

## U.S. HOUSE OF REPRESENTATIVES V. HHS SECRETARY TOM PRICE AND THE DEBATE AROUND COST-SHARING REDUCTIONS

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Although U.S. House of Representatives v. Price (originally U.S. House of Representatives v. Burwell) was filed in 2014, never has the significance of its potential outcome been more important than now, the summer of 2017, after the presumed replacement for the Affordable Care Act (ACA) foundered in the Senate. In the case, filed during the Obama administration, the House argued that the Department of Health and Human Services (HHS) illegally distributed cost-sharing reduction funds (CSRs) to insurance companies without Congressional approval. The Obama administration, in turn, rejected this argument, stating that it had the right to issue payments to insurers for CSRs without a Congressional appropriation because the ACA gave it that right. CSRs are an integral part of the ACA, allowing people whose income is between 100 percent and 250 percent of federal poverty level (FPL) and who purchase insurance through one of the ACA-created exchanges to receive federal funds to reduce out-of-pocket costs related to medical care, such as copayments and deductibles. Approximately six million people have reduced medical expenses through CSRs.

In May 2016, the House won in district court and Obama's HHS appealed the ruling to the District of Columbia Circuit Court of Appeals. The judge in the case delayed the ruling's implementation, aka defunding CSRs, in light of the appeal. HHS's opening brief was originally due in January 2017; however, since the 2016 presidential election, the D.C. Circuit Court has granted multiple House requests for delays to the case, presumably so the Trump administration could decide whether to pursue the case. The Court has granted several House and administration requests that the case be held in abeyance, although its current status is up-in-the-air at the moment, as discussed below. Insurers are forbidden by law from passing CSR costs to consumers. Thus, should the administration fail to defend CSR appropriations and/or should the D.C. Circuit Court rule in favor of the House, and should the House refuse to appropriate the funds, insurers would be left to cover those costs. In 2016, CSRs totaled about seven billion dollars.<sup>1</sup> The potential ramifications to the individual insurance market are widespread.

In May 2017, attorneys general from 17 states (including California) and the District of Columbia filed a motion to intervene in the case. The states argued that their motion to intervene should be granted because it has become apparent that the Trump administration will not defend CSR appropriations. Without such appropriations, the states contend, their insurance markets will be thrown into chaos, resulting in more uninsured people to whom states would be required to provide emergency services.<sup>2</sup> In their responses to the states' motion, the House and the administration asked that the Court deny the states' motion to intervene so that the parties could continue to negotiate. The House's response even suggested in its papers filed with the Court that the states could simply forgo federal Medicare funding so as to waive the federal requirement to provide emergency services to the uninsured and advised that the case's outcome would not necessarily affect the fate of CSRs, since the administration could end CSR payments whenever it wanted.<sup>3</sup> President Trump has said as much many times, threatening to cease CSR payments so as to hasten what he believes to be

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the ACA's inevitable implosion. However, the administration could not end CSR payments whenever it wants if the Court rules against the House; while the administration currently issues CSR payments through HHS so as to avoid the need for Congressional appropriations, President Trump would have no authority to discontinue CSR payments if the Court rules against the House and mandates funding.

The Court apparently took the Trump administration's threats and the House's response seriously because on August 1, 2017 it granted the states' motion to intervene, citing these as reasons for granting the motion. The Court also referenced the injury that ending such payments would cause to the states and that the states' motion had raised sufficient questions about whether the administration would adequately defend their interests or even continue the appeal at all. This means that even if the Trump administration decides not to continue with the appeal in this case, the states could.

On multiple occasions, President Trump has said he wanted to use the potential withholding of CSR funds as a negotiating tactic to get Democrats to work with him on repealing the ACA, or as a means of forcing the ACA to fail. So far, Trump's administration has funded CSRs on a month-to-month basis, although it is uncertain whether it will continue to do so. Meanwhile, the deadlines for insurers' initial rate filings for the individual market have come and gone and there is tremendous anxiety and uncertainty around this issue. Organizations such as America's Health Insurance Plans (AHIP), the American Medical Association (AMA), the U.S. Chamber of Commerce, and others have pleaded with the administration to commit to funding the CSRs. In California, where some 500,000 people receive CSRs, Covered California, the state's health care exchange, required insurers to submit two sets of rates: one that assumes that CSRs will continue and be funded, and one that assumes they will not be. Covered California released these proposed rates on August 1, 2017, the last possible date to do so under federal guidelines.<sup>4</sup> Citing extreme market uncertainty, all plan premiums will increase by an average of 12.5 percent in 2018, while plans that receive CSRs will increase by an additional 12.4 percent should the Trump administration stop funding them or should the House prevail in *House v. Price*.<sup>5</sup> In addition to a potential premium rate increase of 25 percent for CSR plans, should they go unfunded, one of Covered California's major players, Anthem Blue Cross, announced that it will pull out of most of the exchange in 2018. Incidentally, assuming the rest of the ACA remains intact, federally funded premium tax credits, which are provided to consumers who make up to 400 percent FPL, would increase in response to increased premiums, ultimately costing the federal government more money than simply funding CSR payments.<sup>6</sup> A Kaiser Family Foundation study estimates that "the increased cost to the federal government of higher premium tax credits would actually be 23% more than the savings from eliminating cost-sharing reduction payments."<sup>7</sup>

Should the Trump administration decide to provide the necessary money needed for CSRs in the short term, unless it guarantees continuing payments in perpetuity, there would still be tremendous ambiguity about whether such payments would continue, leaving the market in flux. If the administration fails to fund CSRs, it is possible that the House could issue last minute appropriations, though it is highly debatable whether it would do so. Since the Senate's failure to pass any of the three ACA repeal and/or replacement bills during the final week of July 2017, some prominent Republicans have made public comments in support of CSR payments, so as to maintain market stability.<sup>8</sup> The most significant decision still lies with the Court, however. If the Court rules that the House is legally bound to appropriate CSR payments, then the issue will be settled and will overrule any potential Trump administration decision not to fund the payments. On the other hand, if the Court upholds the District Court's ruling and sides with the House, the House could still choose to appropriate the funds for the time being, although the future would still be uncertain. This would save insurers from billions of dollars in losses. Experts disagree on the likelihood of a Congressional bailout should the Court side with the House or should the administration fail to defend CSRs. On the one hand, Congress may not be eager to throw the health insurance market into a tailspin by presenting the industry with a multibillion dollar bill, while on the other hand, Congress may be unlikely to fund anything associated with the ACA.

The questions surrounding what Republicans will do in terms of appropriations of CSRs should *House v. Price* favor the House, have led to great uncertainty within the insurance and medical communities. When it issued its decision to

grant the states' motion to intervene in House v. Price on August 1, 2017, the Court also announced it would continue to hold the case in abeyance until October 30, 2017, when a status report is due from both sides. By law, states have until September 27, 2017 to decide whether or not they will participate in the 2018 exchanges, a full month before anything is guaranteed to happen in this case. The intervening states in House v. Price will likely try to get the case moving sooner than that but until this case is settled one way or another the markets will likely continue to respond negatively to the lack of predictability around CSR payments. Open enrollment for exchange participation in 2018 will begin November 1, 2017.

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