IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-00623-PLF
	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO REQUEST FOR EXPEDITION OF PRELIMINARY INJUNCTION MOTION

Introduction

One of the plaintiffs in this litigation, David Klemencic, has moved for a preliminary injunction, and he has asked that the Court expedite its consideration of that motion, asserting that he will suffer irreparable injury if a hearing is not held on the preliminary injunction motion by October 1. The defendants respectfully oppose the request for expedition. (In this brief, the defendants respond only to the request for expedition; the defendants will oppose the preliminary injunction motion in a separate filing.)

When a party requests expedition of a preliminary injunction motion, this Court's local rules require the party to show the "facts which make expedition essential." Local Rule 65.1(d). If a party does so, the Court will set a hearing date no later than 21 days after the filing of the motion, "unless the court earlier decides the motion on the papers or makes a finding that a later hearing date will not prejudice the parties." *Id.* Here, Klemencic has failed to make any showing that expedition is essential with respect to his preliminary injunction motion, and he would suffer no prejudice from a later hearing date.

Klemencic suffers no injury at all from the regulation that he challenges, let alone an irreparable injury. Nor, even under his own theory of the case, does he suffer any injury that requires expedited consideration of his motion. His asserted (but non-existent) injury is the deprivation of his ability to apply for coverage under a catastrophic health insurance plan. Contrary to his assertions, however, Klemencic may apply for such coverage until March 31, 2014. There is ample time, then, for the Court to consider the preliminary injunction motion. Thus, Klemencic has failed to make any showing that expedition is essential with respect to his preliminary injunction motion, and he would suffer no prejudice from a later hearing date. (In addition, the defendants' motion to dismiss the complaint is fully briefed. As should be apparent from those filings and from the defendants' forthcoming opposition to the preliminary injunction motion, this matter may be decided on the papers in the defendants' favor.)

Discussion

The Patient Protection and Affordable Care Act ("ACA" or "Act") includes a series of measures that will expand the availability of affordable health coverage. In particular, the Act provides for the establishment of new health insurance Exchanges, in which the purchasing power of individuals and small businesses will be combined so that they can buy more affordable insurance. States will establish and operate these Exchanges or, where a state chooses not to do so consistent with federal standards, the federal government will establish and operate that Exchange in place of the state. *See* 42 U.S.C. §§ 18031, 18041. The Act provides for financial assistance and tax incentives to encourage the purchase of insurance, including premium tax credits for eligible individuals to help defray the cost of insurance purchased through the Exchanges. 26 U.S.C. § 36B. These tax credits, when they become available in

2014, will provide substantial financial assistance to millions of Americans for the purchase of affordable health insurance.

Klemencic challenges a regulation promulgated by the Treasury Department, 26 C.F.R. § 1.36B-1(k), which clarifies that individuals who purchase coverage either through state-based Exchanges or through federally-facilitated Exchanges can be eligible for these premium tax credits and cost-sharing reductions. Klemencic asserts that, because he resides in a state that will have a federally-facilitated Exchange, he should not be eligible for premium tax credits under his reading of the Act. He contends that the Treasury Department's contrary interpretation harms him, because it will make insurance more affordable for him, thereby lessening the chance that he could obtain a certificate of exemption, which would authorize him to purchase an insurance plan that provides only catastrophic coverage, as opposed to a plan with more robust benefits.

There are a number of difficulties with Klemencic's theory. To begin, his theory does not allege any legally cognizable injury. Given Klemencic's representations in his declaration (ECF 24-1) regarding his income, age, and family status, his own estimates indicate that he would pay *nothing* for coverage in a "bronze-level" plan on the new Exchanges. *See* Exhibit A to Defs.' Reply Mem. in Supp. of Mot. to Dismiss, ECF 29-1. A catastrophic coverage plan would necessarily provide Klemencic with fewer benefits, at greater cost, given that premium tax credits are not available to subsidize the purchase of a catastrophic plan. He therefore does not suffer any injury at all from a regulation that will provide him with greater benefits, at lower cost, than the plan he would prefer to purchase. *See* Defs.' Reply Mem., ECF 29, at 2-6.

Even if Klemencic suffered any injury, that injury would not be irreparable. "To

demonstrate irreparable injury, a plaintiff must show that it will suffer harm that is 'more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff.'" *Hi–Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (quoting *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981)). And it is well settled in the D.C. Circuit that "economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). But Klemencic does not allege any economic loss at all; he alleges only that he will *gain* an undesired economic benefit from the Treasury regulation. And, to the extent that he complains about his potential liability under the Affordable Care Act's minimum coverage provision, 26 U.S.C. § 5000A, if he foregoes insurance coverage entirely, it should suffice to note that – given his allegations – the maximum assessment that he would face for 2014, even if he were to remain uninsured for the entire year, would be $150. *See* Defs.' Reply Mem., ECF 29, at 16. A $150 assessment would not have any "serious" effect on Klemencic; in any event, the assessment could be recovered in an action for a tax refund, 26 U.S.C. § 7422.

Klemencic thus suffers no injury at all, let alone an irreparable injury, from his asserted inability to purchase a catastrophic plan. But even under Klemencic's own theory of the case, there is no need to expedite the consideration of his preliminary injunction motion. His assertion is that he will be unable to apply for a certificate of exemption after January 1, 2014. It is not apparent why Klemencic believes that a hearing and a decision is required on his preliminary injunction motion *three months* before this supposed deadline. In any event, his calculation of the deadline is flatly wrong; he has simply misread the relevant regulations. An applicant may apply for a certificate of exemption "prior to the last date on which he or she could

enroll in a [qualified health plan] through the Exchange for the month or months of a calendar year for which the exemption is requested." 45 C.F.R. § 155.605(g)(2)(v). The enrollment period for plans offered through the Exchanges will close on March 31, 2014. 45 C.F.R. § 155.410(b). Thus, he may apply for a certificate of exemption at any time up to March 31, 2014, *more than six months* from now. There is no need, then, for the Court to expedite its consideration of the preliminary injunction motion.

Conclusion

The movant, David Klemencic, has failed to make the showing required under Local Rule 65.1(d) that expedition is essential with respect to his preliminary injunction motion. Moreover, he would suffer no prejudice from a later hearing date. This Court accordingly may consider the preliminary injunction motion in the ordinary course without expedition. The request for expedition should be denied.

Dated: September 16, 2013

Respectfully submitted,

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