



U.S. Department of Justice
Civil Division
950 Pennsylvania Ave. NW, Rm. 7235
Washington, DC 20530

Tel.: (202) 514-1597

VIA CM/ECF

November 20, 2020

Peter R. Marksteiner, Clerk
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, NW, Room 401
Washington, DC 20439

Re: *Conway v. United States*, No. 2020-1292 (Fed. Cir.)
Oral argument scheduled for **December 9, 2020**

Dear Mr. Marksteiner:

We respectfully inform the Court of a decision in a related case that was issued after the close of briefing. In *Health Republic Insurance Co. v. United States*, -- F. Supp. 3d --, 2020 WL 5824232 (Fed. Cl. Sept. 30, 2020), then Chief Judge Sweeney addressed the government's right to offset an insurer's debts to the government against the amounts the insurer is owed under the ACA's risk-corridors program. Although Colorado Health—the insurer at issue here—is also a member of the “Dispute Subclass” in *Health Republic*, *see id.* at *2 n.2 the particular offsets at issue here are not at issue in *Health Republic*. However, two legal principles recognized by Chief Judge Sweeney apply here.

First, “the United States has the same common law right to setoff as a private party,” and that common law right “is not an ‘Act of Congress’ subject to the preemption rule set forth in 15 U.S.C. § 1012(b),” the McCarran-Ferguson Act. *Id.* at *7.

Second, “[t]o the extent that defendant’s proposed setoffs are deemed to derive from the provisions of the ACA that require certain insurers to make payments to the government, then 15 U.S.C. § 1012(b) is inapplicable because the ACA relates to the business of insurance.” *Id.* at *7 n.10 (citing *UnitedHealthcare of N.Y., Inc. v. Lacewell*, 967 F.3d 82, 91 n.4 (2d Cir. 2020)). (Chief Judge Sweeney further noted that the Dispute Subclass did not make the argument adopted by Judge Hertling in this case. *See id.*)

Sincerely,

Alisa B. Klein

/s/ Alisa B. Klein

Jeffrey E. Sandberg

Attorneys, Appellate Staff

Civil Division

cc: all counsel (by CM/ECF)