

FILED
March 17 2017
U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Raymond G. Farmer, in his capacity as)
Liquidator of Consumers' Choice Health)
Insurance Company, and Michael J.)
FitzGibbons, in his capacity as Special)
Deputy Liquidator of Consumers' Choice)
Health Insurance Company,)
Plaintiffs,)
vs.)
The United States of America,)
Defendant.)

)

COMPLAINT

The Plaintiffs above-named, complaining of the Defendants herein, would respectfully show unto this Court as follows:

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Raymond G. Farmer ("Liquidator") is the Director of the South Carolina Department of Insurance and is the Liquidator of Consumers' Choice Health Insurance Company ("Consumers' Choice") appointed by the Richland County Court of Common Pleas, in the matter captioned as *Raymond G. Farmer, as Director of the South Carolina Department of Insurance vs. Consumers' Choice Health Insurance Company* (Civil Action Number 2016-CP-40-00034). Mr. Farmer brings this suit in his capacity as the court-appointed Liquidator.

2. Plaintiff Michael J. FitzGibbons is the Special Deputy Liquidator ("Special Deputy Liquidator") of Consumers' Choice appointed by the Richland County Court of Common Pleas, in the matter captioned as *Raymond G. Farmer, as Director of the South Carolina Department of Insurance vs. Consumers' Choice Health Insurance Company* (Civil Action Number 2016-CP-40-

00034). Mr. FitzGibbons brings this suit in his capacity as the court-appointed Special Deputy Liquidator. The Liquidator and the Special Deputy Liquidator are collectively referred to as the “Plaintiff.”

3. Defendant is the United States of America. The Department of Health and Human Services (“HHS”) and the Centers for Medicare & Medicaid Services (“CMS”) are agencies of the federal government and are responsible for overseeing federal administration of the Patient Protection and Affordable Care Act (“ACA”). The United States of America, HHS, and CMS are collectively referred to as the “Government.”

4. This Court has subject matter jurisdiction over this matter pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because the Plaintiff brings claims for damages over \$10,000 against the United States founded upon the Government’s violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, an express contract and/or implied-in-fact contract with the United States, and a taking of Consumers’ Choice’s property in violation of the Fifth Amendment of the United States Constitution.

5. The actions and/or decisions of the Government at issue in this lawsuit were conducted on behalf of the Government within the District of Columbia.

FACTUAL BACKGROUND

I. CONGRESS AUTHORIZED AND HHS ESTABLISHED VARIOUS PROGRAMS AND MECHANISMS PURSUANT TO THE ACA TO FACILITATE THE FORMATION, OPERATION, AND FUNDING OF INSURERS LIKE CONSUMERS’ CHOICE.

A. The Establishment of CO-OPs.

6. On March 23, 2010, President Obama signed the ACA into law.

7. In the ACA, Congress authorized the creation of various programs to facilitate the formation, operation, and funding of insurers such as Consumers’ Choice. These new health

insurance marketplaces, or exchanges, offered consumers organized platforms to shop for coverage with specified benefit levels.

8. To offer plans on the exchanges, the ACA required that an insurer certify that its plans are “qualified health plans” (“QHPs”) that meet certain federally-mandated criteria.

9. In order to promote competition within the exchanges and to provide consumers with greater choices among QHPs, the ACA established the Consumer Operated and Oriented Plan (“CO-OP”) program, which authorized the creation of nonprofit health insurance issuers to offer QHPs to individuals and small groups. Further, the ACA directed HHS/CMS to establish and operate the CO-OP program. *See 42 U.S.C. § 18042(a)(1)–(2).*

B. Funding for CO-OPs.

10. The ACA also authorized two loan types “to persons applying to become qualified nonprofit health insurance issuers” under the CO-OP program:

- a) Start-up loans “to provide assistance to such person in meeting its start-up costs;” and
- b) Solvency loans “to provide assistance to such person in meeting any solvency requirements of States in which the person seeks to be licensed to issue qualified health plans.”

42 U.S.C. § 18042(b)(1).

C. Risk Mitigation for CO-OPs (the “3Rs”).

11. In addition, the ACA created three federal risk mitigation programs in which CO-OPs and other qualified insurers could participate: a temporary Reinsurance program, a permanent Risk Adjustment program, and a temporary Risk Corridor program.

12. These programs, colloquially referred to as the “3Rs,” are integral to the ACA and directly benefit the federal government. The Reinsurance and Risk Corridor programs operate only during the first three years of full implementation of the ACA, *i.e.*, 2014 to 2016.

13. Without the 3Rs, the risks associated with the ACA roll-out (*i.e.*, enrollment of the previously uninsured population with unknown health risks and pent up demand for services) would have necessitated higher premiums and shifted costs to insureds to protect against risk. The 3Rs were intended to allow insurers to offer quality, affordable plans, despite the uncertainty, because they protected against those risks. As explained by CMS, the “overall goal” of the three programs “is to provide certainty and protect against adverse selection in the market while stabilizing premiums in the individual and small group markets as market reforms and [sic] Exchange begin in 2014.” CMS, *Reinsurance, Risk Corridors, and Risk Adjustment Final Rule* (Mar. 2012), available at <https://www.cms.gov/cciio/resources/files/downloads/3rs-final-rule.pdf>.

14. This suit involves the Risk Corridor program, which is established in Section 1342 of the ACA, codified at 42 U.S.C. § 18062, and is intended to level the playing field for issuers and to protect insurers from loss risks associated with the launch of the ACA by mitigating the pricing risk that issuers faced because they had very limited data to use to estimate who would enroll in plans operating under the ACA rules and what their health costs would be.

15. Congress mandated that “[t]he Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan’s aggregate premiums.” 42 U.S.C. § 18062(a).

16. Congress required the ACA Risk Corridors established pursuant to Section 18062 be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program that was signed into law by President George W. Bush. *Id.* (mandating that the Risk Corridors “program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act”).

17. The Risk Corridor program is designed to limit insurer gains and losses. Under the program, a participating plan either (1) must pay to the Secretary of HHS certain sums if the plan’s costs are less than a “target amount” of premium revenues or (2) the “Secretary *shall* pay to the plan” certain sums if the plan’s costs are greater than a certain percentage of the “target amount” of premium revenues. *Id.* § 18062(b) (emphasis added); *see also* 45 C.F.R. § 153.510 (setting out the formula by which the sums and target amounts are calculated).

18. Accordingly, the Government’s obligation to pay Risk Corridor payments is mandatory.

19. Congress did not impose any financial limits or restraints on the Government’s mandatory Risk Corridor payments to QHPs in Section 18062 or any other section of the ACA.

20. Congress did not in any way limit the Secretary of HHS’s obligation to make full Risk Corridor payments to QHPs due to appropriations, restrictions on the use of funds, or otherwise in either Section 18062 or anywhere else in the ACA.

21. Congress has not amended or repealed Section 18062 since its enactment.

22. Accordingly, the Government lacks statutory authority to pay anything less than 100% of the Risk Corridor payments due to Consumers’ Choice, and are legally obligated to make full payment.

23. CMS issued implementing regulations related to the Risk Corridor program containing the same mandatory language and the same mathematical formulas found in Section 18062. *See* 45 C.F.R. § 153.510.

24. The regulation implementing the Risk Corridor program imposed a 30-day deadline for a QHP to fully remit payments due to HHS under the Risk Corridor program. *See* 45 C.F.R. § 153.510(d).

25. Although the regulation does not contain an express deadline for HHS to tender full Risk Corridor payments to QHPs, during the proposed rulemaking that ultimately resulted in adoption of the 30-day deadline for QHPs to make payments, CMS and HHS stated the deadline for the Government to make Risk Corridor payments to QHPs “should be the same” as the QHP’s 30-day deadline. *See* 76 FR 41929, 41943 (July 15, 2011); 77 FR 17219, 17238 (Mar. 23, 2012).

26. Nothing in 45 C.F.R. Part 153 limits CMS’s obligation to pay promptly to QHPs the full amount of Risk Corridor payments due based on appropriations, restrictions on the use of funds, or otherwise.

27. Consumers’ Choice relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become a QHP and to accept the obligations and responsibilities of QHPs, believing that the Government would pay the full Risk Corridor payments owed to it within 30 days after payment obligations for a calendar year were determined should Consumers’ Choice experience losses sufficient to qualify for Risk Corridor payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

28. Indeed, when HHS implemented a final rule regarding HHS Notice of Benefit and Payment Parameters for 2014, HHS confirmed, “The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit

payments as required under section 1342 of the Affordable Care Act.” 78 FR 15409, 15473 (Mar. 11, 2013).

29. Since Congress’s enactment of the ACA in 2010, HHS and CMS have repeatedly publicly acknowledged and confirmed to Consumers’ Choice and other QHPs their statutory and regulatory obligations to make full and timely Risk Corridor payments to qualifying QHPs.

30. These public statements by HHS and CMS were made by representatives of the Government who had actual authority to bind the United States.

31. Consumers’ Choice relied on these public statements by HHS and CMS to assume and continue its QHP status, including its continued participation as a CO-OP in the ACA.

32. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, “Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment,” stating that under the Risk Corridors program, “qualified health plan issuers with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of those losses.” HealthCare.gov, “Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment” (July 11, 2011), attached hereto at **Exhibit 1**.

33. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (77 FR 17219). Although HHS recognized that it did not propose deadlines for making Risk Corridor payments, HHS stated that “QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.” 77 FR 17219, 17238 (Mar. 23, 2012).

34. When HHS implemented a final rule on March 11, 2013, regarding HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15409), HHS confirmed, “The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and

receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.” 78 FR 15409, 15473 (Mar. 11, 2013).

35. In HHS’s response letter to the U.S. Government Accountability Office (“GAO”) dated May 20, 2014, HHS again admitted that “Section 1342(b)(1) . . . establishes . . . the formula to determine . . . the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.” Letter from William B. Schulz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), attached hereto at **Exhibit 2**.

36. On June 18, 2014, HHS sent to U.S. Senator Sessions and U.S. Representative Upton identical letters stating that, “As established in statute, . . . [QHP] plans with allowable costs at least three percent higher than the plan’s target amount will receive payments from HHS to offset a percentage of those losses.” Letter from Sylvia M. Burwell, Secretary, HHS, to U.S. Senator Jeff Sessions (June 18, 2014), attached hereto at **Exhibit 3**.

37. On February 27, 2015, HHS’s implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), further confirmed that “HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.” 80 FR 10749, 10779 (Feb. 27, 2015).

38. CMS’s letter to state insurance commissioners on July 21, 2015, stated in boldface text that “CMS remains committed to the risk corridor program.” Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), attached hereto at **Exhibit 4**.

39. On November 19, 2015, CMS issued a public announcement further confirming that “HHS recognizes that the Affordable Care Act requires the Secretary to make full payments

to issuers.” Bulletin, CMS, “Risk Corridors Payments for the 2014 Benefit Year” (Nov. 19, 2015), attached hereto at **Exhibit 5**.

40. HHS and CMS’s direct statements to Consumers’ Choice have unequivocally confirmed the agencies’ position that Risk Corridor payments owed to Consumers’ Choice are a binding obligation of the United States.

II. CONSUMERS’ CHOICE IS FORMED AS A SOUTH CAROLINA INSURER, RECEIVES FEDERAL FUNDING UNDER THE ACA TO OPERATE AS A CO-OP, AND PARTICIPATES IN THE 3RS.

41. Consumers’ Choice was one of 23 CO-OPs created under the ACA and was certified by CMS as a QHP to participate on the ACA exchanges.

42. It was organized under South Carolina law as a non-profit mutual benefit corporation, effective August 25, 2011, and its home office was 301 University Ridge, Suite 5050, Greenville, SC 29601.

43. In reliance on the Government’s statutory, regulatory, and contractual obligations and inducements described above, Consumers’ Choice applied for federal funding to operate as a CO-OP, and in early 2012, HHS/CMS approved Consumers’ Choice’s business plan and application to operate as a QHP, and authorized federal funding to Consumers’ Choice to operate as a CO-OP as defined in 42 U.S.C. § 18042(a)(1)–(2).

44. On March 27, 2012, HHS/CMS and Consumers’ Choice closed on a Loan Agreement that included Promissory Notes for a Start-up Loan to Consumers’ Choice in the amount of \$18,709,800 (“Start-up Loan”) and a Solvency Loan to Consumers’ Choice in the amount of \$68,868,408 (“Solvency Loan”).

45. Consumers’ Choice received the Start-up Loan and Solvency Loan from HHS/CMS pursuant to 42 U.S.C. § 18042(b)(a)(A)–(B) and the Loan Agreement.

46. Although Consumers' Choice received funding and was subject to the CO-OP program, it received its certificate of authority from the South Carolina Department of Insurance on May 2, 2013 and began operating as a non-profit mutual benefit corporation under South Carolina law.

47. On September 11, 2013, Consumers' Choice and CMS entered into a Qualified Health Care Plan Issuer Agreement regarding Consumers' Choice's provision of insurance in calendar year ("CY") 2014 and the payment of various amounts between Consumers' Choice and CMS. *See* 2014 Qualified Health Care Plan Issuer Agreement (the "2014 QHP Agreement") attached here to as **Exhibit 6**.

48. Consumers' Choice first offered health insurance plans to individuals and groups during the "open enrollment" period beginning on October 1, 2013, for health insurance coverage effective January 1, 2014.

49. On October 28, 2014, pursuant to § III.B of the 2014 QHP Agreement, Consumers' Choice and CMS renewed its QHP Agreement to extend through CY 2015 (the "2015 QHP Agreement"), attached hereto as **Exhibit 7**.

50. As of October 2015, Consumers' Choice had approximately 67,000 participating members.

51. Over the course of its operations, Consumers' Choice participated in and upheld its obligations under the ACA's Risk Corridor program.

III. CONSUMERS' CHOICE EXPERIENCES FINANCIAL DISTRESS AND IS PLACED INTO REHABILITATION AND THEN INTO LIQUIDATION PURSUANT TO SOUTH CAROLINA LAW.

A. Consumers' Choice Experiences Financial Distress.

52. Beginning in 2014—after Consumers' Choice had already begun to participate in the ACA in reliance upon the Risk Corridor payment provisions in Section 1342 and 45 C.F.R.

§ 153.510, as well as upon HHS and CMS's statements confirming their obligations to make full and timely Risk Corridor payments—the Government announced that the United States would not honor its mandatory risk corridor payment obligations.

53. On March 11, 2014, HHS stated in the Federal Register that “HHS intends to implement this [risk corridors] program in a budget neutral manner.” 79 FR 13743, 13829 (Mar. 11, 2014).

54. This statement was inconsistent with HHS’s prior statement—made exactly one year earlier in the Federal Register, March 11, 2013—which stated: “The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.” 78 FR 15409, 15473 (Mar. 11, 2013).

55. On April 11, 2014, HHS and CMS issued a bulletin entitled “Risk Corridors and Budget Neutrality,” which contained HHS and CMS’s statement that:

We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. ***However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall.*** Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

Bulletin, CMS, “Risk Corridors and Budget Neutrality” (Apr. 11, 2014) (emphasis added), attached hereto at **Exhibit 8.**

56. The bulletin of April 11, 2014, was the first instance in which HHS and CMS publicly suggested that Risk Corridor charges collected from QHPs would be less than the Government's full mandatory Risk Corridor payment obligations owed to QHPs.

57. Only one month earlier, on March 11, 2014, HHS and CMS had announced in the Federal Register that "we believe that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." 79 FR 13743, 13829 (Mar. 11, 2014).

58. On December 16, 2014, Congress enacted the Omnibus appropriations bill for fiscal year 2015, the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). Pub. L. 113-235.

59. In the 2015 Appropriations Act, Congress specifically targeted the Government's existing, mandatory Risk Corridors payment obligations owed to QHPs, including Consumers' Choice, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 227 of the 2015 Appropriations Act:

None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services-Program Management" account, ***may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).***

128 Stat. 2491 (emphasis added).

60. Section 1342(b)(1) of Public Law 111-148—referenced in the above quote—is the ACA's prescribed methodology for the Government's mandatory Risk Corridor payments to QHPs.

61. Congress's failure to appropriate sufficient funds for Risk Corridor payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including Consumers' Choice.

62. On or about October 1, 2015, Consumers' Choice was informed by CMS that it would receive only 12.6% of the Risk Corridor payments that it was scheduled to receive for CY 2014. These payments were to be made in full in 2015. CMS represented to Consumers' Choice that the remaining 87.4% would be paid in subsequent years based on collections and funding.

63. HHS and CMS further announced on October 1, 2015, that they would be collecting full Risk Corridor charges from QHPs in November 2015.

64. HHS and CMS failed to provide Consumers' Choice with any statutory authority for their unilateral decision to make only partial, prorated Risk Corridor payments for CY 2014, and to withhold delivery of full risk corridor payments for CY 2014 beyond 2015.

65. CMS later informed the South Carolina Department of Insurance that Consumers' Choice would not receive any of the remaining risk corridor payments owed for CY 2014. This resulted in Consumers' Choice having to non-admit the promised full Risk Corridor payment because it was no longer qualified as an admitted asset and is required by statutory accounting principles to be non-admitted. Consequently, Consumers' Choice risk-based capital ("RBC") ratio dropped from 877% as of December 31, 2014 to an amount at or below the regulatory action level.

66. Without the Risk Corridor payments, Consumer' Choice's pro forma projections indicated that it would be in a hazardous financial condition without additional federal financial support or a significant capital infusion.

67. On October 20, 2015, CMS advised that any additional federal funds to Consumers' Choice would be extremely unlikely. Without the Government's promised funds, Consumers' Choice's premium structure would not be sufficient to support its ongoing operation.

68. Regarding CY 2014 Risk Corridor payments, HHS and CMS acknowledged in a public bulletin on November 19, 2015 as follows:

HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation [sic] of the United States Government for which full payment is required.

Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), [Exhibit 5](#).

69. The Government's written acknowledgement of its Risk Corridors payment obligation for CY 2014, however, is an insufficient substitute for full and timely payment of the amounts owed as required by statute, regulation, contract, and HHS and CMS's previous statements.

70. On December 18, 2015, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

71. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory Risk Corridor payment obligations owed to QHPs, including Consumers' Choice, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 225 of the 2016 Appropriations Act:

None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services-Program Management" account, ***may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).***

129 Stat. 2624 (emphasis added).

72. Again, Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed methodology for the Government's mandatory risk corridor payments to QHPs.

73. Congress's failure to appropriate sufficient funds for Risk Corridor payments due for CY 2014 and CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely Risk Corridor payments to QHPs, including Consumers' Choice.

B. Consumers' Choice Reorganization and Liquidation in the South Carolina State Court Under the Liquidation Act.

74. On October 21, 2015, Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and Consumers' Choice entered into a consent order placing Consumers' Choice into supervision.

75. On October 22, 2015, Consumers' Choice agreed to wind down its operations.

76. On January 6, 2016, the Consumers' Choice's Board of Directors consented to a rehabilitation of its business.

77. On January 8, 2016, the Richland County Court of Common Pleas, acting pursuant the South Carolina Insurers Rehabilitation and Liquidation Act (hereinafter the "Liquidation Act"), found in Title 38, Chapter 27 of the South Carolina Code, entered an order placing Consumers' Choice into rehabilitation ("Rehabilitation Order"). The Rehabilitation Order contained a "Notice of Automatic Stay", which among things, and pursuant to S.C. Code Ann. §§ 38-27-70(a)(4), (11) prevented "waste of the insurer's assets" and "any other threatened or contemplated action that might lessen the value of the insurer's assets."

78. The subsequent efforts of Plaintiffs Farmer and FitzGibbons to rehabilitate Consumers' Choice proved futile, and ultimately they filed a petition and supporting affidavit with the Richland Court of Common Pleas describing their efforts, seeking an order of liquidation, and confirming that further attempts to rehabilitate Consumers' Choice substantially increased the risk of loss to creditors, policyholders, or the public.

79. On March 28, 2016, the Richland County Court of Common Pleas, again acting pursuant to the Liquidation Act, filed an order placing Consumers' Choice into liquidation (the "Liquidation Order").

80. The Liquidation Order stated, among other things, that the Liquidator and his designees were authorized to institute suits and other legal proceedings and to collect all debts and monies due and claims belonging to Consumers' Choice.

81. The Liquidation Order also provided as follows:

5. PURSUANT TO S.C. Code Ann. §§ 38-27-70 & -430 (2015) and the Rehabilitation Order, Notice is hereby given that the permanent automatic stay and injunction applicable to all persons and proceedings, other than the Receiver, shall remain in full force and effect and survive entry of this Order.

82. S.C. Code Ann. § 38-27-70(a)(4) and (11) prevent "waste of the insurer's assets" and "any other threatened or contemplated action that might lessen the value of the insurer's assets."

IV. THE GOVERNMENT'S FAILURE TO PAY AMOUNTS OWED TO CONSUMERS' CHOICE UNDER THE RISK CORRIDOR PROGRAM

83. Under the ACA and HHS's implementing regulations, Consumers' Choice is owed \$12,425,230 under the Risk Corridor program for the CY 2014.

84. Despite its statutory mandate and assurance to pay 100% of the Risk Corridor payments, HHS/CMS announced that participating plans would receive only up to 12.6% owed to

plans under the Risk Corridor program for CY 2014, and accordingly, only paid to Consumers' Choice \$1,345,799 of the amount Consumers' Choice was due for CY 2014, leaving a net balance owing to Consumers' Choice of \$11,079,431 for CY 2014.

85. HHS/CMS attributed the shortfall on the mandated payments to the plans to a shortfall in issuer payments into the program and purported limits on the Government's ability to pay the remaining obligation despite this shortfall.

86. HHS/CMS has issued guidance indicating that amounts due for Risk Corridor payments will be made from available 2014 Risk Corridor revenues as well as 2015 and 2016 Risk Corridor revenues. Only after 100% of 2014 Risk Corridor payments are funded will 2015 and 2016 Risk Corridor revenues be applied to 2015 or 2016 Risk Corridor payments due.

87. Under the ACA and HHS's implementing regulations, Consumer's Choice is owed \$81,122,278 under the Risk Corridor program for CY 2015, of which no amount has been paid by HHS to Consumers' Choice.

88. Despite being owed a total of \$93,547,508 under the Risk Corridor program for CY 2014 and CY 2015, Consumers' Choice has only been paid \$1,345,799, a shortage of \$92,201,709.

FOR A FIRST CAUSE OF ACTION
(Violation of Federal Statute or Regulation)

89. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

90. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridor payments to QHPs in accordance with the payment formula set forth in the statute.

91. HHS and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" Risk Corridor payments to QHPs in

accordance with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

92. HHS and CMS's regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit charges to HHS within 30 days after notification of such charges.

93. HHS and CMS's statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridor "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011); 77 FR 17219, 17238 (Mar. 23, 2012).

94. Consumers' Choice was a QHP in CY 2014 and CY 2015, and was qualified for and entitled to receive mandated Risk Corridor payments from the Government.

95. Consumers' Choice satisfied all statutory and regulatory requirements for participation in and payments under the Risk Corridors Program in 2014 and 2015.

96. Consumers' Choice is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated Risk Corridor payments from the Government for CY 2014 and CY 2015.

97. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$12,425,229, that the Government concedes it owes Consumers' Choice for CY 2014. *See* Risk Corridors Payment and Charge Amounts for Benefit Year 2014, Table 41, attached hereto as **Exhibit 9**.

98. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$81,122,278.86, that the Government concedes it owes Consumers' Choice for CY 2015. *See* Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year at 11, attached hereto as **Exhibit 10**.

99. The Government has failed to make full and timely Risk Corridor payments to Consumers' Choice for CY 2014 or CY 2015, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make Risk Corridor payments.

100. Congress's failure to appropriate sufficient funds for Risk Corridor payments due for CY 2014 or CY 2015, without modifying or repealing Section 1342 of the ACA, did not and could not defeat or otherwise abrogate the Government's statutory obligation created by Section 1342 to make full and timely Risk Corridor payments to QHPs, including Consumers' Choice.

101. The Government's failure to make full and timely Risk Corridor payments to Consumers' Choice for CY 2014 and CY 2015 constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

102. As a result of the Government's violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), Consumers' Choice has been damaged in the amount of \$92,201,709 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

103. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

104. Consumers' Choice entered into a valid QHP Agreements with CMS. *See* Exs. 6 and 7.

105. The QHP Agreements were executed by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

106. The QHP Agreements obligated CMS to “undertake all reasonable efforts to implement systems and processes that will support [QHP] functions.” *See Exhibit 6 at § II.d; see also Exhibit 7 at § III.a (same).*

107. By agreeing to become a QHP, Consumers’ Choice agreed to provide health insurance under the ACA, and to accept the obligations, responsibilities, and conditions the Government imposed on QHPs under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq.*

108. Consumers’ Choice satisfied and complied with its obligations and/or conditions under the QHP Agreements.

109. The QHP Agreements provided that they “will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies” Exhibit 6 at § V.g; *see also Exhibit 7 at § V.g (same).*

110. Therefore, the QHP Agreements incorporated the provisions of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) into the QHP Agreements.

111. The Government’s statutory and regulatory obligations to make full and timely Risk Corridor payments were significant factors material to Consumers’ Choice’s agreement to enter into the QHP Agreements.

112. The Government’s failure to make full and timely Risk Corridor payments to Consumers’ Choice is a material breach of CMS’ obligation to support Consumers’ Choice’s function as a QHP.

113. Congress's failure to appropriate sufficient funds for Risk Corridor payments did not defeat or abrogate the Government's contractual obligation to make full and timely Risk Corridor payments to Consumers' Choice.

114. The Government's breach of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) by failing to make full and timely CY 2014 and CY 2015 Risk Corridor payments to Consumers' Choice is a material breach of the QHP Agreements.

115. As a result of the Government's material breach of the QHP Agreements by failing to make Risk Corridor payments due and owing to Consumers' Choice, Consumers' Choice has been damaged in the amount of \$92,201,709 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied-in-Fact Contract)

116. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

117. In the alternative, Consumers' Choice entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely Risk Corridor payments to Consumers' Choice in exchange for Consumers' Choice's agreement to become a QHP and participate as a CO-OP in the ACA.

118. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's admissions regarding their obligation to make Risk Corridor payments were made by representatives of the Government who had actual authority to bind the United States, and constituted a clear and unambiguous offer by the Government to make full and timely

Risk Corridor payments to health insurers, including Consumers' Choice, that agreed to participate as a QHP.

119. Consumers' Choice accepted the Government's offer by agreeing to become a QHP and to participate in and accept the uncertain risks imposed by the ACA.

120. By agreeing to become a QHP, Consumers' Choice agreed to provide health insurance under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPs—subject to the implied covenant of good faith and fair dealing—under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq.*

121. Consumers' Choice satisfied and complied with its obligations and/or conditions which existed under the implied-in-fact contracts.

122. The Government's agreement to make full and timely Risk Corridor payments was a significant factor material to Consumers' Choice's agreement to enter into the QHP Agreements and to participate as a CO-OP under the ACA.

123. The parties' agreement is further confirmed by the parties' conduct, performance, and statements following Consumers' Choice's acceptance of the Government's offer, the execution by the parties of the QHP Agreements expressly incorporating “the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies,” *see* Exhibits 6 and 7 at § V.g, and the Government's repeated assurances that full and timely risk corridor payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013).

124. The implied-in-fact contracts were authorized by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

125. The Risk Corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced Consumers' Choice's decision to agree to become a QHP and participate as a CO-OP under the ACA.

126. Consumers' Choice, in turn, provided a real benefit to the Government by agreeing to become a QHP and participate in the ACA, despite the uncertain financial risk.

127. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the ACA: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

128. The Government induced Consumers' Choice to participate in the ACA by including the Risk Corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health insurers financially against risk selection and market uncertainty.

129. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely Risk Corridor payments to qualifying QHPs through its conduct and statements to the public and to Consumers' Choice, made by representatives of the Government who had actual authority to bind the United States. *See, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012).

130. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$12,425,229.72, that the Government concedes it owes Consumers' Choice for CY 2014. *See Exhibit 9.*

131. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$81,122,278.86, that the Government concedes it owes Consumers' Choice for CY 2015. *See Exhibit 10.*

132. Congress's failure to appropriate sufficient funds for Risk Corridor payments due for CY 2014 or CY 2015, did not and could not defeat or otherwise abrogate the United States' contractual obligation to make full and timely Risk Corridor payments to Consumers' Choice.

133. The Government's failure to make full and timely CY 2014 or CY 2015 Risk Corridor payments to Consumers' Choice is a material breach of the implied-in-fact contracts.

134. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with Consumers' Choice regarding the CY 2014 and CY 2015 ACA CO-OP Program, Consumers' Choice has been damaged in the amount of \$92,201,709 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

135. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

136. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

137. The express or, alternatively, the implied-in-fact contracts entered into between the Government and Consumers' Choice regarding the CY 2014 and 2015 ACA CO-OPs created the reasonable expectations for Consumers' Choice that full and timely CY 2014 and CY 2015 Risk Corridor payments would be paid by the Government to QHPs, just as the Government expected that full and timely CY 2014 and CY 2015 Risk Corridor remittance charges would be paid by QHPs to the Government.

138. By failing to make full and timely CY 2014 and CY 2015 Risk Corridor payments to Consumers' Choice, the Government destroyed Consumers' Choice's reasonable expectations regarding the fruits of the express or, alternatively, the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

139. Despite the Government's failure to honor its contractual obligations, Consumers' Choice, in good faith conformance with its express or implied-in-fact contractual obligations, has submitted its full and timely CY 2014 Risk Corridors remittance charges owed to the Government. Further, had Consumers' Choice been required to remit a Risk Corridors charge to the Government for CY 2015, it would have done so in good faith as it had agreed and attested to do.

140. The QHP Agreements allow CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions," but do not define standards for CMS's implementation of the function-supporting systems and processes.

141. Where, as here, an agreement affords CMS the power to make a discretionary decision without defined standards, the duty to act in good faith limits the Government's ability to act capriciously to contravene Consumers' Choice's reasonable contractual expectations.

142. CMS is afforded substantial discretion in determining the systems and processes that it will implement to support Consumers' Choice's functions as a QHP.

143. Congress granted HHS with rulemaking authority regarding the Risk Corridors program in Section 1342(a) of the ACA. HHS and CMS are permitted to establish charge remittance and payment deadlines that support QHP functions. HHS and CMS have an obligation to exercise the discretion afforded to it in good faith, and not arbitrarily, capriciously or in bad faith.

144. The United States breached the implied covenant of good faith and fair dealing by, among other things:

- (a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of Risk Corridor charges to the Government, but failing to create a similar deadline for the Government's full payment of Risk Corridor payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline (*See, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012));
- (b) Requiring QHPs to fully remit Risk Corridor charges to the Government, but unilaterally deciding that the Government may make prorated Risk Corridor payments to QHPs;
- (c) In Section 227 of the 2015 Appropriations Act, legislatively targeting and limiting funding sources for CY 2014 Risk Corridor payments after Consumers' Choice had undertaken significant expense in performing its obligations as a QHP, based on the reasonable expectation that the Government would make full and timely Risk Corridor payments if Consumers' Choice experienced sufficient losses in CY 2014;
- (d) In Section 225 of the 2016 Appropriations Act, legislatively targeting and limiting funding sources for CY 2014 Risk Corridor payments after Consumers'

Choice had undertaken significant expense in performing its obligations as a QHP, based on the reasonable expectation that the Government would make full and timely Risk Corridor payments if Consumers' Choice experienced sufficient losses in CY 2014; and

(e) Making repeated statements regarding its obligation to make Risk Corridor payments, then depriving Consumers' Choice of full and timely Risk Corridor payments after Consumers' Choice had fulfilled its obligations as a QHP by participating in the ACA and had suffered losses which the Government had promised would be shared through mandatory Risk Corridor payments.

145. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$12,425,229.72, that the Government concedes it owes Consumers' Choice for CY 2014. *See Exhibit 9.*

146. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling \$81,122,278.86, that the Government concedes it owes Consumers' Choice for CY 2015. *See Exhibit 10.*

147. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, Consumers' Choice has been damaged in the amount \$92,201,709 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A FIFTH CAUSE OF ACTION
**(Taking Without Just Compensation in Violation
of the Fifth Amendment to the U.S. Constitution)**

148. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

149. The Government's actions complained of herein constitute a deprivation and taking of Consumers' Choice's property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

150. Consumers' Choice has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated Risk Corridor payments for CY 2014 and CY 2015. Consumers' Choice had a reasonable investment-backed expectation of receiving the full and timely CY 2014 and CY 2015 Risk Corridor payments payable to it under the statutory and regulatory formula, based on its QHP Agreement, its implied-in-fact contracts with the Government, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

151. The Government expressly and deliberately interfered with and has deprived Consumers' Choice of property interests and its reasonable investment-backed expectations to receive full and timely CY 2014 and CY 2015 Risk Corridor payments. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the Risk Corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014).

152. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 Risk Corridor payments would be reduced pro rata to the extent of any shortfall in Risk Corridor collections. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Exhibit 8.

153. Further, in Section 227 of the 2015 Appropriations Act and Section 225 of the 2016 Appropriations Act, Congress specifically targeted the Government's existing, mandatory Risk Corridor payment obligations under Section 1342 of the ACA, expressly limiting the source of

funding for the United States' CY 2014 Risk Corridor payment obligations owed to a specific small group of insurers, including Consumers' Choice. *See* 128 Stat. 2491; 129 Stat. 2624. HHS and CMS continue to refuse to make full and timely Risk Corridor payments to Consumers' Choice, and therefore the Government has deprived Consumers' Choice of the economic benefit and use of such payments.

154. The Government's action in withholding, with no legitimate governmental purpose, the full and timely CY 2014 and CY 2015 Risk Corridor payments owed to Consumers' Choice constitutes a deprivation and taking of Consumers' Choice's property interests and requires payment to Consumers' Choice of just compensation under the Fifth Amendment of the U.S. Constitution.

155. Consumers' Choice is entitled to receive just compensation for the United States' taking of their property in the amount of at \$92,201,709, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendant, the United States of America, as follows:

(1) For the First Cause of Action, awarding damages sustained by Consumers' Choice, in the amount of at least \$92,201,709 as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the CY 2014 and CY Risk Corridor payments;

(2) For the Second Cause of Action, awarding damages sustained by Consumers' Choice, in the amount of at least \$92,201,709, together with any losses actually sustained as a

result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the QHP Agreements regarding the CY 2014 and CY 2015 Risk Corridor payments;

(3) Alternatively, for the Third Cause of Action, awarding damages sustained by Consumers' Choice, in the amount of at least \$92,201,709, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contracts with Consumers' Choice regarding the CY 2014 and CY 2015 Risk Corridor payments;

(4) For the Fourth Cause of Action, awarding damages sustained by Consumers' Choice, in the amount of at least \$92,201,709, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the implied covenant of good faith and fair dealing that exists in the QHP Agreements or, alternatively, the implied-in-fact contracts regarding the CY 2014 and CY 2015 Risk Corridor payments;

(5) For the Fifth Cause of Action, awarding damages sustained by Consumers' Choice, in the amount of at least \$92,201,709, as a result of the Defendant's taking of Consumers' Choice's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution;

(6) Should the Court determine, under any Cause of Action, that the Government is liable to Consumers' Choice for monetary damages for failure to make full and timely Risk Corridor payments for CY 2014 or CY 2015, and thus enter judgment against the United States, the Plaintiff further requests that the Court declare, as incidental to that monetary judgment, that based on the Court's legal determinations as to the Government's CY 2014 and/or CY 2015 Risk Corridor payment obligations, the Government must make full and timely all other Risk Corridor

payments to Plaintiff if Consumers' Choice experienced qualifying losses during those years, within 30 days of determination of the payment amount;

- (7) Awarding Plaintiff all available interest, including, but not limited to, pre- and post-judgment interest;
- (8) Awarding all available attorneys' fees and costs to Plaintiff; and
- (9) Awarding such other and further relief to Plaintiff as the Court deems just and proper.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

C. Mitchell Brown

Counsel of Record

E-Mail: mitch.brown@nelsonmullins.com

Thad H. Westbrook*

E-Mail: thad.westbrook@nelsonmullins.com

Miles E. Coleman*

E-Mail: miles.coleman@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

**Of counsel*

Attorneys for Plaintiffs Raymond G. Farmer, in his capacity as Liquidator of Consumers' Choice Health Insurance Company, and Michael J. FitzGibbons, in his capacity as Special Deputy Liquidator of Consumers' Choice Health Insurance Company

March 17, 2017