

In the United States Court of Federal Claims

No. 16-259C
(Filed: July 23, 2020)

HEALTH REPUBLIC INSURANCE *
COMPANY, *
*
Plaintiff, *
*
v. *
*
THE UNITED STATES, *
*
Defendant. *

ORDER

On July 17, 2020, the parties in the above-captioned case filed (1) a joint motion to divide the class into subclasses and stipulation for the entry of a partial judgment and (2) a joint status report regarding further proceedings. As set forth below, the court grants the parties’ motion, adopts a schedule for further proceedings, and directs the entry of judgment pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims (“RCFC”).

The Joint Motion to Divide the Class Into Subclasses

On January 3, 2017, the court certified the following class:

All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2014 and 2015 benefit years, and whose allowable costs in either the 2014 or 2015 benefit years, as calculated by the Centers for Medicare and Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act). Excluded from the Class are the Defendant and its members, agencies, divisions, departments, and employees.

In light of the decision of the United States Supreme Court in Maine Community Health Options v. United States, 140 S. Ct. 1308 (2020), the parties agree that the class members are entitled “to receive payment of damages from the United States under ACA section 1342 for risk corridors benefit years 2014 and 2015.” Mot. 3. They further “agree on the amount due to the Class with respect to all but four class members” and that one of the class members that does not have a dispute with the government “is not yet authorized to stipulate to judgment.” Id. They therefore request that the class be divided into three subclasses pursuant to RCFC 23(c)(5) to facilitate the resolution of the class members’ claims.

The first proposed subclass is “the ‘Non-Dispute Subclass,’ which consists of Class members who have no disputes with the government,” id., contains all but five of the members of the existing class, and is defined as follows:

All approved class members offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2014 and 2015 benefit years, whose allowable costs in either the 2014 or 2015 benefit years, as calculated by the Centers for Medicare & Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act), except those entities with ongoing disputes with the government concerning the amount due to the entity under Section 1342 of the Affordable Care Act, entities that dispute the government’s right to offset debts against a judgment pursuant to Section 1342, or entities that disputes [sic] the extent of any such offset.

Id. at 4. Plaintiff Health Republic Insurance Company “has agreed to serve as the class representative for the Non-Dispute Subclass.” Id.

The second proposed subclass is “the ‘Dispute Subclass,’ which consists of Class members who have a legal dispute with the government,” id. at 3, and is defined as follows:

All approved class members offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2014 and 2015 benefit years, whose allowable costs in either the 2014 or 2015 benefit years, as calculated by the Centers for Medicare & Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act), and that dispute the amount due to the entity under Section 1342 of the Affordable Care Act, and/or dispute the government’s right to offset debts against a judgment pursuant to Section 1342, and/or dispute the extent of any such offset.

Id. at 4. The proposed Dispute Subclass would include Colorado Health Insurance Cooperative, Inc., Freelancers CO-OP of New Jersey, Inc., Meritus Health Partners, and Meritus Mutual Health Partners. Class member “Colorado Health Insurance Cooperative, Inc. has agreed to serve as the class representative for the Dispute Subclass.” Id.

The third proposed subclass is “the ‘Arches Subclass,’ which consists of Arches Mutual Insurance Company, who has no legal dispute with the government but is not yet authorized to stipulate to judgment,” id. at 3, by “the state court governing its liquidation,” id. at 3 n.2. The proposed subclass is defined as follows:

All approved class members offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2014 and 2015 benefit years, whose allowable costs in either the 2014 or 2015 benefit years, as calculated by the Centers for Medicare & Medicaid Services, were more than 103 percent of their

target amounts (as those terms are defined in the Patient Protection and Affordable Care Act), and who have reached an agreement with the government related to offsets, but must seek approval from a state court prior to stipulating to judgment.

Id. at 5. Class member “Arches Mutual Insurance Company has agreed to serve as the class representative for the Arches Subclass.” Id.

“When appropriate, a class may be divided into subclasses that are each treated as a class.” RCFC 23(c)(5). “Subclasses may be certified . . . to isolate common issues of law or fact shared by distinct groups of plaintiffs.” Haggart v. United States, 104 Fed. Cl. 484, 488 (2012). When entertaining a motion to certify subclasses, even when such a motion is made jointly by the parties, the court must determine whether each subclass satisfies the prerequisites of RCFC 23(a) and (b). Id. Specifically, a proposed subclass representative must demonstrate (i) numerosity—that the proposed subclass is so large that joinder is impracticable; (ii) commonality—that there are common questions of law or fact that predominate over questions affecting individual prospective subclass members and that the government has treated the prospective class members similarly; (iii) typicality—that its claims are typical of the proposed subclass; (iv) adequacy—that it will fairly represent the proposed subclass; and (v) superiority—that a class action is the fairest and most efficient method of resolving the suit. RCFC 23(a)-(b).

With respect to the proposed Non-Dispute Subclass, the court finds that its definition is imprecise because, as drafted by the parties, it includes a member of another proposed subclass: Arches Mutual Insurance Company. To remedy this issue, the court amends the definition as follows (amendments are underlined for the parties’ convenience):

All approved class members offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2014 and 2015 benefit years, whose allowable costs in either the 2014 or 2015 benefit years, as calculated by the Centers for Medicare & Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act), except those entities that must seek approval from a state court prior to stipulating to judgment, entities with ongoing disputes with the government concerning the amount due to the entity under Section 1342 of the Affordable Care Act, entities that dispute the government’s right to offset debts against a judgment pursuant to Section 1342, and entities that dispute the extent of any such offset.

As amended, the court finds that the proposed Non-Dispute Subclass satisfies the requirements described in RCFC 23(a)-(b). In addition, although the proposed Dispute Subclass includes only four members and the proposed Arches Subclass includes only one member, the nature of these proceedings and the rationale for the creation of the subclasses supports a finding that these subclasses satisfy the requirements described in RCFC 23(a)-(b).¹ Accordingly, the court

¹ Indeed, the court is entitled to consider issues of judicial economy when certifying a class, see, e.g., Haggart, 104 Fed. Cl. at 489, and by jointly proposing the creation of the

GRANTS the parties' motion and certifies (1) the Non-Dispute Subclass, as defined by the court; (2) the Dispute Subclass, as defined by the parties; and (3) the Arches Subclass, as defined by the parties. In addition, the court appoints Quinn Emanuel Urquhart & Sullivan, LLP, who the court appointed as counsel for the original class, as counsel for each subclass.²

Further Proceedings in the Dispute and Arches Subclasses

With respect to the Dispute Subclass, the parties propose a schedule for briefing defendant's anticipated motion for leave to amend its answer. The court adopts the parties' proposal, as follows:³

- Defendant shall file its motion for leave to amend its answer **no later than Monday, August 3, 2020.**
- The subclass representative, Colorado Health Insurance Cooperative, Inc., shall file its response to defendant's motion **no later than Thursday, August 13, 2020.**
- Defendant shall file its reply in support of its motion **no later than Thursday, August 20, 2020.**

With respect to the Arches Subclass, the parties shall file, **no later than Friday, August 21, 2020**, a joint status report advising the court of the status of the request for state court approval and proposing a schedule for providing the court with periodic updates on that request.

Entry of Judgment and Further Proceedings in the Non-Dispute Subclass

With respect to the Non-Dispute Subclass, the parties jointly stipulate that "the Non-Dispute Subclass is entitled to payment from the United States under the risk corridors program for the 2014 and 2015 benefit years in the amount of \$1,921,068,282.41," that defendant "is entitled to payment from Non-Dispute [Subclass] member Louisiana Health Cooperative, Inc." in the total amount of \$17,406,235.22, and that the amount due to each subclass member is

subclasses, the parties are implicitly representing that the creation of these two small subclasses provides the most efficient method of resolving the claims of the proposed subclasses' members.

² Although the parties did not address the appointment of counsel for the subclasses in their motion, the court is required to appoint counsel for the subclasses pursuant to RCFC 23(c)(1) and RCFC 23(c)(5). See, e.g., Haggart, 104 Fed. Cl. at 491.

³ Notwithstanding the addition of two class representatives, the parties may, for simplicity, retain the existing case caption in their filings related to the claims of the Dispute Subclass and the Arches Subclass.

accurately set forth in the exhibit attached to their joint stipulation. The parties request that the court enter judgment in accordance with these stipulations. The court **GRANTS** that request.⁴

Pursuant to RCFC 54(b), there being no just reason for delay, the clerk shall enter judgment in favor of the Non-Dispute Subclass in the amount of \$1,921,068,282.41 and judgment in favor of the United States in the amount of \$17,406,235.22. The judgment in favor of the United States shall be paid through deduction from the amount owed under the judgment in favor of the Non-Dispute Subclass, such that the net amount payable by the United States to the Non-Dispute Subclass from the Judgment Fund is \$1,903,662,047.19. The amount due to each member of the Non-Dispute Subclass is set forth in Exhibit A. The judgment shall be payable to JND Legal Administration, the claims administrator retained by class counsel, for distribution to the members of the Non-Dispute Subclass.⁵

In addition, plaintiff requests that the court set a schedule for determining attorney's fees and nontaxable costs payable from the Non-Dispute Subclass's net judgment proceeds pursuant to RCFC 23(h). The court **GRANTS** plaintiff's request and adopts the following schedule:

- Subclass counsel shall file a motion for an award for attorney's fees and nontaxable costs **no later than Thursday, July 30, 2020**. Pursuant to RCFC 23(h)(1), "[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." **The notice shall be provided to subclass members promptly after the motion is filed, and shall include instructions for the submission of written objections or responses to the motion to subclass counsel.**
- Members of the Non-Dispute Subclass may object or respond to the motion. Such objections/responses **must be made in writing and submitted to subclass counsel in the manner described in the notice no later than Thursday, August 20, 2020.**
- **No later than Thursday, September 3, 2020**, subclass counsel shall file either (1) a reply that addresses all subclass member objections/responses,

⁴ In conjunction with this order, the court **FINDS** the parties' cross-motions for summary judgment (ECF No. 47 and ECF No. 52) to be **MOOT**.

⁵ Plaintiff "requests that the Court direct the government to present this judgment to the Department of Treasury for payment to the Court-appointed claims administrator JND Legal Administration." First, the court has not appointed JND Legal Administration as the claims administrator. Rather, it appointed Health Republic Insurance Company as class representative and Quinn Emanuel Urquhart & Sullivan, LLP as class counsel, see ECF No. 30; RCFC 23(c)(1), who retained JND Legal Administration to serve as claims administrator. Second, defendant is not responsible for presenting the judgment to the Department of Treasury. Rather, after the entry of judgment, the clerk of court will provide plaintiff's counsel with a certified transcript of judgment and instructions for obtaining payment of the judgment from the Department of Treasury.

with every objection or response received by counsel attached to the reply as an exhibit; or (2) a status report indicating that no objections or responses were received.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Chief Judge

Exhibit A

IN THE UNITED STATES COURT OF FEDERAL CLAIMSHEALTH REPUBLIC INSURANCE
COMPANY,Plaintiff,
on behalf of itself and all others
similarly situated,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 16-259C

Judge Sweeney

**EXHIBIT A TO JOINT MOTION TO DIVIDE CLASS INTO SUBCLASSES AND
STIPULATION FOR ENTRY OF PARTIAL JUDGMENT AS TO ONE SUBCLASS**

HIOS ID	Issuer Name	Total Payments Balance	Offsets	Net RC Balance
16049	All Savers Insurance Company	\$6,697,668.39		
36373	All Savers Insurance Company	\$11,449,513.89		
36677	All Savers Insurance Company	\$294,912.81		
39924	All Savers Insurance Company	\$7,972,985.11		
85947	All Savers Insurance Company	\$62,422,090.52		
92137	All Savers Insurance Company	\$184,407.92		
98971	All Savers Insurance Company	\$7,002,813.66		
67577	Alliance Health and Life Insurance Company	\$369,880.03		
32536	ATRIO Health Plans	\$589,657.01		
60536	Avera Health Plans, Inc.	\$26,120,468.22		
74980	Avera Health Plans, Inc.	\$913,160.23		
15287	Blue Cross & Blue Shield of Rhode Island	\$381,639.63		
16842	Blue Cross and Blue Shield of Florida	\$12,018,283.99		
18558	Blue Cross and Blue Shield of Kansas, Inc.	\$38,218,779.37		
42690	Blue Cross and Blue Shield of Massachusetts HMO Blue, Inc.	\$3,275,797.62		
26065	Blue Cross and Blue Shield of South Carolina	\$11,205,576.67		
49532	BlueChoice HealthPlan of South Carolina, Inc.	\$7,837,407.61		

27811	BlueCross BlueShield Kansas Solutions, Inc.	\$12,968,346.42		
40586	Bluegrass Family Health, Inc.	\$4,440,440.13		
82569	Boston Medical Center Health Plan, Inc.	\$1,445,782.89		
70285	CA Physician's Service dba Blue Shield of CA	\$22,807,199.00		
45127	Capital Advantage Assurance Company	\$2,505,542.65		
82795	Capital Advantage Insurance Company CAIC	\$241,532.88		
10207	CareFirst BlueChoice, Inc.	\$2,560,974.15		
28137	CareFirst BlueChoice, Inc.	\$37,089,252.70		
45532	CareFirst of Maryland, Inc.	\$12,096,305.98		
54192	CareSource Indiana, Inc.	\$1,293,422.26		
45636	CareSource Kentucky Co.	\$3,577,396.03		
92551	CDPHP Universal Benefits Inc.	\$47,697,764.95		
47579	Chinese Community Health Plan	\$593,429.63		
72034	CHRISTUS Health Plan	\$134,369.02		
63312	Colorado Choice Health Plans	\$6,659,644.23		
87416	Common Ground Healthcare Cooperative	\$67,325,233.36		
18581	Community Health Plan of Washington	\$1,187,131.21		
98905	CommunityCare HMO Inc.	\$2,422,216.86		
87698	CommunityCare Life & Health Insurance Co	\$761,894.83		
41895	Consumers Mutual Insurance of Michigan	\$25,843,655.17		
38345	Dean Health Plan	\$31,644,174.98		
66699	Denver Health Medical Plan, Inc	\$380,764.18		
78124	Excellus Health Plan, Inc.	\$31,028,716.81		
88806	Fallon Community Health Plan, Inc.	\$1,218,752.09		
56503	Florida Health Care Plan, Inc.	\$719,021.99		
22444	Geisinger Health Plan	\$36,995,506.57		
75729	Geisinger Quality Options	\$8,372,420.70		
94084	GHMSI	\$4,445,042.32		
85408	GlobalHealth, Inc.	\$6,202,344.71		
47949	Golden Rule Insurance Company	\$0.00		
80473	Group Health Cooperative	\$521,384.24		
34102	Group Health Plan, Inc.	\$11,396,084.43		
40308	Group Hospitalization and Medical Services Inc.	\$155,508.63		

27651	Gundersen Health Plan, Inc.	\$394,393.50		
91058	Gundersen Health Plan, Inc.	\$6,096,264.82		
27357	Health First Health Plan, Inc.	\$85,751.91		
77150	Health First Insurance, Inc.	\$1,708,120.48		
30252	Health Options, Inc.	\$9,475,810.73		
95865	Health Plan of Nevada, Inc.	\$643,589.93		
96383	Health Republic Insurance Company	\$19,565,019.76		
47342	Health Tradition Health Plan	\$1,385,886.58		
92036	HealthSpan	\$12,878,282.88		
20126	HealthSpan Integrated Care	\$21,869,077.92		
19636	HMO Louisiana, Inc.	\$18,013,347.69		
21032	Kaiser Foundation Health Plan of Colo.	\$64,718,412.45		
89942	Kaiser Foundation Health Plan of Georgia	\$10,913,600.35		
90296	Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	\$17,630,217.35		
94506	Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	\$3,903,893.99		
95185	Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	\$34,598,194.30		
40513	Kaiser Foundation Health Plan, Inc.	\$117,740,652.66		
60612	Kaiser Foundation Health Plan, Inc.	\$34,324,694.58		
71287	Kaiser Foundation Healthplan of the NW	\$9,821,230.13		
53789	Keystone Health Plan Central	\$528,671.99		
67202	Louisiana Health Cooperative, Inc.	\$63,331,147.11	\$17,406,235.22	\$45,924,911.89
97176	Louisiana Health Service & Indemnity Company	\$73,296,024.88		
58326	MercyCare HMO, Inc.	\$2,414,171.05		
35334	MercyCare Insurance Company	\$1,170,713.86		
11177	MetroPlus Health Plan	\$16,424,594.93		
11555	New Health Ventures Inc	\$177,328.66		
82483	North Shore-LIJ Insurance Company Inc	\$18,002,649.15		
20507	Optima Health Plan	\$2,229,495.98		
74289	Oscar Insurance Corporation	\$58,424,157.02		
50221	Oscar Insurance Corporation of New Jersey	\$2,132,615.32		
48834	Oxford Health Plans (NJ), Inc.	\$1,357,526.59		
10091	PacificSource Health Plans	\$16,892,224.87		

23603	PacificSource Health Plans	\$17,473,387.21		
60597	PacificSource Health Plans	\$3,930,773.68		
65441	PHPS, Inc. (fka Phoenix Health Plans, Inc.)	\$34,931.14		
50816	Physicians Health Plan of Northern Indiana, Inc.	\$6,370,812.47		
58564	Physicians Plus Insurance Corporation	\$171,543.34		
88102	PreferredOne Insurance Company	\$45,727,888.21		
26734	Premier Health Plan, Inc.	\$2,572,926.75		
57173	Presbyterian Health Plan, Inc.	\$2,063,703.11		
29698	Priority Health	\$14,688,532.68		
29241	Priority Health Insurance Company (PHIC)	\$5,678,007.91		
16698	Prominence HealthFirst	\$501,439.74		
56707	Providence Health Plan	\$7,302,569.66		
70525	QCA Health Plan, Inc.	\$3,957,601.38		
37903	QualChoice Life & Health Insurance Company, Inc.	\$4,524,487.98		
80208	Rocky Mountain Health Care Options	\$366,780.94		
97879	Rocky Mountain HMO	\$34,831,063.53		
38166	Security Health Plan of Wisconsin, Inc.	\$36,886,330.97		
26002	SelectHealth	\$60,598,770.69		
68781	SelectHealth	\$180,603,493.13		
26539	SHA, LLC DBA FirstCare Health Plans	\$7,356,449.15		
92499	Sharp Health Plan	\$37,507.58		
62210	South Dakota State Medical Holding Company, Inc.	\$13,269,548.73		
52664	Summa Insurance Company, Inc.	\$2,091,574.38		
14650	Time Insurance Company	\$494,806.51		
19068	Time Insurance Company	\$1,450,728.94		
19524	Time Insurance Company	\$4,045,974.64		
20544	Time Insurance Company	\$7,352,482.72		
24867	Time Insurance Company	\$253,920.36		
28020	Time Insurance Company	\$7,661,197.18		
29176	Time Insurance Company	\$568,168.32		
29211	Time Insurance Company	\$7,321,151.53		
39996	Time Insurance Company	\$1,451,025.54		
42260	Time Insurance Company	\$925,446.08		
60299	Time Insurance Company	\$234,775.92		

62662	Time Insurance Company	\$61,174,353.15		
67807	Time Insurance Company	\$1,111,551.75		
80863	Time Insurance Company	\$7,624,448.10		
89029	Time Insurance Company	\$431,897.82		
91842	Time Insurance Company	\$4,618,815.85		
29125	Tufts Associated Health Maintenance Org	\$285,907.70		
85736	UCare Minnesota	\$10,464,932.43		
71667	UnitedHealthcare Community Plan, Inc.	\$144,054.47		
31779	UnitedHealthcare Insurance Company	\$166,087.58		
49650	UnitedHealthcare Insurance Company	\$497,317.92		
45002	UnitedHealthcare Life Insurance Company	\$27.28		
59809	UnitedHealthcare Life Insurance Company	\$6,577.07		
68259	UnitedHealthcare of Alabama, Inc.	\$8,688,275.81		
68398	UnitedHealthcare of Florida, Inc.	\$42,820,458.16		
43802	UnitedHealthcare of Georgia, Inc.	\$12,145,393.47		
23671	UnitedHealthcare of Kentucky, Ltd.	\$13,606.24		
38499	UnitedHealthcare of Louisiana, Inc.	\$4,251,825.74		
97560	UnitedHealthcare of Mississippi, Inc.	\$809,174.17		
79881	UnitedHealthcare of New England, Inc.	\$635.07		
54235	UnitedHealthcare of New York, Inc.	\$909,112.89		
54332	UnitedHealthcare of North Carolina, Inc	\$18,401,376.06		
33931	UnitedHealthcare of Ohio, Inc.	\$902,297.30		
24872	UnitedHealthcare of Pennsylvania, Inc.	\$5,937,531.25		
21066	UnitedHealthcare of the Mid-Atlantic Inc	\$14,598.52		
31112	UnitedHealthcare of the Mid-Atlantic Inc	\$128,553.76		
16724	UnitedHealthcare of the Midwest, Inc.	\$115,915.27		
66413	UnitedHealthcare of Utah, Inc.	\$6,697.41		
37833	Unity Health Plans Insurance Corporation	\$11,131,237.20		
88925	University of Arizona Health Plans-University Healthcare, Inc.	\$1,750,150.59		

75293	USable Mutual Insurance Company	\$15,919,592.28		
67243	Vantage Health Plan, Inc.	\$1,785,495.97		
93689	Western Health Advantage	\$176,519.93		
TOTAL		\$1,921,068,282.41	\$17,406,235.22	\$1,903,662,047.19