did not silver-load, or otherwise obtain additional premium tax credits to offset the unpaid CSR payments, in 2017 or 2018. *See* ECF No. 31 at 4-5; ECF No. 20 at 6-7; ECF No. 18 at 13; ECF No. 1, ¶¶ 68-78. The Government has not disputed those facts in its filings. Therefore, it is BCBSVT's position that there is no possible damages offset against the unpaid CSR payments owed to BCBSVT and, as a result, the parties should expeditiously agree on the amount of damages and then request that this Court enter a final judgment in that amount.

In the process of meeting and conferring to prepare this Joint Status Report, the parties have agreed to continue discussing a potential resolution of this case in light of the Federal Circuit rulings. In addition, BCBSVT may elect to request relief from the Court, including by supplementing its pending motion for partial summary judgment with a further filing requesting a ruling on damages that should be awarded based on *Sanford* and *Community Health*, on or before September 17, 2020. If BCBSVT submits a supplemental filing on or before September 17, 2020, BCBSVT proposes that the Government have 30 days to respond, and that BCBSVT have 14 days to reply to the Government's response. If BCBSVT does not submit a supplemental filing on or before September 17, 2020, BCBSVT agrees with the Government that the parties should submit a joint status report on September 18, 2020. The parties will promptly advise the court if the parties reach a resolution prior to September 18, 2020.

Government's Position

This case is one of approximately two dozen CSR cases, including a class action involving more than 100 insurer plaintiffs, that have been directly impacted by the Federal Circuit's decisions in *Sanford* and *Community Health*. Because these decisions were only issued five days ago, the Government is still internally assessing the impact of the decisions and the appropriate next steps.

In light of the magnitude of these rulings, and the billions of dollars potentially at issue collectively in these cases, such internal assessment necessarily requires input from the highest levels of the Justice Department and the client agencies involved. Further, because the Federal Circuit just issued these rulings, that Court still has jurisdiction over those appeals, and there is a possibility that one or more parties may seek *en banc* review or petition the Supreme Court for *certiorari*.

However, the Government does recognize that BCBSVT appears to be unique among the many CSR plaintiffs in that it has represented to the Court through briefing and declarations that it did not and could not raise premiums in 2018 to offset the cessation in CSR payments. Assuming BCBSVT is differently situated than other CSR plaintiffs, the Government's approach regarding the next steps to be taken in this case may be different from that taken in other cases. In order to properly consider this and all other CSR cases, the Government needs additional time in which to formulate its position, and respectfully proposes that the Court order the parties to file a joint status report on or before September 18, 2020 proposing next steps. Additionally, if BCBSVT files a supplemental brief on or before September 17, the Government agrees with its proposal that the Government be given 30 days in which to respond.

Dated: August 19, 2020

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