

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE)	
COMPANY, INC., <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	No. 16-587
)	Judge Wolski
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

NOTICE OF ADDITIONAL AUTHORITY

Plaintiffs First Priority Life Insurance Company, Inc. and the other Highmark Plaintiffs (collectively, “Plaintiffs”) respectfully advise the Court of the attached risk corridors decision issued this week by Judge Wheeler in *Moda Health Plan, Inc. v. United States*, No. 16-649C (Fed. Cl. Feb. 9, 2017) (Exhibit A hereto) (“Moda Op.”), which is pertinent to Defendant’s pending motion to dismiss (*see* ECF No. 8).

In his detailed 40-page opinion, Judge Wheeler:

1. Denied the Government’s Rule 12(b)(1) motion to dismiss, finding that the Court had subject-matter jurisdiction over Moda’s claim for violation of the money-mandating statute and its implementing regulations (which mirrors Plaintiffs’ Count I here) and over Moda’s non-frivolous allegations of breach of an implied-in-fact contract (mirroring Plaintiffs’ Count III), and finding that the claims were ripe for adjudication because Section 1342 and HHS’ interpretation of the statute require annual payments. *See* Moda Op. at 16-22. In so doing, Judge Wheeler “concur[red] in full with the Health Republic court’s analysis” by Judge Sweeney regarding ripeness. *Id.* at 19 (citing *Health Republic Ins. Co. v. United States*, No. 16-259C, --- Fed. Cl. ---, 2017 WL 83818, at *12-18 (Jan. 10, 2017)).

2. Granted Moda's motion for partial summary judgment regarding liability for the statutory count, and denied the Government's Rule 12(b)(6) motion to dismiss on that count. *See* Moda Op. at 22-34. Judge Wheeler found the *Land of Lincoln* merits analysis "puzzling," *id.* at 25, and, relying on *New York Airways* and similar cases, concluded that Section 1342 requires full annual risk corridors payments to insurers, even with the existence of the riders to the FY 2015 and FY 2016 appropriations acts. *Id.* at 23-34.

3. Found that the Government breached an implied-in-fact contract when it failed to make full, annual risk corridors payments to Moda, granting Moda's motion for partial summary judgment as to liability for the contractual count, and denying the Government's Rule 12(b)(6) motion to dismiss on that count. *See* Moda Op. at 34-39. Relying on cases like *New York Airways*, *Radium Mines* and *Winstar*, and rejecting all of Defendant's arguments, Judge Wheeler found that Moda had shown that no genuine dispute exists for each of the four elements of an implied-in-fact contract with the Government regarding the United States' risk corridors payment obligations: (1) mutuality of intent to contract, (2) consideration, (3) lack of ambiguity in offer and acceptance, and (4) authorized Government representative. *See* Moda Op. at 35-39.

Plaintiffs believe that Judge Wheeler's decision in *Moda* is well-reasoned, and should be followed in this case.

Date: February 10, 2017

Respectfully Submitted,

s/ Lawrence S. Sher

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, a copy of the foregoing Notice of Additional Authority was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
Lawrence S. Sher
Counsel for Plaintiffs