IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL CONWAY, in his capacity as Liquidator of COLORADO HEALTH INSURANCE COOPERATIVE, INC.	)	
Plaintiff,	)	Case No. 18-1623C
v.	)	Judge Nancy B. Firestone
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS

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Plaintiff is the Liquidator of the Colorado Health Insurance Cooperative, Inc. ("Colorado HealthOP"), seeking money owed to Colorado HealthOP for distribution according to the order of priorities established by Colorado statute to govern insurance liquidations. This Court's jurisdiction extends both to the Liquidator's claim and to the Government's sole defense, whether the U.S. Department of Health and Human Services' (HHS) proposed unilateral offset, outside the liquidation process, provides a permissible basis for HHS's refusal to pay. 28 U.S.C. § 2508. Because the facts are not in dispute and the law supports Plaintiff's claim, the Court should grant summary judgment for Plaintiff and reject the motion to dismiss.

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The Government's federally-based theory of why HHS has a right to offset turns on whether any provision of the Affordable Care Act—the only "Act of Congress" the Government invokes—grants HHS a substantive right to take offsets where those offsets are not otherwise consistent with applicable law, here Colorado law. It does not. Under both McCarran-Ferguson, and the ACA itself, 42 U.S.C. § 18041(d), statutory silence will not suffice to provide a basis for preemption, and the Government identifies nothing in the ACA in conflict with Colorado law, or which grants HHS a right to offset when not authorized by governing law.[1]

To be sure, in administering various funds under the ACA, HHS may, of course, net payments and obligations, just as would any private party. But it must do so consistent with governing law. Once liquidation (or bankruptcy) commences, the determination whether offset is permissible is governed by the law applicable to such proceedings. The Payment and

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[1] Two notes on terminology: Colorado HealthOP is an *insurer*. Under the ACA, Colorado HealthOP would be called an *issuer.* As a general rule, we refer to insurers throughout. The terms *offset* and *setoff* are used interchangeably in the statute books, cases, and the treatises. We use them interchangeably.

Collections Processes regulation, 42 C.F.R. § 156.1215—the "netting regulation" on which the Government ultimately rests—does not purport to create any *substantive* legal rules for offset or debt payment that might override applicable Colorado law.

The Government's alternative argument, that Colorado law allows this proposed offset, is equally misconceived. Colorado law permits offsets only where the debts (i) are mutual and (ii) arise out of one or more contracts between the parties. The Government's argument that Colorado's offset statute allows offsets arising from something other than contracts ignores the words actually used in the Colorado statute. And the debts here are not "mutual" because the debt owed Colorado HealthOP, on the one hand, and HHS's claimed credit, on the other, involve money coming from, and going to, different funds, and no taxpayer money at all.

RESPONSE TO THE GOVERNMENT'S INTRODUCTION AND BACKGROUND

As the Government concedes, the issue presented to the Court is purely legal. Nonetheless, we offer this brief response to the Government's introduction and background.

1. The Government's assertion that Liquidator's claim implicates "taxpayer funds,"[2] is erroneous. Neither of the two programs at issue—the reinsurance program, 42 U.S.C. § 18061, which owes money to Colorado HealthOP, and the risk adjustment fund, 42 U.S.C. § 18063, to which Colorado HealthOP owes money, is funded by the taxpayers. The money that flows into (and from) each of them comes from the insurers subject to each of them—a different group of insurers under the two programs. *See* Pl.'s Mot. Summ. J. at 32-33.

Nonetheless, the Government begins its brief by asserting that Colorado HealthOP defaulted on $72 million in loans, and that the Liquidator now "demands" $24 million in "taxpayer funds." As noted *ante*, that is wrong. And in suggesting a grab for taxpayer funds, the

[2] Def.'s Mot. Dismiss (hereinafter "Gov't Br.") at 1.

Government's assertion paints a distorted picture. The issue here arises only because Colorado HealthOP is in liquidation and Colorado has established clear priorities for the distribution of assets in liquidation, ensuring that obligations to policyholders are met first. Indeed, under *Fabe* (as discussed below), state law controls *only* to the extent that it protects policyholders—not equity holders or non-priority creditors of the insurer. Moreover, the references to unpaid loans is misleading because, as the Government ultimately concedes (Gov't Br. at 10 n.8), the loans are surplus notes. Surplus notes are purposely not classified as debt, and are subordinated to obligations owed all other creditors. *See* C.R.S. § 10-3-541(1)(g).

2. To try to bolster its theory that offset here satisfies the mutuality requirement of the Colorado offset statute (discussed below), the Government characterizes the reinsurance program, the risk adjustment program, and the risk corridors program, as "three *interrelated* premium stabilization programs." Gov't Br. at 3. Although all three share some common purposes, they are not interrelated in any relevant sense. Each protects, or imposes payment obligations on, different groups and types of insurers. Two were temporary, reinsurance and risk corridors; risk adjustment is permanent. Each is funded through payments required of certain insurers. And the types and population of insurers in each—those insurers required to pay under, and those eligible for payments from—of the programs was different. Of particular relevance here, there is no cross-funding in connection with the risk adjustment and reinsurance programs. Risk adjustment and reinsurance are operated independently, using closed pools of money provided by the insurers subject to the respective programs.

3. The Government attaches calculations reflecting its netting process. These documents reflect that the offset at issue took place *after* liquidation had commenced, and thus *after* state law rules on permissible offset had attached. Colorado HealthOP came under state

supervision in early 2015 and it was placed in liquidation in January 2016. *See* Compl. ¶¶ 47-49. The Government confirms that it began offsetting in August 2016 and continued doing so through December 2017. *See* Gov't Br. at 11. Once the liquidation began, HHS's unilateral offset effectively "jumped the line," elevating Colorado HealthOP's debt to the risk adjustment fund above Colorado HealthOP's debts to policyholders, and was therefore unlawful.

4. The Government concludes its introduction with a tally of what it claims Colorado HealthOP "owed and currently owes HHS," even after the contested offset. But the tally is quite irrelevant to the issues presented here. The Government was free to assert these claims in the liquidation proceeding and claim the priority prescribed by statute and its own agreements. The only issue here is whether the Government acted properly (it did not) by unilaterally offsetting amounts it is owed under the risk adjustment program against amounts it owes the Liquidator under the reinsurance program.

ARGUMENT

I. COLORADO LAW IS CONTROLLING ON PRIORITY AND OFFSET IN INSURER LIQUIDATIONS.

A. Under The McCarran-Ferguson Act, and The Affordable Care Act, Colorado Law Is Controlling on Issues of Priority Protecting Policyholders in Insurer Liquidation, Including Eligibility for Offset.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1105, and an explicit exemption of domestic insurers from *federal* bankruptcy law, 11 U.S.C. § 109, ensures that the liquidation of an insurance company will be governed by state law. In Colorado, the basic framework of a liquidation, as set forth in the Colorado Insurers' Rehabilitation and Liquidation Act, C.R.S. § 10-3-501 *et seq*., requires the liquidator to collect *all* debts owed the liquidating insurer. C.R.S. § 10-3-520(1)(h). The liquidating insurer's debts are then paid only according to the order of priority established by statute. Under Colorado law, liquidation expenses and payments owed policyholders are granted the highest priority; debts owed the federal government are ranked immediately afterwards. C.R.S. § 10-3-541. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), and the ACA, 42 U.S.C. § 18041(d), both highlight that state priority law controls, and gives way to federal law only where a federal insurance statute specifies a contrary rule.

Fabe expressly holds that the federal government is subject to state priority rules designed to protect distributions to policyholders *unless* Congress, by statute, exempts the federal government from the reach of such laws.[3] Specifically, McCarran-Ferguson declares that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). It explains that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . [of insurance] business by the several States." 15 U.S.C. § 1011. And it states that "Act[s] of Congress" not expressly regulating "the business of insurance" do not "invalidate, impair, or supersede" states laws that do. *Id.* at §1012(a) & (b). McCarran-Ferguson does not require an explicit statement of intention to preempt in the form "'state law is preempted,' or the like." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 43 (1996). But as *Barnett Bank* makes clear, there must be a direction, in a federal law relating to insurance, that Congress would anticipate as creating a conflict between federal law and state regulatory authority—resulting in federal law prevailing. *Id.* The ACA is obviously a statute that addresses

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[3] Colorado law, C.R.S. §10-3-541(1) & (2), grants liquidation expense and policyholder claims top priority. This makes it easy to apply *Fabe,* which held that state law trumps the federal priority law only to protect policyholders, and that the federal government might still claim priority over other creditors. *Fabe*, 508 U.S. at 508. Consistent with *Fabe*, after payment to policyholders, Colorado grants "Claims of the federal government" the next highest priority. C.R.S. § 10-3-541(3).

insurance. But it contains no provision authorizing HHS to use offset to pay debt where doing so would be inconsistent with state law.

Moreover, the ACA expressly confirms that it is *not* intended to displace state law regulating insurance, unless state law conflicts with its mandates. Under the heading "No interference with States regulatory authority," it specifies that "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d). The Government identifies no provision of Colorado law that "prevents the application of" any provisions of the ACA.[4]

In the absence of conflict, Colorado law controls because, as explained in our opening brief (at 24-25), the allowance or disallowance of offsets is part and parcel of the state system of priorities governing insurer liquidation. *See* C.R.S. § 10-3-529(1). An offset takes an asset of the company designated for distribution according to the statutory priority hierarchy, and seizes it for the sole benefit of only one creditor. It effectively grants the party taking the offset a preference over the claims of every other creditor who would otherwise have priority. *See, e.g.*, *Barnett Bank of Jacksonville v. Dep't of Ins.*, 507 So. 2d 142 (Fla. Dist. Ct. App. 1987). Here, HHS's unilateral offset elevated the debt that Colorado HealthOP owed the risk adjustment fund, and insurers in that fund, over Colorado HealthOP's obligations to policyholders.

As the Colorado Supreme Court explained: An offset not authorized by the legislature is improper because it "would be contrary to the order of distribution provided in the liquidation act." *Bluewater Ins. Ltd. v. Balzano*, 823 P.2d 1365, 1374 (Colo. 1992). Disallowing an *unauthorized* offset puts the party claiming the offset in the position of "'other' general creditors

[4] Before *Fabe*, the federal government asserted that the portion of the Debt Collection Act known as the Federal Priority Statute, 31 U.S.C. § 3713, a two-hundred-year-old law granting super-priority to debts owed the federal government, controlled in insurance liquidations.

who must get in line behind the policyholders." *Id*. *B*ecause the claimed offset here was not authorized by the legislature, "any exercise of the right to offset . . . would create a preference for the [reinsurer claiming the offset] over the policyholders in the distribution of [the liquidating insurer's] assets, contrary to public policy." *Id.* at 1376.

B. The Government Identifies Nothing in the ACA That Conflicts With the Priority and Offset Rules Established by the Colorado Legislature, or Which Would Entitle HHS to Offset in Violation of Colorado Law.

The Government argues that state law has no role here, and federal law controls. But to prevail on that theory, the Government would have to show that something in a statute relating to insurance—meaning here, something in the ACA—creates a conflict with Colorado law defining what offsets are permissible in a Colorado-run insurance liquidation. The Government's argument fails at this threshold because nowhere in its opposition brief does it identify *any* provision of the ACA that conflicts with the Colorado liquidation offset statute.

The Government emphasizes that the ACA relates to the business of insurance, but that is not in dispute. That point would have significance if the Government could point to something in the ACA that provides a federal substantive right to offset the sums at issue here, or which granted HHS the authority to do so. But the Government identifies nothing in the ACA, or any other "Act of Congress," that provides the federal government any different right or interest than would be possessed by any other creditor or debtor to engage in self-help by offset. In the area of insurance, it is not enough for the United States to show up and say only that "we are the United States and we can do as we please." In the absence of a statutory conflict with Colorado law that preempts Colorado law, the Government cannot jump the line.

The Government initially tries to overcome the absence of any ACA provision authorizing offset by invoking a series of platitudes about the ACA: The Government says that the ACA is "unique"; it "materially altered the legal landscape of the insurance industry nationwide"; it is built on a series of "interlocking reforms"; it is designed to "fundamentally transform . . . the relationship between insurers and insureds." These broad assertions might be significant if the parties were arguing about field preemption, *i.e.*, that the ACA, by its very nature, swept away state insurance regulations addressing the same subject matter. But that kind of preemption argument is precluded by both the McCarran-Ferguson Act and the ACA itself, which require an actual conflict between state law and some provision of the ACA. *E.g.*, 42 U.S.C. § 18041(d) (ACA: "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title."); 15 U.S.C. § 1012(a) (McCarran-Ferguson: "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.").

The Government also cites the rule that the federal government has the same common law right of offset as a private party. *United States v. Munsey Trust Co*., 332 U.S. 234, 239 (1947). That is correct: The Government may use a common law right of offset in the circumstance *that a private party may use it*, which means that once Colorado HealthOP entered liquidation, the exercise of that right became subject to the laws governing that liquidation. What the Government is actually arguing here is that HHS somehow has offset rights *greater* than those exercised by a private party. To succeed on such a claim, the Government must show that the ACA granted HHS such greater rights. The Government fails to do so.

C. HHS's Regulations Do Not Change Substantive Law Applicable to a Liquidating Insurer.

Failing to identify anything in the ACA allowing HHS to create substantive offset rules, the Government cites two regulations: HHS's administrative offset provision, 42 C.F.R. § 401.607; and its netting regulation, 45 C.F.R. § 156.121. Both are unavailing.

1. The Cited Regulations Are Not a Provision of the ACA and Nothing in the ACA Grants HHS the Power to Promulgate Regulations That Would Allow It to Offset in the Manner Suggested Here.

To be faithful to the text of McCarran-Ferguson and the ACA preemption provision, any grant of authority to take offsets not otherwise authorized by law—whether directly or by promulgating regulations that have that kind of substantive effect—should be found in the ACA itself. Neither of the regulations cited by the Government are an "Act of Congress" for purposes of McCarran-Ferguson. Neither is a "provision" of the ACA for purposes of 42 U.S.C. § 18041(d). And under the plain language of both those statutes, the displacement of traditional state authority over insurance regulation must be based on some form of conflict with a statute. Mere silence will not suffice. But insofar as the ACA is concerned, all we have here is silence. Nothing in the ACA reflects that Congress ordered, permitted, or "anticipated" that HHS would promulgate substantive rules on offset designed to override governing law.

2. Neither 42 C.F.R. § 401.607 nor 45 C.F.R. § 156.1215 Provides any Substantive Law Rule Allowing for Offset Where Not Authorized by Colorado Liquidation Law.

Moreover, even if one were to ignore the need to find the source of preemptive authority on offset in the ACA itself, neither regulation cited by the Government grants HHS a substantive right to offset where the offset would not otherwise be consistent with governing law.

a. 42 C.F.R. § 401.607

The Government invokes 42 C.F.R. § 401.607, which was not promulgated under the ACA and which states that "CMS may offset, where possible, the amount of a claim against the amount of pay, compensation, benefits or other monies that a debtor is receiving or is due from the Federal government." But the Government notably does not tell the Court anything about the genesis or the limitations on that right of administrative offset.

The source of that regulation is the Federal Debt Collection Act (FDCA), 31 U.S.C. § 3711 *et. seq*., which includes a detailed provision entitled Administrative Offset, 31 U.S.C. § 3716. The statutorily authorized process of administrative offset, available to all federal agencies, is subject to a range of prescribed procedures and requirements that must precede any offset. 31 U.S.C. § 3716(a)(1)-(4). The agency must provide notice, an opportunity to inspect and copy records, and a chance to review the decision within the agency. *Id*. Additionally, to engage in administrative offset, an agency like HHS (or CMS) must first adopt rules and regulations promulgated by the Department of Justice and the Department of the Treasury, or their equivalent. *See* 31 U.S.C. § 3716(b)(1) & (2). In promulgating 42 C.F.R. § 401.607, HHS opted for the latter, conforming its practices to the regulations issued by the Department of the Treasury and the Department of Justice (31 C.F.R. parts 900-904). *See* 42 C.F.R. §401.601.[5]

With that in mind, HHS's administrative offset regulation, 42 C.F.R. § 401.607, cannot help the Government here for three distinct reasons:

First, the Government does not suggest that it followed the required procedures before purporting to take an offset here, and there is no indication that it did so.

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[5] 42 C.F.R. § 401.601. *Basis and scope*.

> (a) "Basis. This subpart implements the following statutory provisions:
>
> (1) For CMS the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) (DCIA), 110 Stat. 1321, 1358 (April 26, 1996) (codified at 31 U.S.C. 3711, and conforms to the [Treasury] regulations (31 CFR parts 900-904) issued jointly by the Department of the Treasury and the Department of Justice that generally prescribe claims collection standards and procedures under the DCIA for the Federal government.

Second, the Government does not argue that this regulation is authorized by the ACA, or by any other federal statute dealing specifically with insurance—thus allowing it to overcome McCarran-Ferguson or fit within the ACA's own preemption provision.[6]

Third, despite the fact that administrative offset is broadly allowed and mostly uncontroversial *outside* the realm of bankruptcy and liquidation, the right of self-help through administrative offset ends once bankruptcy or other legal proceedings begin. It has long been understood that an administrative offset—an agency prerogative of self-help to take a true offset—does not override the substantive rules governing permissible offset once a bankruptcy or other judicial proceedings have commenced. *See In re Britton*, 83 B.R. 914 (E.D.N.C. 1988) (provision for administrative offset does not override the standards for permissible offset applicable in bankruptcy). Indeed, the Treasury Regulations themselves make clear that administrative offset is subject to—meaning that it does not override—substantive common law rules governing permissible offset, and further, that such self-help is impermissible once judicial proceedings, including bankruptcy, begin.[7] 31 C.F.R. § 901.3.

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[6] Notably, it was because of the absence of a specific connection to a law dealing with insurance that the Supreme Court in *Fabe* rejected the application of the companion section of the Debt Collection Act, 31 U.S.C. § 3713 (the Federal Priority Act) in state-run insurance liquidations.

[7] As noted above (n.5), CMS's regulation "conforms to the [Treasury] regulations (31 CFR parts 900-904)." The Treasury Regulation states:

> 31 CFR § 901.3 - Collection by administrative offset.
>
> "(a) Scope.
>
> (1) The term "administrative offset" has the meaning provided in 31 U.S.C. 3701(a)(1).
>
> (2) This section does not apply to:
>
> …….

(Continued...)

As a general matter, offset is common and uncontroversial in commercial practice, whether by private parties or the government. Outside the realm of bankruptcy and liquidation, there are rarely substantive law rules, or rules of priority among creditors, to contend with in determining which offsets are permissible. But that all changes with a bankruptcy or liquidation because offset then becomes subject to the jurisdiction and substantive law that governs the bankruptcy, liquidation, or other court proceedings. This is bedrock public policy. In state liquidation proceedings, collected assets of the liquidating entity are to be collected, and must be distributed under a priority scheme designed to reflect the public policy goals of the State and its citizens. Similarly, the automatic stay in federal bankruptcy typically prevents any party, including the federal government, from taking an offset once a bankruptcy is filed.

Once bankruptcy begins, it is for the bankruptcy court to determine whether an offset is permissible. Because the U.S. Bankruptcy Code does not contain substantive law on offset, bankruptcy courts apply common law principles to determine when, and if, a proposed offset is permissible. Only where Congress, by statute, has clearly conferred a substantive right of offset on a federal agency, such as the specific statutory offset right granted the Treasury in connection with tax payments, 26 U.S.C. § 6402(a)-(d), will bankruptcy courts apply federal statutory law.

But regulations adopted under the Debt Collection Act, such as 42 C.F.R. § 401.607, do not change the substantive rules applicable in a bankruptcy setting. And, as *In re Britton* makes clear, even after the stay is lifted, the court will apply substantive law standards, not the

(vi) Offsets or recoupments under common law, State law, or Federal statutes specifically prohibiting offsets or recoupments of particular types of debts; or

(vii) Offsets in the course of judicial proceedings, including bankruptcy.

administrative offset regulations, in determining whether an agency offset is permissible. 83 B.R. at 919-21.

b. 45 C.F.R. § 156.1215

Similarly unavailing is 45 C.F.R. § 156.1215, HHS's "netting" regulation. As described above, the Government cites nothing in the ACA that grants HHS any power to promulgate regulations establishing substantive law on taking offsets, or allowing the use of offsets to pay debts where not otherwise authorized by law. And the netting regulation, on its face, is fully consistent with that fact. By its terms, it does *not* purport to create any independent federal right of offset, or debt payment, to override otherwise governing law. Rather, it facilitates payments and charges *within* the confines of substantive law.

First, as is immediately apparent, nothing in 45 C.F.R. § 156.1215 mentions offset or debt payment. The words offset and setoff are not found in the regulation. Yet these are the terms used to refer to the exercise of a legal right to pay debt through a cross-payment:

> As part of its payment and collections process, HHS may net payments owed to issuers and their affiliates operating under the same tax identification number against amounts due to the Federal or State governments from the issuers and their affiliates under the same taxpayer identification number for advance payments of the premium tax credit, advance payment of and reconciliation of cost-sharing reductions, payment of Federally-facilitated Exchange user fees, payment of any fees for State-based Exchanges utilizing the Federal platform, and risk adjustment, reinsurance, and risk corridors payments and charges.

42 C.F.R. § 156.1215(b). The absence of any mention of offset or setoff is in sharp contrast with the numerous federal laws and regulations[8], and hundreds of cases that specifically do refer to

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[8] *E.g.*, 31 U.S.C. § 3716 (administrative offset statute); 26 U.S.C. § 6402(a) (IRS may setoff taxpayer's overpayment of tax against tax liability for prior years); 31 U.S.C. § 3720A (federal agencies may refer past due debt to Treasury for offset against tax overpayment pursuant); 31 U.S.C. § 3716(c) (Treasury disbursing officer offset statute); 31 U.S.C. § 3728 (United States (Continued...)

offset (or setoff) in discussing the legal right of an agency or private party to use cross-payment to pay debt.

Second, the content of the netting regulation makes clear that its function is to set forth a process for efficient payment and collection in the ordinary course. It describes a procedure and method for use as "part of its payment and collections process," both for payments in and payments out. It suggests no grant of any special right to take offsets not permitted by substantive law. Thus, the Government writes only one check, netting amounts due against amounts owed under multiple programs, and even to related insurers operating under a single tax identification number.[9] The regulation itself does not purport to affirmatively change the rights of any of those multiple related insurers, let alone provide a substantive right to offset, or a means to pay debts, that could apply once a liquidation or bankruptcy has commenced, if offset would not be allowed under substantive law. As such, it operates within the confines of substantive law governing offset; it does not confer power on HHS to override substantive law.

The Federal Register notice promulgating the regulation likewise described it solely as a means of enhancing the efficiency and expedition of the payment and collection process:

> This process would permit HHS to calculate amounts owed each month, and pay or collect those amounts from issuers more efficiently. When netting occurs, HHS would demand amounts due only when there is a balance due to the Federal government.

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can setoff judgment against it to recover a debt plaintiff owes to the United States); 7 C.F.R. § 1951.103 (1995) (Consolidated Farm Services Agency can setoff debts to the United States against ongoing Conservation Reserve Program payments); 13 C.F.R. § 140.5 (1993) (SBA offset); 41 C.F.R. § 101-41.102(a)(3) (GSA can setoff amounts due to the United States from ongoing payments to carriers); 48 C.F.R. §§ 32.611, 32.612 (1992) (United States can setoff obligations between itself and parties contracting with the United States).

[9] The Government does not mention the third section of the netting regulation, 42 C.F.R. § 156.1215(c), which refers to the amount resulting from the netting as a "determination of debt." That determination of debt is a step in the procedural mechanism that allows the United States to pursue the debt under the Debt Collection Act. *See* 31 C.F.R. § 901.3(b)(4)(ii)(B)(2).

> [. . .]
>
> To streamline payment and charge flows from all of these programs—advance payments of the premium tax credit, advance payments and reconciliation of cost-sharing reductions, FFE user fees, and the premium stabilization programs—we propose in § 156.1215(b) that HHS may net amounts owed to the Federal government against payments due to an issuer (or an affiliated issuer under the same TIN) under these programs in 2015 and later years. We believe that this process will enable HHS to operate a monthly payment cycle that will be efficient for both issuers and HHS.

78 Fed. Reg. 72,370-71 (Dec. 2, 2013).

The Government simply says that "'netting' is a form of 'offset.'" Gov't Br. at 9. Sort of; netting is a *process* for implementing permissible offsets. But "offset" (or setoff) is the term that denotes a substantive legal right to recover a debt by deduction or cross-payment, whether through legal process or self-help. It is the term with legal connotation. And the absence of any reference to offset, or debt collection, in the netting regulation highlights that it is not purporting to create a federal substantive right to offset where that would conflict with governing law.

In the ordinary course, netting is typically uncontroversial. If all parties are solvent, netting reduces the need to send out separate bills and checks under separate programs. But all of that changes when an insurer enters liquidation because at that point state statutes dealing with insurer liquidation—the business of insurance—prescribe substantive limits on setoff, which impacts any netting that would otherwise occur. And the federal government is subject to those substantive limits absent some specific provision of federal law changing those substantive rules.

In sum, nothing in the ACA authorizes HHS to take an offset after an insurer enters liquidation; nothing in the ACA authorizes HHS to promulgate regulations granting itself the power to do so; and the netting regulation does not do so. Colorado law, therefore, controls.

D. The Government Gains No Support for Its Federal Defense From the Case Law It Cites.

The case law cited by the Government highlights the weaknesses in its argument.

As an example of ACA preemption, the Government cites *St. Louis Effort for Aids v. Huff*. The court there began by noting that the ACA "preemption clause is a narrow one, and only those state laws that 'hinder or impede' the implementation of the ACA run afoul of the Supremacy Clause." 782 F.3d 1016, 1022 (8th Cir. 2015). *Huff* found a conflict between the ACA and various regulations instructing Federal Navigators and counselors to inform consumers of various things, and regulations adopted by the State, barring them from doing so. But the case offers little support for the Government's position here because the duties of the Federal Navigators and counselors were initially spelled out in the ACA and were simply further refined, as the ACA instructed, in HHS regulations. *See id.* at 1020, 1023. Thus the state statute thwarted a direction from the ACA itself; the conflict was clear.

Likewise, *United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616 (1st Cir. 1996), does not help the Government's cause. The principal controversy there was whether the provisions of the Medicare Secondary-Payer Act, which authorized the United States to stand in the shoes of a Medicare payee in pursuit of other sources of insurance, related to insurance. It did, but that point is of no consequence here. The important point here is that in that case, there was a straight on conflict between the Medicare Secondary-Payer statute and the payment structure prescribed for payments by the state guarantee fund. Although the court cited a regulation, the conflict was created by the statute, and regulations that Congress had plainly authorized.[10]

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[10] Two additional cases cited by the Government (Gov't Br. at 17) are wholly inapposite. *Geston v. Anderson*, 729 F.3d 1077 (8th Cir. 2013) simply applied controlling Medicaid Act (Continued...)

Barnett Bank of Marion Cty. further highlights the weakness in the Government's argument here. The Court had to answer the question whether a federal statute authorizing national banks to act as agents for insurance sales related to insurance, holding that it did. But no similar question is present here; the ACA relates to insurance. The question here is whether anything in the ACA conflicts with the state law. In *Barnett Bank*, the Court found a clear and easily anticipated conflict with a state law that forbade the activity that the federal statute expressly permitted. In so holding, the Court relied on the specific language and evident intent of Congress as expressed in that statutory language. Congress was necessarily aware that the federal statute would have such preemptive effect; its "state regulatory implications are not surprising," nor inadvertent.[11] 517 U.S. at 41.

The decisive point here remains that the Government fails to identify any conflict between Colorado law and any provision of the ACA, including any authorization within the ACA allowing HHS to regulate in a manner conflicting with state law.

II. THE GOVERNMENT'S CLAIMED OFFSET IS NOT PERMISSIBLE UNDER COLORADO LAW.

In its motion for summary judgment, the Liquidator showed that Colorado (unlike some other states) recognizes no common law right of offset in insurer liquidations because an offset not authorized by the legislature would overturn the statutory hierarchy for distribution of assets in insurer liquidations. Pl.'s Mot. Summ. J. at 28; *Bluewater*, 823 P.2d at 1374. Offset is

rules about whether the federal statutory rule would control over any state law rule to the contrary. And *Gunter v. Farmers Ins. Co*., 736 F.3d 768 (8th Cir. 2013) holds only that the provisions of the National Flood Insurance Act preempt various state common law claims.

[11] More pertinent here is the final paragraph of *Barnett*. *Barnett* rejected the assertion that *Fabe* required Congress to state an intention to preempt in the form, "'state law is preempted,' or the like." 517 U.S. at 43. Rather, *Barnett* makes clear that preemption can be inferred from a manifest conflict between the federal statute, and the state statute, as was found in *Barnett* itself. That conflict is absent here.

consistent with the legislature's statutory ordering of priorities only if the offset itself is authorized by statute. And indeed, following *Bluewater*, Colorado enacted a statute allowing offset in the setting rejected in *Bluewater*, where the offset involves mutual debts under one or more contracts. C.R.S. § 10-3-529(1).

Here the Government's attempted offset failed to meet the requirements of C.R.S. § 10-3-529(1) for three reasons. First, it did not arise out of contract. Second, there was no mutuality between the parties because the risk adjustment program and the reinsurance program involve different groups of insurers. Third, taking risk corridors into account, HHS is a net debtor.

A. To Qualify For Offset, The Mutual Debts Must Be Contractual.

The Colorado statute on offsets in insurance liquidation provides:

> mutual debts or mutual credits, whether arising out of one or more contracts between the insurer and another person in connection with any action or proceeding under this part 5, shall be set off, and the balance only shall be allowed or paid . . . .

C.R.S § 10-3-529(1). The plain language of the statute clearly limits offsets to mutual debts or mutual credits arising from contractual relationships.

1. The Colorado Statute Is Limited to Offset Arising From One or More Contracts.

The Government argues briefly that the statute is not addressed only to contractual debts and credits, but would somehow reach torts and statutory claims as well. The Government says this can be inferred because the "whether" clause is within commas, which indicates that it is non-restrictive—and thus it "tells the reader something about debts and credits, but does not limit or restrict the meaning of those terms." Gov't Br. at 24.

The problem with the Government's punctuation argument is that there are a multitude of reasons why a clause may be set off in commas, not merely to denote a non-restrictive clause. And a clause that begins with "whether" and contains two options is a perfectly conventional usage that is almost always bounded by commas.[12] A "whether" clause is not a classic that/which problem in which one usage is almost always in commas, and the other almost never.

Indeed, even in the classic "that/which" universe, meaning trumps punctuation. Thus, the Fifth Circuit held that while a clause set off by commas might be read as nonrestrictive in isolation, "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *United States v. Transocean Deepwater Drilling, Inc.,* 767 F.3d 485, 495 (5th Cir. 2014) (quoting *United States Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993)). Although, in general, "nonrestrictive clauses introduced by 'which' add nonessential parenthetic information and are set off by commas," the court found the clause to be restrictive because it was clear that the clause set off by commas gave "essential meaning about the preceding nouns." *Id.* at 494, 545. Similarly here, the debts or credits that are the subject of the offset statute are those that arise out of contracts, giving essential meaning to those phrases.

The important point here is that the Government concedes that the "whether" clause modifies the terms debts and credits that precede it. And the way that it modifies those terms is determinative. As Garner puts it: "*whether* usually directly follows the noun whose dilemma it denotes." Garner's Dictionary of Legal Usage (3d ed. 2009) at 941. To choose a simple example, "You can have the balloons, whether blue or green." One would never interpret that sentence as saying anything on the subject of orange or red balloons. Just as here, simplified, the statute applies to "mutual debts and mutual credits, whether from one or more contracts." No

[12] The Government (at 24) gives two examples where the "whether" clause is not within commas. "She decided whether to eat apples or pears." There is no comma in the Government's two examples because the whether clause connects to the *verb* in the main clause. In fact, it is a noun clause that serves direct object of the verb, hence no comma between a verb and its direct object. Here, the whether clause follows and modifies the noun. *See supra*.

reader would suggest that this sentence says anything on the subject of debts or credits arising in tort. Moreover, while "whether" clauses *usually* follow the noun being modified, they are often placed first in the sentence to enhance readability. "Whether in one or more contracts, mutual debts and mutual credits" shall be setoff. The only reasonable reading here is that the sentence is addressing mutual debts and credits from contracts.

In fact, other provisions of the same statute clarify that it is directed at contracts alone. For example, the offset statute contains an effective date provision. That section makes clear that it is effective with respect to contracts, and nothing else. *See* C.R.S. § 10-3-529 (6).[13] *See also* C.R.S. § 10-3-529(5) (describing permissible setoff in terms of contract: "accruing from business written where the contracts were entered into, renewed, or extended . . .").

Indeed, the context of the statute's enactment also confirms the point. As the Government notes, C.R.S. § 10-3-529 was intended to overturn the result in *Bluewater*, where the Colorado Supreme Court held that no right of offset was available in connection with reinsurance contracts. In overturning that result, the legislature addressed a contract setting, and nothing in the statute suggests an intention to go beyond that setting.

In sum, permissible offsets in Colorado are confined to mutual debts arising from one or more contracts.

[13] That effective date provision says:

> This section shall be effective January 1, 1993, and shall apply to all contracts entered into, renewed, extended, or amended on or after said date and to debts or credits arising from any business written or transactions occurring after January 1, 1993, pursuant to any contract including those in existence prior to January 1, 1993, and shall supersede any agreements or contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer. For purposes of this section, any change in the terms of, or consideration for, any such contract shall be deemed an amendment.

2. *Bluewater* Precludes the Government's Theory That Colorado Recognizes a Common Law Right of Offset Outside the Offset Statute.

The Government also argues that even if we read C.R.S § 10-3-529(1) as pertaining solely to contracts, that would make no difference here because Colorado recognizes a common law right of offset in insurer liquidations, even where not permitted by statute. The Government says that *Bluewater* merely barred offsets for reinsurance contracts involving fiduciary duties. The Government's theory is a wishful misreading of *Bluewater*.

In the first two parts of *Bluewater*, the court held that (1) valid regulations precluded the offset, and (2) allowing offsets not authorized by the legislature would conflict with the priority statute. In particular, the court acknowledged that a common law or equitable right to offset would be allowed under (federal) bankruptcy law. But the court rejected the idea that any such right is carried forward under *Colorado* law. The court said:

> We nevertheless briefly address this issue since the reinsurers argue that section 10-3-507(3) was intended to establish a system of priorities which tracks the system of priorities in federal bankruptcy law, and therefore also brings in tow the right to offset recognized in bankruptcy law.
>
> In the legislative history of the insurance liquidation act, even a demonstrated intent by the legislature to borrow one element from bankruptcy law does not mean that other elements of bankruptcy, such as the recognized right to offset, were also intended. The reinsurers' "coattails" construction of the liquidation act is not persuasive. The general intent of the liquidation act was to protect the public and to establish uniformity in liquidations of insurance companies. Here, the reinsurers' acquiescence in Aspen's delinquencies makes them "other" general creditors who must get in line behind the policyholders. § 10-3-507(3)(d). *In practice, the relief prayed for by the reinsurers, predicated on the existence of an equitable right to offset, would favor their private interest over the interest of policyholders, contrary to law. We hold that the full amount of the reinsurance proceeds due is a general asset to be collected and distributed according to the order of priorities provided in the liquidation act.*

Bluewater, 823 P.2d at 1374 (emphasis added). In short, recognition of a common law right of offset would be inconsistent with the priority statute.

The Government asserts that *Bluewater* applies only to fiduciary duty cases, and that all other forms of common law offset are allowed. But the Government is taking *Bluewater*'s discussion of fiduciary duty out of context. The court discussed the fiduciary issue in the last section of the opinion—which the Government cites. But it began that last section by clarifying that it had already resolved the issue against allowing offset. It was simply going on to consider whether the reinsurer was correct that the court's conclusion, rejecting offset, would be inconsistent with a series of old common law cases the reinsurers were citing. *Id.* at 1374-76.

Thus, the court began Section III of its opinion by citing the law of another state that declined to recognize a common law right of offset and observing that "[t]he foregoing statutory analysis disposes of this case, and a common law analysis would not lead to a different result. *See Allendale Mut. Ins. Co. v. Melahn*, 773 F. Supp. 1283 (W.D. Mo. 1991) (no common law right to offset in Missouri)." *Id.* at 1374. It then examined the group of "late nineteenth century United States Supreme Court cases" in order "to dispel any impression that there might be a significant tension between Colorado's regulation of reinsurance and the Supreme Court's early equity jurisprudence." *Id.* at 1374-76. *Bluewater* saw no tension because even under those old cases, the quasi-fiduciary nature of reinsurance precluded offset. The Government simply loses sight of the holding in the case.

Indeed, after distinguishing those nineteenth century cases, the court distinguished Colorado from other states that had adopted offset *by statute*:

> [I]n *Stamp v. Insurance Co. of North America,* 908 F.2d 1375 (7th Cir. 1990), . . . the court construed a section of the Illinois insurance code which also specifically provided that certain mutual debts could be offset. *See* Ill.Rev.Stat. ch. 73, § 818 (1983). *It*

> *should be apparent by now that Colorado's insurance code has no similar provision.* We must decline to follow the New York court and the Seventh Circuit Court of Appeals, because both were required to construe and apply the New York and Illinois insurance codes respectively. *See Allendale Mut. Ins. Co. v. Melahn*, 773 F. Supp. 1283 (W.D. Mo. 1991) (contract provision preserving the right to offset according to New York insurance code not enforceable because contrary to Missouri insurance code).

Id. at 1375-76 (emphasis added). Put simply, the Government's reading of *Bluewater* is flatly wrong. *Bluewater* is clear that there was no common law right of offset recognized in Colorado.

At pages 25-28, the Government makes various arguments, none of which make much sense. For example, the Government asserts that "courts have repeatedly rejected the assertion that the right of setoff is limited by a state priority scheme." Gov't Br. at 25. But what those cases actually hold is that a permissible setoff, authorized by state law, does not disrupt a state's priority scheme. Here, Colorado has made clear that *unless* the offset is allowed by the legislature, it is impermissible because it would upset the priorities established by the legislature.

B. The Obligations Here Are Not "Mutual" Because the Debt, on the One Hand, and the Government's Claimed Credit, on the Other, Involve Money Coming From, and Going to, Different Funds.

To be eligible for offset under Colorado law, the debts must be "mutual." The Liquidator and the Government agree that mutuality requires that in order for offset to be allowed, the debts in question must be in the same right and between the same parties, standing in the same capacity. *See* Gov't Br. at 20. Colorado requires mutuality by statute. Mutuality is a requirement to offset even under common law and bankruptcy law, and the wealth of cases proves instructive here. As those cases demonstrate, mutuality is strictly construed, and precludes offset in a variety of circumstances where one of the parties would find it convenient to offset something over which it has control, rather than pay what it owes.[14]

Mutuality is a central limitation on offset in bankruptcy and liquidation. Mutuality cannot be found where the party claiming offset is seeking to triangulate the obligations at issue.

> The requirement of mutuality is that each party own his claim in his own right severally, with the right to collect in his own name [and] in his own right and severally. The mutuality requirement is designed to protect against "triangular" set-off; for example, where the creditor attempts to set off its debt to the debtor with the latter's debt to a third party.

In re United Scis. of Am., Inc., 893 F.2d 720, 723 (5th Cir. 1990) (citations omitted). Suppose that Company X owes the liquidating estate $25 million, and the estate owes $25 million to Company Y. In the ordinary course, the estate would gather the $25 million from Company X; Company Y, as creditor, may or may not collect some portion of the $25 million, depending on the priority structure that governs creditors in the liquidation. But suppose then that both Company X and Company Y are managed by the same entity. That manager might love to triangulate that debt: to unilaterally eliminate the $25 million that Company X owes by

[14] *See, e.g.*, *In re Fernandez Super Markets, Inc.*, 1 B.R. 299, 302 (Bankr. D. Mass. 1979) (funds held in trust for another may not be used for setoff because mutuality is lacking inasmuch as agent-trustee is not acting in his individual capacity); *In re Bevill, Bresler & Schulman Asset Mgmt.*, 896 F.2d 54, 57 (3d Cir. 1990) (no mutuality where the creditor holds property of the debtor as a bailment); *In re James River Coal Co.*, 534 B.R. 666, 672 (Bankr. E.D. Va. July 16, 2015) (creditor had no right to offset tax refund it was holding because those sums were deemed held in trust for the benefit of the state); *In re Winstar Commc'ns*, 315 B.R. 660, 663 (D. Del. 2004) (creditor could not offset tax refunds because creditor was acting in an agency capacity rather than its individual capacity); *Gray v. Rollo*, 85 U.S. 629, 632-33 (1873) (mutuality lacking where partnership has a claim against an individual, but the individual has a claim against only one partner); *WJM, Inc. v. Mass. Dep't of Pub. Welfare*, 840 F.2d 996, 1011 (1st Cir. 1988) (offset not permitted between nursing homes under common ownership); *In re Candor Diamond Corp.*, 76 B.R. 342 (Bankr. S.D.N.Y. 1987) (principal of corporation not the same as corporation); *In re Knedlik*, 192 B.R. 559, 561 (Bankr. D. Kan. 1995) (no setoff where "a debtor-creditor relationship gave rise to the first obligation and a fiduciary relationship gave rise to the other").

cancelling it out with the $25 million owed Company Y. Allowing that kind of offset would take the process of collecting debts and paying creditors outside the liquidation proceedings (and the priority rules that govern liquidation proceedings) and put it in the hands of the manager.

The mutuality principle keeps that from happening. It limits offset to the one circumstance where it is truly compelling: Where the debts are owed to, and owed by, precisely the same entity. *See Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913) ("the absurdity of making A pay B when B owes A").

Here, HHS "operates"—the statutory word, 42 U.S.C. § 18041, and the word the Government uses (Gov't Br. at 4)—two different funds, with different members, neither funded by taxpayer money.[15] As operator, HHS is in control of funds that Colorado HealthOP is owed from the reinsurance fund, and it claims the right to use those funds to pay Colorado HealthOP's debt to the risk adjustment fund. HHS has used its position as the operator of two funds, outside the liquidation, to grant the risk adjustment fund a priority over the policyholders. That is precisely the form of triangulation that the requirement of mutuality guards against.

The Government observes that dozens of cases affirm the general rule that the United States, and all its agencies, are "one party" for mutuality purposes. That general rule is unsurprising because there is but a single Treasury. In both paying and collecting, the ultimate payor is typically the Treasury, using taxpayer funds. But that general rule has no application here, with HHS serving as the statutory "operator" of a reinsurance pool, and as the statutory "operator" of a risk adjustment fund. This is an unusual situation for the Government to be in.

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[15] As pointed out in Colorado HealthOP's motion for summary judgment, the Government is a potential beneficiary under the reinsurance program. *See* Pl.'s Mot. Summ. J. at 33-34.

With dozens of cases to choose from affirming the "one party" principle, the Government does not cite a single case that supports a finding of mutuality in a situation like this.

Where a federal agency acts as the administrator of a separate pool of money, the principle that all federal agencies are one party for mutuality purposes has no application. For example, the Pension Benefit Guarantee Corporation (PBGC), although admittedly a federal agency, was not entitled to offset amounts it owed against amounts owed to the U.S. Postal Service and General Services Administration because the sums held by the PBGC were not taxpayer funds, but rather administered separately from taxpayer funds. *See, e.g.*, *In re Art Metal U.S.C., Inc*., 109 B.R. 74 (D.N.J. 1989). *See also Doe v. United States*, 58 F.3d 494 (9th Cir. 1995) (noting that the United States does not take the position, for example, that mutuality applies to the FDIC when it acts as receiver). This principle applies here. Here, neither the reinsurance fund from which Colorado HealthOP is owed money, nor the risk adjustment fund that HHS, as operator, decided to pay using Colorado HealthOP's reinsurance asset, uses taxpayer funds. They are separate pools of money, with separate participants, and separate payors and payees for any given year. HHS said so itself when promulgating the regulations. *See* Gov't Br. at 4 (citing 76 Fed. Reg. 41930, 41948 (July 5, 2011) for the proposition that the "payments and receipts" for risk adjustment and reinsurance, *inter alia*, are "financial transfers between insurers").

The Government asserts that insurers "owe money to CMS and CMS owes money to them, establishing a linear debtor/creditor relationship." Gov't Br. at 20. Thus, "the United States acts as an ordinary creditor when it operates the risk adjustment program." *Id.* at 20. But that is not accurate. With respect to both funds, HHS has no stake of its own. It only owes to insurers in each of these pools what it takes in, no more. *See* 42 U.S.C. § 18063 (risk adjustment program); 42 U.S.C. § 18061 (reinsurance program). If HHS does not receive the money, it has no obligation to pay any of the insurers participating in the funds. HHS's role is not, therefore, that of an "ordinary creditor" or "debtor." Rather, for each fund, it acts as an operator or conduit.

The Government cites a single unreported *pro se* case, having nothing to do with mutuality, that suggests that the federal government ought not lightly be deemed a fiduciary. Gov't Br. at 21. But the Government's argument misses the mark because mutuality is a matter of substance, not labels. Mutuality focuses on the actual stakeholders, and the respective role of the party claiming the offset. It is the substance of the position that HHS occupies—here as agent/operator of two funds serving two different groups of insurers—that controls. It is handling the money, but doing so as an agent or operator. That two funds, with different stakeholders, are controlled by the same agent or "operator," does not create mutuality.

The two cases that the Government cites for the dictum that capacity for mutuality purposes turns on labels and formalities, rather than substance, do not prove that point. For example, in *In re Liquidation of Home Ins. Co.*, 953 A.2d 443, 447-48 (N.H. 2008), the reinsurer was required to make payments to the liquidator, "net" of permissible setoff. The reinsurer tried to set off amounts payable by the liquidator to the reinsurer's affiliates under common ownership. The court recognized that this ordinarily would "be a prohibited triangular setoff," where "A attempts to offset an obligation owed to B against B's debt to C," which is "prohibited because there is no mutuality of debt between two parties." *Id.* at 448 (citation omitted).

But in that case, the affiliate had explicitly assigned the debt to the reinsurer and the assignment was *bona fide*. The court held that the substance of that assignment would control. If the assignment transferred *ownership* of the debt to the reinsurance company, the reinsurance company could use it as setoff. But if the assignment was merely for the purpose of collecting the money, mutuality would keep it from being a permissible setoff:

> [A]n assignee for purposes of collection cannot set off his personal debt against the assigned claim because, "[s]ince mutuality is essential, the debtor must be the beneficial owner of the claim or judgment which he seeks to set off and not merely a trustee on behalf of an assignor who has retained the equitable interest in the thing assigned."

Id. at 549. The court thus looked at the substance of the transaction, not the formal title.

Matter of Midland Ins. Co., 590 N.E.2d 1186, 1192-93 (N.Y. App. 1992) is even less apposite. There, the court simply held that the mere passage of the claim from the insolvent insurer to the liquidator did not destroy mutuality. Although the claim was being pursued by the liquidator, it was—in substance—the same claim possessed by the insolvent insurer.

At bottom, the Government bases much of its mutuality argument on its self-conscious characterization of the reinsurance provisions, the risk adjustment provisions, and the risk corridor payment provisions, as "interrelated" or "interlocking." But they are not interlocking in any fiscal respect; they are operated separately, each as a closed fund. This is the opposite of the required showing that the debts owed to, and owed by, are "mutual."

C. Taking Into Account Amounts Owed, but Which HHS Has No Obligation to Pay Under the Risk Corridors Program, the United States Is a Net Debtor.

The Liquidator's motion for summary judgment pointed out a third reason why offset is improper: Taking into account what Colorado HealthOP is owed under the risk corridors program, HHS is a net debtor. Pl.'s Mot. Summ. J. at 34-35. As the Federal Circuit has held, Section 1342 of the ACA created an unambiguous obligation to pay insurers under the formula set forth in that section—resulting in the $111 million that HHS had itself calculated as the amount owed Colorado HealthOP. *See Moda*, 892 F.3d at 1321-22. Those payments were initially conceived to be made from a combination of payments that insurers were required to make under the statutory formula, and taxpayer funds from the yearly appropriations to HHS. *See id.* at 1328.[16]

But Congress barred HHS from using appropriated taxpayer funds for such payments. In *Moda*, the Federal Circuit held that Congress thereby suspended the obligation to use taxpayer funds to make the payment. *Id.* at 1322-29. Payments were limited to non-taxpayer funds.

But the issues here do not involve payment of taxpayer funds. That risk corridor obligations were not presently payable absent appropriations should not have affected the computation of Colorado HealthOP's net position.

III. THE GOVERNMENT'S REMAINING ISSUES.

The Government makes two additional arguments.

A. The Liquidator Agrees That the Government's Procedural Default in the Liquidation Proceedings, and the Resulting Rejection of Its Proof of Claim, Do Not Decide the Issue Presented Here.

The Government states that the liquidation court's order on the Government's proof of claim does not resolve whether offset is appropriate here. The Liquidator agrees, although not precisely for the reasons the Government suggests.

The Government cites cases holding that it is not required to meet the time limits set by state law for submitting proofs of claim in state insurance liquidation proceedings because that would amount to a waiver of sovereign immunity. Gov't Br. at 28-29. Those rulings are

[16] HHS declared that it would administer the risk corridor program on a yearly basis using only insurer payments in, always affirming that the entirety of the sums due were an obligation of the United States. *See, e.g.*, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015) ("HHS is recording those amounts that remain unpaid . . . as [a] fiscal year 2015 obligation of the United States Government for which full payment is required."); CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016) ("[T]he Affordable Care Act requires the Secretary to make full payments to issuers" and HHS will "record payments due as an obligation of the United States Government for which full payment is required").

irrelevant. Here, the United States did submit a proof of claim, and submitted to the liquidation court for the determination of those claims, and the claims were disallowed. But it does not appear that the Government submitted the issue of offset to the state court. Therefore, the state court's order does not independently resolve the issues in this case. Both the Liquidator's affirmative claim, and HHS's position that it is entitled to an offset against that claim, fall squarely within this Court's jurisdiction. 28 U.S.C. § 2508.

B. The Liquidator Has Not Asserted a Separate State Law Claim.

The Government argues that Count II of the Complaint should be dismissed because it asserts a separate state law claim over which this Court has no jurisdiction. The Government misunderstands.

Count II asserted that the Government's offset violated state law, but it did not purport to state any affirmative state law right of recovery. Rather, the Liquidator's right of recovery arises from 42 U.S.C. § 18061. Because the Liquidator's claim arises under a money-mandating federal statute, this Court has jurisdiction over the claim and any asserted right to offset to reduce that claim. 28 U.S.C. § 2508.

CONCLUSION

For all the reasons explained above, the Liquidator is entitled to judgment on its claim for reinsurance payments owed in the amount of $24,489,535, and the Government's claim of offset should be rejected. The Liquidator's motion for summary judgment should be granted, and the Government's motion to dismiss should be denied.

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Respectfully submitted,

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