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Court Directs Government to Make Full ACA Risk Corridors Payments to Health Plan Moda

By Sandra J. Durkin

Chicago, IL – On Thursday, February 9, 2017, the Court of Federal Claims ruled in favor of Moda Health Plan, Inc. in its action against the federal government seeking risk corridors payments for the 2014 and 2015 plan years. The *Moda* decision is the third decision by the Court of Federal Claims in a series of cases brought by health insurers against the government concerning the risk stabilization policies of the Affordable Care Act, known as the 3Rs. Judge Wheeler's decision on the *Moda* case comes after Judge Lettow's ruling granting judgment on the administrative record in favor of the government in *Land of Lincoln Health Insurance Company v. United States*, No. 1:16-cv-00744-CFL, Dkt. No. 47 (Ct. Cl. Nov. 11, 2016) and Judge Sweeney's ruling that the court had jurisdiction over the claims plaintiff asserted on behalf of itself and other insurers in *Health Republic Insurance Company v. United States*, No. 1:16-cv-00259-MMS, Dkt. No. 31 (Ct. Cl. Jan. 10, 2017), and signals a division in how courts are treating the issue of whether the ACA requires the government to make full, annual risk corridors payments.

In the most expansive and pro-health plan risk corridors opinion yet, Judge Wheeler found that the court not only had jurisdiction over Moda's claims and that Moda's claims were ripe, but also that the government is liable to Moda for the full amount of its risk corridors payments for 2014 and 2015, an amount that Moda contends exceeds $214 million. The court held the government liable pursuant to the money-mandating provisions in the ACA or, alternatively, under an implied-in-fact contract between the parties. The opinion repeatedly describes the intention of the 3Rs, and the risk corridors program in particular, to "help insurers adjust to the Exchanges" (p. 3), to avoid the problem of insurers' costs "detrimentally exceed[ing] the premiums collected" (p. 20), and to offer an incentive for insurers to offer plans on the exchanges (p. 20). The court relied heavily on the *Health Republic* court's analysis of the ripeness issue and disapproved of the *Land of Lincoln* court's finding that HHS determined that risk corridors should be budget neutral (and the corresponding decision to grant *Chevron* deference to that interpretation). The *Moda* court's holding that risk corridors payments must be made in full, on an annual basis, is premised largely on the language and purpose of the relevant statutory provisions, though the court also interpreted subsequent actions and statements by agencies such as HHS and the CBO as supporting this reading of the statute. The court also expressly found that the subsequent riders passed by Congress preventing HHS from using appropriated funds to make risk corridors payments beyond what it collected from QHP issuers were insufficient to negate the government's obligation to pay, and that the court was empowered to order the government to make the payments out of the Judgment Fund. In holding that there is no genuine dispute that the government is liable to Moda and directing the government to fulfill its promise to make risk corridors payments, the court said, “to say to [Moda], ‘The joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.” (P. 39.)

A brief description of the court’s reasoning with regard to each of the issues raised by the parties in their cross-motions for summary judgment follows:

The court rejected the government’s argument that it lacked jurisdiction by summarily concluding that Section 1342 and its implementing regulation are, on their face, “clearly money-mandating” because they dictate that HHS “shall pay” specific amounts to QHP issuers and that QHP issuers “will receive payment from HHS.” (P. 17.) The court also found that, at least at the jurisdictional stage, Moda’s allegations regarding the existence of a contract between Moda and the government were non-frivolous and thus sufficient to confer jurisdiction.

In ruling that Moda’s claims were ripe, the court relied on the *Health Republic* opinion to find that Section 1342 requires annual risk corridors payments based on the text of the statute (which contains two references to distinct years), its reference to the Medicare Part D program (which required a risk corridor to be established “for each plan year”), and its function (which is to “cushion[] the initial financial blow” to insurers who set premiums too low). (Pp. 19-20.) Moreover, the court found that even if Section 1342 were ambiguous, HHS had repeatedly indicated that it would make payments every year, and that its interpretation of the statute as requiring annual (though not necessarily full) payments was entitled to *Chevron* deference.

On the merits, the court held that Section 1342 is facially and unambiguously not budget-neutral because it requires that HHS “shall pay” specific amounts of money to QHP issuers. The fact that Congress failed to appropriate funds for the payments in the ACA is irrelevant, the court reasoned, since funds were already available from the 2014 CMS Program Management appropriation. Though it found the language of the ACA to be dispositive, the court observed that HHS itself took the position that the risk corridors program was not budget-neutral early on. The court also criticized the *Land of Lincoln* court’s decision to grant *Chevron* deference to HHS’s later statements that it intended to implement the program in a budget-neutral manner as “puzzling.” (Pp. 26-27.) The court went on to reject the government’s alternative argument that, even if funds were initially available for risk corridors payments, the 2015 and 2016 appropriations riders made Section 1342 budget-neutral; the court defeated this contention by applying the presumption that a funding restriction in an appropriations law does not amend or repeal a substantive law that imposes payment obligations on the government. The court found instead that the 2015 and 2016 riders cut off a single source of funding for the risk corridors payments (the CMS Program Management account), but did not reduce or eliminate the government’s obligation. Thus, though the riders effectively forced HHS to operate in a budget-neutral manner, they did not prevent *the court* from making the payments out of the Judgment Fund.

Finally, and in the alternative, the court found as a matter of law that the ACA created an implied-in-fact contract between the government and QHP issuers under which the government owed risk corridors payments if a QHP issuer participated on the Exchanges and incurred losses that would qualify it for payments under the terms of the statute. The court rejected the notion that any further discovery into the parties' intent was necessary because the ACA's risk corridors framework met the standard for creating a contract. First, it contained an incentive program that private parties could join voluntarily by performing services according to the program's rules and, second, it contained a firm government promise to pay those parties a fixed amount for performance. Furthermore, the court held that the government breached its contract with Moda by failing to make full risk corridors payments.

In sum, whether risk corridors payments are owed under the money-mandating provisions of the ACA or an implied-in-fact contract, the *Moda* decision represents a significant victory for health plans seeking to recover their risk corridors payments.

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