The End of CSRs: Trump Eliminates “Bailouts” While Others Seek a Solution

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Trump Administration Has Eliminated CSR Payments

On October 11, 2017, in a memo to the Department of Treasury and the Department of Health and Human Services (HHS), Attorney General Jeff Sessions provided his legal opinion that Cost Sharing Reduction (CSR) payments were unlawful. CSR payments reimburse insurance companies for losses in deductibles, copays, and coinsurance payments owed by lower income individuals in health plans on the Affordable Care Act (ACA) exchanges. The following day, Eric Hagan, the acting Secretary of HHS, announced that CSR payments must stop immediately. (1)

Responses to the Announcement

California v. Trump

In response to this announcement, California, joined by 17 states and the District of Columbia, filed a complaint on October 13, 2017 against the Trump administration in the Northern District Court of California seeking injunctive relief. The complaint advanced three main arguments: first, the decision to end CSRs violated the Administrative Procedure Act|second, the decision was arbitrary and capricious|and third, Trump’s decision to end CSR payments purposely undermined the ACA and in doing so, directly violated the take care clause of the Constitution which requires President to faithfully execute the laws of the United States.

The States' complaint highlighted that the Trump administration had continued to make CSR payments since January 2017, but abruptly stopped nine months later. The States contended that this created "substantial reliance risks" for consumers, insurers, and states that assumed that the payments would continue. These risks, the States argued, will inevitably result in higher premiums and increase the rate of uninsured individuals throughout the country.

The complaint further illustrated the Trump administration's continued attempt to sabotage the ACA. For instance, the Administration reduced the budget for outreach and advertising to encourage consumers to sign up for health insurance on the exchanges from $100 million to just $10 million. The administration also reduced the budget for patient navigators, people who are trained to help consumers sign up for insurance, from $63 million to $36 million. In addition to these budget cuts, the enrollment period was cut in half – consumers now only have six weeks, instead of twelve, to sign up for insurance on the exchange. The complaint also blasted the Administration's plan to shut down Healthcare.gov for nearly twelve hours every Sunday, a day when many people would have time to sign up for health insurance benefits outside of work.

Despite these allegations, Northern District Court Judge Vince Chhabria denied the motion for preliminary injunction on October 25, 2017. In the order denying the motion, Judge Chhabria asserted that the emergency declaratory relief sought by the states would be "counterproductive," since many states, including California, had anticipated CSR's end and devised plans accordingly. Although he acknowledged that the states alleged lasting harm resulting from the future elimination of CSR payments, Judge Chhabria said that the real issue, at least for the case at hand, was "how people will be affected in 2017 and 2018 without a preliminary injunction."

And to that inquiry, he reiterated that because many states (thirty-eight in fact) had anticipated this action by the Trump administration and had set their rates with this in mind, most consumers will not be harmed by the CSR elimination in 2017 and 2018, and some may even benefit.

To illustrate this point, Judge Chhabria discussed how many people who qualify for CSRs also qualify for premium tax credits. The amount of a premium tax credit an individual will receive is determined by the premium in the second lowest price silver plan. As premiums increase in the silver plans, so will premium tax credits. Unlike CSRs, Congress appropriated the premium tax credits, so the Trump Administration cannot avoid paying them. As a result, many states have increased the price of the silver plans in their state to both account for the loss of the CSR payments to insurers and increased the premium subsidies available to individuals to enable them to purchase more coverage. Under this plan, consumers can take their higher premium tax credits and apply them to a different plan and save money or get better coverage. For instance, a person might choose to apply their tax credits to the lower tier, the bronze plan, and save a significant amount of money. On the other end, a person might apply their credits to a higher tier gold plan, and possibly pay slightly less than what they would for the silver plan, on top of getting a plan with better coverage.

However, Judge Chhabria did acknowledge that not *all* states have planned for CSR elimination. In these cases, the harm can actually be very significant. In fact, some experts think that Judge Chhabria's analysis didn't account for all possibilities. Tim Jost, Emeritus Professor of Washington and Lee University School of Law, noted that,

"Judge Chhabria acknowledges that some people will pay higher premiums with the CSR defunding. In fact, he does not go far enough in acknowledging this fact. Most states have not only loaded the CSR costs onto on-exchange plans, but onto off-exchange plans as well. Thus people who do not receive tax credits will certainly pay more. And a number of states have loaded the cost onto all metal level plans, driving up their costs for all consumers. The administration's last minute decision has caused a great deal of confusion and will almost certainly depress enrollment, thus driving up premiums further as the risk pool deteriorates." (2)

In fact, many advocates and organizations are concerned about the effect this confusion will have on consumers. In its amicus brief filed on behalf of Families USA et. al., the National Health Law Program (NHeLP) cited various statistics and behavioral studies to demonstrate how adding even small procedural steps can significantly affect the amount of participation in a particular program. For example, one study in Louisiana found that when a program changed its procedure to require checking in a simple, clearly marked box, applications to the program decreased by 62%. NHeLP argued that it is unrealistic to expect consumers throughout the country, in the limited time before enrollment, to take into consideration the subtle implications CSR elimination have on their coverage, or even become aware that they could switch to a different tier to save money. These behavioral science indicators taken in conjunction with decreased funding for navigators and outreach programs could have seriously detrimental effects on consumers. (3)

Alexander Murray Bill

Some members of Congress have made an effort to address CSR elimination by introducing the "Bipartisan Health Care Stabilization Act of 2017," otherwise known as the Alexander-Murray Bill. This bill would appropriate money for CSRs through

2019. This bill could address some of the immediate effects of CSR elimination that Tim Jost pointed out. By directly appropriating funds to cover CSR payments, this bill would address increased pricing in states that distributed costs on all levels and price hikes experienced by those who do not qualify for premium tax credits.

However, a recent report by the Congressional Budget Office and Joint Committee on Taxation (CBO) stated that the bill would likely be enacted after enrollment period has already ended. Because the CBO has already accounted for CSR payments in its baseline spending for 2018 and 2019, the Alexander-Murray Bill would not affect premiums already set for 2018 given that baseline. The report also estimated that the bill "would not substantially change the number of people with health insurance coverage, on net, compared with the baseline projection." Even so, a bipartisan bill that has even marginal benefits seems promising. The report estimated that the bill would "reduce the deficit by $3.8 billion over the 2018-2017 period[.]" (4)

What About House v. Price?

As you may recall, the House of Representative filed a lawsuit against HHS in 2014 claiming that the language of the ACA never actually appropriated funds for CSR payments, thus making CSR payments unlawful. The District Court of Columbia agreed with the House of Representatives, but held the final judgment in abeyance, subject to status reports every 90 days. Since then, eighteen states have joined the suit on appeal. Interestingly, the Trump administration has not yet terminated the suit. However, we won't have to wait too long to see the final outcome of *House v. Price,* as the next status report is scheduled for October 30, 2017. (5)

What's Next?

As mentioned, the Alexander Murray Bill, if passed, wouldn’t necessarily go into effect until the next calendar year. So far, this appears to be the only solution on the table proposed by Congress. Further, the insurance companies are likely to sue the federal government to recover the lost CSR payments. Ironically, if they win in court, the insurance companies may actually end up being paid twice for the CSR payments, since they accounted for them in their premiums – a windfall from President Trump! Unless Congress finds a lasting solution to the current state of our health care system, many of us will be at the mercy of Trump’s attacks on the ACA. Perhaps this will be the driving force our country and its leaders need to start thinking about radical health care reform – reform in which consumers are not at the mercy of partisan politics or large health care corporations.