

Cost-Sharing Reduction Class Action in Court of Federal Claims Continues to Move Forward

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Health Care

In April, in *Common Ground HealthCare Cooperative v. United States*, 17-877C (Fed. Cl. April 17, 2018) the Court of Federal Claims granted Common Ground Healthcare Cooperative's motion for class certification. The certified class includes all insurers offering Qualified Health Plans (QHP) under the ACA for the 2017 or 2018 benefit year that reduced cost-sharing to eligible beneficiaries, but did not receive payment from the federal government.

Background

Under Section 1402 of the ACA, QHPs are required to “reduce the cost-sharing” for eligible individuals with household incomes at or below 250 percent of the federal poverty level (FPL), and the federal government is required to “make periodic and timely payments to [] issuer[s] equal to the value of the reductions.” The legality of cost-sharing reduction (CSR) payments has been in question since 2016, when a judge in the U.S. District Court for the District of Columbia ruled that the government had no authority to make CSR payments to QHPs because Congress never appropriated the money for such payments. The Obama Administration appealed the decision, and continued to make CSR payments during the pendency of the appeal.

On October 12, 2017, the Trump Administration announced that it would cease making CSR payments to insurers, agreeing with the district court that such payments could not be made absent Congressional appropriations. However, under the ACA, QHPs are prohibited from charging cost sharing above the statutorily specified amount for individuals at or below 250 percent of the FPL regardless of whether the federal government makes CSR payments to the QHPs. Thus, the Trump Administration's decision to end CSR payments effectively passed to the plans the financial responsibility for the decreased cost-sharing guaranteed by the ACA.

The ACA also provides subsidies to individuals in the form of advanced premium tax credit (APTC) payments. APTC payment amounts are calculated based on the cost of the “second lowest-cost silver plan” offered by the insurer; as premiums for the “second lowest-cost silver plan” rise, APTC payment levels rise commensurately. However, individuals do not need to spend APTC subsidies on purchasing only silver level plans – they can be used to purchase cheaper bronze level plans, or to subsidize a more modest portion of the more expensive gold level plans.

CSR Litigation and *Common Ground Healthcare Cooperative v. United States*

In response to the Trump Administration's decision to cease CSR payments, several insurers sued the federal government, arguing that the Administration's failure to make CSR payments violates the government's statutory and contractual obligations under the ACA. They specifically argue that regardless of the lack of appropriations, the structure and language of the ACA and the federal government's implementing regulations and actions impose a statutory and contractual obligation on the government to make CSR payments to insurers.

There are currently four lawsuits pending against the Trump Administration for the government's failure to make CSR payments: *Common Ground Healthcare Cooperative v. United States*, 17-877C (June 27, 2017); *Maine Community Health Options v. United States*, 17-2057 (Dec. 28, 2017); *Sanford Health Plan v. United States*, 18-136C (Jan. 26, 2018); and *Montana Health CO-OP v. United States*, 18-143C (Jan. 30, 2018).

In December 2017, Common Ground moved to certify a class of all QHP issuers that "offered individual coverage in the ACA exchanges in 2017 and are owed CSR reimbursements." The government opposed class certification, arguing that insurers recovered a majority of their CSR losses by raising premiums, resulting in increased premium tax credit payments from the government. For this reason, the government asserted that the calculations of damages in a class suit would be unduly burdensome, as it would require individual review of each insurer's *actual* losses, after accounting for premium increases and APTC subsidies.

The court rejected the Government's argument, holding that the ACA does not explicitly authorize the government to offset CSR payments with APTC payments, and that APTC payments would not reduce the government's liabilities for its failure to make CSR payments. Thus, the court granted Common Ground's motion for class certification, and certified as a class QHP issuers who, in the 2017 or 2018 benefit year, "made cost-sharing reductions for eligible insured pursuant to Section 1402. . . but did not receive a 'timely and periodic' payment from the Government of an amount 'equal to the value of the reductions' provided to its insureds."

The Current State of the ACA Exchanges

Some experts had predicted that an end to CSR payments would result in a spiral of increasing premiums: as issuers increased premiums to account for the lost CSR payments, healthy individuals would leave the market, leaving behind a greater proportion of sick individuals, requiring that insurers raise premiums to cover their greater health care costs. And in fact, many insurers priced their 2018 QHPs assuming that CSR payments might end, and attempted to recover a portion of those losses through increased premiums.

Many insurers, however, have also mitigated losses from CSR payments through a practice known as "silver loading," which funnels most of the premium increases due to the end of CSR payments into premiums for silver-level plans only. Generally, insurers spread premium increases across all metal levels evenly. Due to the practice of silver-loading, however,

premiums for the lowest-cost silver-level plans have increased an average of 32% in 2018, as compared to 17% for the lowest-cost bronze plans, and 18% for the lowest-cost gold plans.¹

Insurers have chosen to disproportionately increase premiums for silver plans in order to take advantage of continuing APTC payments to low-income households. The amount of the APTC payment that individuals receive is calculated based on the premium of silver plans, so that a low-income household purchasing a silver plan will see the same out-of-pocket costs regardless of the increase in premiums. As a result, by “loading” losses from CSR payments onto silver plans, insurers are able to procure a larger subsidy for low-income households, while keeping premiums for bronze and gold level plans relatively low. In fact, most low-income individuals have seen larger APTC subsidies in 2018, and have been able to use that larger subsidy to purchase bronze plans for free or at a very cheap premium, and gold plans at a comparatively reduced rate.

Approximately 83% of individuals who signed up for an exchange for the 2018 coverage year qualified for APTC subsidies and, on account of silver-loading, have been able to take advantage of the benefit of cheaper bronze and gold level plans. On the other hand, there has been a significant decline in enrollment among middle-class and other higher-income households that are not eligible for APTC subsidies. Still, final numbers reported by CMS show that only 400,000 fewer people signed up for ACA plans in 2018, and some experts have credited “silver-loading” as a critical factor in stabilizing ACA exchanges for the 2018 coverage year.

The future of “silver-loading” is in question, however. CMS has indicated that it is reviewing whether the agency will continue to allow QHPs to continue this practice, though Secretary Azar recently said that CMS will continue to allow it in 2019. Should the Trump Administration restrict this practice in the future, premiums across all health plans are likely to increase, and may cause healthy members in the exchange to either drop health coverage or opt for low-cost plans such as short-term catastrophic plans.

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¹ Kaiser Family Foundation, *How Premiums Are Changing in 2018* (Nov. 29, 2017), available at <https://www.kff.org/health-reform/issue-brief/how-premiums-are-changing-in-2018/>