

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE)	
COMPANY, INC., <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	No. 16-587C
)	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 decision issued earlier this week by Judge Sweeney in *Health Republic Ins. Co. v. United States*, No. 16-cv-002359 (Fed. Cl. Jan. 10, 2017) (Exhibit A hereto), which is pertinent to Defendant’s pending motion challenging the jurisdiction and ripeness of Plaintiffs’ claims in this case (*see* ECF No. 8).

Like in *Health Republic*, Plaintiffs assert in Count I of their Complaint (ECF No. 1) a Tucker Act claim for money damages under § 1342 of the Affordable Care Act (“ACA”), 42 U.S.C. § 18042, and its implementing regulation, 45 C.F.R. § 153.510, alleging the Government’s breach of its statutory and regulatory obligations to make full, annual risk corridors payments. As in this case, Defendant in *Health Republic* moved to dismiss under RCFC 12(b)(1) on the grounds that the Court lacked subject matter jurisdiction to hear the plaintiff’s claim, and that the plaintiff’s claim was unripe because, Defendant asserted, payments were not due until sometime after the end of the risk corridor program.

Judge Sweeney denied Defendant’s motion in part, holding that the Court has subject matter jurisdiction over the money-mandating claim and that the claim was ripe. After reviewing

the text and purpose of § 1342 and its implementing regulations, the text and purpose of the ACA, and the agencies' proposed and final rules, Judge Sweeney further held that "HHS is required to make annual risk corridors payments to eligible qualified plans." Ex. A at 23. The Court found that § 1342 and its implementing regulations were *not* ambiguous as to whether risk corridors payments were due annually, but even if they were ambiguous, Judge Sweeney concluded that, applying *Chevron* deference, HHS itself "construed its regulations to require annual risk corridors payments." *Id.* at 25 (citing July 11, 2011 HHS proposed rule, March 11, 2013 HHS final rule, and April 11, 2014 HHS bulletin).

Date: January 13, 2017

Respectfully Submitted,

s/ Lawrence S. Sher

Lawrence S. Sher (D.C. Bar No. 430469
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.474.9299
Email: lscher@reedsmit.com

Of Counsel:

Daniel I. Booker (D.C. Bar No. 377926)
Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: dbooker@reedsmit.com
kbahr@reedsmit.com
cshaffer@reedsmit.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 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/ Lawrence S. Sher

Lawrence S. Sher

Counsel for Plaintiffs