IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. F/K/A HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY D/B/A HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., AND HIGHMARK SELECT RESOURCES INC.,	:	Case No. 16-587C
Plaintiffs,	:	Judge Wolski
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

NOTICE OF SUPPLEMENTAL AUTHORITY

The United States hereby advises the Court of recent decisions by Judge Lettow and Judge Sweeney that are pertinent to the United States' pending Motion to Dismiss, Docket No. 8. *See Land of Lincoln Mutual Health Ins. Co. v. United States ("Land of Lincoln")*, No. 16-744C, 129 Fed. Cl. 81 (2016) (Lettow, J.), *appeal docketed*, No. 17-1224 (Fed. Cir.), and *Health Republic Ins. Co. v. United States* ("*Health Republic*") No. 16-259C, -- Fed. Cl. --, 2017 WL 83818 (Fed. Cl. Jan. 10, 2017) (Sweeney, J.).

In *Land of Lincoln*, the Court considered a nearly identical complaint to Highmark's Complaint. *Compare* Complaint, Docket No. 1, *with Land of Lincoln*, No. 16-744C, Complaint, Docket No. 1. On the merits, the Court held that "[s]ection 1342 . . . does not obligate HHS to make annual payments or authorize the use of any appropriated funds." *Land of Lincoln*, 129 Fed. Cl. at 107. Accordingly, the Court concluded that "HHS's interpretation of the ambiguous

statute [is] reasonable." *Id.* at 108. The Court dismissed the contract and takings claims under RCFC 12(b)(6).

In *Land of Lincoln*, the plaintiff sought expedited consideration of its claims, and the Court ordered the United States to file an administrative record and the parties to file simultaneous dispositive motions. *See Land of Lincoln*, No. 16-744C, Scheduling Order (Aug. 12, 2016), Docket No. 12. The United States filed an administrative record in accordance with the Scheduling Order, and the parties filed motions for judgment on the administrative record on the statutory and regulatory claim as directed. The United States also moved to dismiss for lack of jurisdiction and lack of a justiciable claim on the same grounds the United States seeks dismissal here. *Compare* Motion to Dismiss, at 13-21, *with Land of Lincoln*, No. 16-744C, United States' Motion to Dismiss, at 14-22, Docket No. 22.[1]

The Court granted the United States' motion, entering judgment in favor of the United States on the statutory and regulatory claim and dismissing the remaining counts. While the Court agreed with the United States that it lacked jurisdiction to grant declaratory relief, the Court concluded that it possessed jurisdiction over the statutory and regulatory claim and that the claim was ripe. *Land of Lincoln*, 129 Fed. Cl. at 97-102; *see also Health Republic*, 2017 WL 83818 at *12, *16.[2]

[1] Because the statutory and regulatory claim presented a pure question of law, the United States noted that it was also entitled to judgment as a matter of law on that count. *Land of Lincoln*, No. 16-744C, United States' Motion to Dismiss, at 22 n.7, Docket No. 22. The United States also moved to dismiss plaintiff's contracts and takings claims for failure to state a claim upon which relief could be granted, but noted that the administrative record did not address those claims and opposed judgment on the administrative record on those claims. *Id.*; *Land of Lincoln*, No. 16-744C, United States' Opposition To Plaintiff's Cross-Motion For Judgment On The Administrative Record On Counts II-V, at 9-12, Docket No. 43.

[2] The Health Republic Complaint asserts only a statutory and regulatory count, and the United States sought dismissal only under RCFC 12(b)(1).

Judge Lettow reasoned that "the court's jurisdictional analysis differs depending on whether the plaintiff relies on a money-mandating statute," and a "presently due" claim is a jurisdictional requirement only when a plaintiff's claim is founded on a contract. *Land of Lincoln*, 129 Fed. Cl. at 97. Judge Sweeney, on the other hand, concluded that "the requirement that money damages be presently due speaks more to the ripeness of a claim than to whether the court has subject matter jurisdiction." *Health Republic*, 2017 WL 83818 at *12. Judge Sweeney determined that the claims were ripe "[b]ecause HHS has ascertained plaintiff's entitlement to risk corridors payments for 2014 and 2015—the only years for which plaintiff asserts its claim." *Id.* at *16.

The United States respectfully disagrees with both analyses. The Court has jurisdiction over a claim founded on a statute or regulation only where "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 217 (1983). Without a breach of a presently owed obligation, there can be no injury and, by definition, no "damages sustained." *See Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) ("The term 'money damages' . . . normally refers to a sum of money used as compensatory relief . . . for a suffered loss"). Moreover, the *Mitchell* test is a question of statutory interpretation, not a pleading standard. It is the court—not the plaintiff—that interprets the substantive law to determine whether the plaintiff has a money-mandating source of compensation. *Fisher*, 402 F.3d at 1173 ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall dismiss the cause for lack of jurisdiction."). When interpreting a statute that is ambiguous regarding the specific process by which it is to be implemented, courts must defer to an agency's reasonable implementation of that statute. *See*,

e.g., *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544-45 (1978) (absent compelling circumstances, courts should not "dictat[e] to the agency the methods, procedures, and time dimension" of their tasks because such review "clearly runs the risk of propelling the court into the domain which Congress has set aside exclusively for the administrative agency") (citation and punctuation omitted); *Exxon Corp. v. Phillips Petroleum Co.*, 265 F.3d 1249, 1253 (Fed. Cir. 2001) (in "recognition of the agency's familiarity with the problems associated with the agency's mission," judicial "deference is owed to the agency's choice of its procedures to implement its assignment"). Thus, if, under the agency's reasonable implementation of the statute, no payments are presently due, then the statute is not "fairly interpreted as mandating compensation," and the court lacks jurisdiction.

Indeed, the Court in *Land of Lincoln* determined, as a merits question, that HHS's three-year payment framework is reasonable and entitled to deference. *Land of Lincoln*, 129 Fed. Cl. at 103-08. Noting that Congress gave discretion to HHS in administering the risk corridors program, the Court determined that the three-year framework fills a gap in the statute left by Congress and reflects the agency's considered deliberation, including in notice and comment rulemaking. *Id.* at 105-07. Moreover, HHS's three-year, budget neutral interpretation "reasonably reflects" (1) the Congressional Budget Office's scoring of the ACA in 2010, (2) Congress's decision not to specifically appropriate funds for risk corridors payments, and (3) Congress's choice to omit from section 1342 the appropriation language used in the Medicare Part D statute. *Id.* at 107. As a result, the Court held that "[s]ection 1342 . . . does not obligate HHS to make annual payments or authorize the use of any appropriated funds." *Id.* The Court, therefore, granted the United States' motion for judgment on the statutory and regulatory claim.[3]

[3] Like Judge Lettow, Judge Sweeney concluded that whether HHS may make partial payments is

The Court's analysis of the three-year framework and section 1342 is undoubtedly correct, and the Court's determination that issuers are not presently, in the absence of additional collections or appropriations, entitled to more than they have received, is a jurisdictional determination. In other words, the statute *cannot* "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained" *Mitchell*, 463 U.S. at 217, because it does not require final payment prior to the conclusion of HHS's three-year framework. Accordingly, should the Court concur with the reasoning of *Land of Lincoln* in concluding that HHS's implementation of section 1342 is reasonable, the Court should dismiss this case for lack of jurisdiction.

As noted above, the Complaint in *Land of Lincoln* is nearly identical to Highmark's Complaint. Judge Lettow concluded that counts II through V (the contract-related and takings counts) fail to state a claim upon which relief can be granted, and dismissed them under RCFC 12(b)(6). *Land of Lincoln*, 129 Fed. Cl. at 108-14. The Court's reasoning in *Land of Lincoln* is sound and equally applicable here: counts II through V should be dismissed for failure to state a claim.

On count II, the express contract claim, the Court rejected the same arguments Highmark raises here and held that "Lincoln . . . failed to allege that the [QHP] agreements . . . created a valid express contract pertaining to risk corridors payments." *Id.* at 110. On count III, the implied contract claim, the Court noted that "[s]ection 1342 and the implementing regulations do not provide any express or explicit intent on behalf of the government to enter into a contract with qualified health plan issuers." *Id.* at 111. Thus, the Court held that "[s]ection 1342 and the

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a merits question. *Health Republic*, 2017 WL 83818 at *18. Because the United States sought dismissal only under RCFC 12(b)(1), the Court in *Health Republic* did not address whether the three-year framework is permissible.

implementing regulations do not constitute an offer or invite acceptance by performance alone." *Id.* at 113. On count IV, the good faith and fair dealing claim, the Court held that without a valid contract for risk corridors payments, the plaintiff could not allege a breach of an implied covenant of good faith and fair dealing. *Land of Lincoln*, 129 Fed. Cl. at 113-14. Finally, on count V, the takings claim, the Court held that "because a statutory right to payment is not a recognized property interest," qualified health plans do not have a protected property interest in risk corridors payments under the Fifth Amendment. *Id.* at 114.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2017, a copy of the foregoing, *Notice of Supplemental 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/ *Charles E. Canter*
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