Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Department of Health and Human Services Halts Cost-Sharing Reduction (CSR) Payments

October 26, 2017

Over the past three years, the House of Representatives and the Department of Health and Human Services (HHS) have been adverse parties in a suit challenging HHS's payment of cost-sharing reduction (CSR) subsidies under Section 1402(c)(3) of the Patient Protection and Affordable Care Act (ACA). CSR payments are made to compensate those insurers that are required by the ACA to reduce out-of-pocket costs (such as co-pays and deductibles) for lower-income enrollees. After the House obtained a judgment against HHS from the U.S. District Court for the District of Columbia in 2016, an appeal has been pending before the U.S. Court of Appeals for the District of Columbia (D.C. Circuit).

However, the case, currently captioned *House of Representatives v. Hargan*, took a sharp turn on October 13, 2017, when HHS informed the D.C. Circuit that the agency would immediately comply with the House's demand and cease cost-sharing reduction (CSR) payments to insurers.

After HHS gave its notice to the court, attorneys general of 18 states and the District of Columbia filed suit in the U.S. District Court for the Northern District of California challenging HHS's decision to terminate CSR payments. The plaintiffs in this second suit, captioned *California v. Trump*, sought a preliminary injunction to compel HHS to continue making CSR payments to insurers. However, the court in *California* denied the request for a preliminary injunction on October 25, 2017. Absent a preliminary injunction being issued, CSR payments will not be made while the court considers the merits of the claims raised in the suit.

At its heart, the central issue raised in both suits surrounding the CSR payments asks whether the constitutional requirements to draw funds from the federal treasury have been met. Article I, Section 9, clause 7 of the Constitution, commonly referred to as the Appropriations Clause, provides that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . ." In the context of the CSR payments, the question is whether Congress has enacted a law appropriating, and therefore allowing the payment of, such funds from the Treasury.

Some payments under the ACA, such as the refundable tax credit for insurance premiums, included permanent appropriations expressly for such purposes within the same Act (the tax refund appropriation).

Congressional Research Service
https://crsreports.congress.gov
LSB10018

The funds for other payments, such as risk corridor payments to insurers, are appropriated on an annual basis. For CSR payments, no annual appropriation was provided (although one was initially requested by the Obama Administration for FY2014), and HHS began making CSR payments to insurers beginning in calendar year 2014, arguing that the tax refund appropriation could be read to also cover CSR payments. In response, the House of Representatives filed suit giving rise to the *House v. Hargan* litigation.

In its October 13 notice to the D.C. Circuit, HHS reversed its interpretation of the tax refund appropriation's coverage of CSR payments. HHS also included a legal opinion issued by Attorney General Sessions on October 11, 2017, concluding that "the best interpretation of the law is that [the tax refund appropriation] does not appropriate funds for the Affordable Care Act's Cost-Sharing Reduction program." In reaching this conclusion, the Attorney General emphasized that (1) the text of the ACA provision providing a permanent appropriation for refundable tax credits does not expressly reference CSR payments; (2) the provision only expressly addresses refunds under the Internal Revenue Code; and (3) the premium tax credits for which permanent appropriations are authorized and CSR payments constituted distinct programs, as evidenced by the fact that the premium tax credits and CSR payments are authorized by separate sections of the ACA to accomplish distinct forms of assistance (and with different eligibility criteria).

In contrast, the plaintiffs in *California v. Trump* argue that both the premium subsidies and the CSR payments are so interrelated that the appropriation for premium subsidies should be allowed to cover both, mirroring HHS original litigation position. The plaintiffs additionally argue that the Administration's explanation for changing its interpretation of the tax refund appropriation is insufficient and violates the Administrative Procedure Act's (APA's) prohibition against arbitrary and capricious agency actions. Lastly, the plaintiffs assert claims under the Take Care Clause of the Constitution, arguing that the cessation of CRS payments constitutes an effort to "undermine, rather than faithfully execute, the ACA."

Below are a few takeaways from HHS's notification that it will halt CSR payments. A forthcoming Sidebar will discuss the specific issues raised by the *California v. Trump* litigation under the APA and the Take Care Clause in more detail. In his order denying the preliminary injunction, the judge in *California* described the underlying appropriations issue as a "close and complicated question," but also stated that "the Administration may seem to have the better argument at this stage." If the plaintiffs in *California* are unable to successfully persuade the court that the tax refund appropriation clearly covers CSR payments, they may also face difficulty succeeding under their APA and Take Care Clause claims given the relative deference afforded to the Executive under those standards.

What will happen to the lawsuit between the House of Representatives and HHS?

In its original complaint, the House of Representatives alleged that no appropriations had been authorized for CSR payments, and the House initially sought the termination of CSR payments to insurers so long as an appropriation was not available. With the stoppage of CSR payments by HHS, the relief sought from the court by the plaintiffs would have occurred, and the suit would typically be rendered moot as a result.

However, the situation may be complicated by the fact that attorneys general from seventeen states and the District of Columbia were granted leave to intervene in *House v. Hargan* on August 1, 2017 (this is a slightly different group of states than those that filed suit in *California v. Trump*). The Supreme Court has held that "[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'" However, the D.C. Circuit, in granting leave to intervene in the CSR case, concluded that (1) the states had demonstrated that they would be harmed by the cessation of CSR payments; (2) HHS's claim that it could unilaterally suspend payments is a debated legal issue; and (3) the states had raised "sufficient doubt concerning the adequacy of the Department's representation of their interests." Consequently, the presence of the state attorneys general in the suit may

raise questions regarding whether there remains a live controversy such that the suit should not be dismissed as moot. A status hearing in *House v. Hargan* is scheduled for October 30, 2017.

What legal options do insurers in the exchanges have to recover CSR payments?

Following the cessation of CSR payments, it is not clear that insurers would be relieved of their obligation to provide reduced cost-sharing to certain low-income enrollees. Because the CSR payments are intended to compensate insurers that provide such relief to enrollees, some commentators have raised the possibility that insurers may file suit against the federal government to recover unmade CSR payments.

As discussed in this previous post, such a suit would likely be pursued through the Tucker Act, which gives the U.S. Court of Federal Claims jurisdiction to render judgment over certain claims against the United States that are founded on, among other things, "acts of Congress." Whether claims may be heard by the Court of Federal Claims under the Tucker Act largely depends upon whether the payments sought were authorized by a "money mandating statute," defined by the Supreme Court as a statute that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." If the court determines that a money mandating statute exists, the jurisdictional requirement of the Tucker Act is satisfied, and a reviewing court may then examine the merits of a plaintiff's claim (e.g., whether the claimant meets the eligibility requirements for payment under the statute). But if the court determines that a statute is not money-mandating, the court may lack jurisdiction to hear the case, and the claim may be dismissed.

Insurers suing to recover CSR payments may argue that Section 1402(c)(3) states that the Secretary of HHS "shall" make payments equal to the value of the cost-sharing reductions. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has recognized that use of the word "shall" generally is an indicator that a statute is money-mandating. On the other hand, the House has argued that insurers cannot obtain a judgment under the Tucker Act because, among other things, recovery under such a suit would be an "untenable end run" around the congressional appropriations process.

In litigation involving separate payments to insurers under a different provision of the ACA, the U.S. Court of Federal Claims has also recently held in two separate cases that similar statutory language (directing that the Secretary "shall pay" specific amounts to insurers) constitutes a "money mandating statute" for purposes of the Tucker Act sufficient to allow insurers' suit to proceed. If successful, any damages awarded by the court would be payable from the permanent indefinite appropriation known as the Judgment Fund. As discussed in this post, that case is currently pending before the Federal Circuit, but would suggest that insurers may have opportunity to seek reimbursement for unpaid CSR payments through litigation.

What legislative options are there for Congress?

Fundamentally, the legal obstacle to the issuance of CSR payments is the alleged lack of an appropriation. Therefore, should Congress wish, it may restart CSR payments by appropriating funds for that purpose. For example, two recent proposals would appropriate funds for CSR payments for two years. Earlier this Congress, the Better Care Reconciliation Act of 2017 (BCRA) and the Obamacare Repeal Reconciliation Act of 2017 (ORRA), both draft Senate amendments to the House-passed American Health Care Act of 2017 (AHCA), would have appropriated "such sums as necessary" for the cost-sharing payments through December 31, 2019, while repealing the CSR requirement and payments after that date.

On the other hand, if Congress does not wish the CSR payments to be made, it may wish to repeal the CSR payments, or the underlying obligation for insurers to reduce cost-sharing for low-income enrollees. Congress may also choose to limit the federal government's exposure under the types of lawsuits described above. That may be through an amendment to the Tucker Act to deprive the Court of Claims of

jurisdiction to hear such claims or through an amendment to the Judgment Fund to limit its use to pay any judgments awarded by that court in such cases.

Author Information

Edward C. Liu
Legislative Attorney

Jennifer A. Staman
Legislative Attorney

Disclaimer