

IN THIS ISSUE

Moda Health Plan Entitled to Recoup Risk Corridor Payments From Government 1

People News 3

Upcoming Cyber Event 3

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Moda Health Plan Entitled to Recoup Risk Corridor Payments From Government

By Steven B. Davis and Kristin J. Jones

The federal government is liable to Moda Health Plan, Inc. for failing to make risk corridor payments totaling \$214 million, a federal judge ruled last week.

The risk corridors program is a risk-reduction mechanism established by the Affordable Care Act (ACA) to encourage insurer participation in new initiatives. Because new initiatives (such as federally funded health exchanges) lacked historical data necessary for underwriting, the risk-reduction mechanisms protected early adopters from significant losses. The program provided for government reimbursement of certain losses for qualified health plans on the health exchanges, but required profitable health plans to pay excess gains to the government. Although the ACA’s risk corridor program was not intended to be budget-neutral, Congress refused to fund the program in its appropriations spending. Instead, risk corridor payments for 2014 and 2015 were to be funded solely from excess gains received from profitable health plans. The attempt at revenue neutrality was unsuccessful. For 2014, insurers requested \$2.87 billion in risk corridor payments, but profitable insurers paid only \$362 million in excess gains.¹ The government’s failure to fund the risk corridors program left the insurers to absorb \$2.5 billion in funding shortfalls. In 2015, program profits were used to cover unpaid 2014 risk corridor obligations, and more than \$5.8 billion in risk corridor payments for 2015 remain outstanding.²

A Recent Risk Corridor Litigation Success: *Moda Health Plan, Inc. v. U.S.*

Moda Health Plan, Inc. (Moda) suffered \$214 million in losses after being paid only 12.6 percent of its claimed risk corridor payments for 2014 and nothing for 2015. To recover the outstanding balance of its risk corridor payments, Moda sued the government. Moda argued that the government was obligated under the ACA to make risk corridor payments or, in the alternative, that the risk corridors program was an implied-in-fact contract between the insurers and the government. The government denied these allegations, largely relying on Congress’ failure to appropriate money for the program and its declaration in the appropriations bill that the risk corridors program be budget-neutral.

Judge Wheeler of the U.S. Court of Federal Claims rejected the government’s arguments and granted summary judgment in favor of Moda. The court held that the ACA requires annual payments to insurers and that Congress did not design the risk corridors program to be budget-neutral. In the alternative, the court found that the government, through the ACA, offered a unilateral contract to insurers, which Moda accepted by offering qualified health plans on federally funded health exchanges. The government was thus obligated to fulfill its obligations under that unilateral contract: paying the full risk corridor obligations. Accordingly, the court found that the government was liable to Moda for the full risk corridor payment under the ACA.³

(continued on page 2)

Moda Health Plan

(continued from page 1)

In Contrast, the Unsuccessful *Land of Lincoln Mut. Health Ins. Co. v. U.S.*

Judge Wheeler’s decision contrasts with another recent decision in the Court of Federal Claims: *Land of Lincoln Mut. Health Ins. Co. v. U.S.*⁴ In *Land of Lincoln*, a different judge – Judge Lettow – denied Land of Lincoln’s claim for risk corridor payments. Judge Lettow held that the ACA was ambiguous regarding the government’s responsibility for deficits or excess funds in the risk corridors program and, further, risk corridor payments were not required by express or implied contract with the government. Congress issued its declaration that the risk corridors program be budget-neutral before the 2015 plan year, and according to Judge Lettow’s analysis, it was not reasonable for an insurer to expect to be paid the full risk corridors obligations in 2015.

Although Judge Lettow focused on whether the insurers could reasonably expect the government to follow through on its obligations, Judge Wheeler focused on the government’s bait-and-switch tactics, explaining:

Whether under statute or contract, the Court finds that the Government made a promise in the risk corridors program that it has yet to fulfill. Today, the Court directs the Government to fulfill that promise. After all, “to say to [Moda], ‘The joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.” *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

The Future of Risk Corridor Litigation

Several similar cases remain pending, including cases brought by Health Republic Insurance Company, Highmark and CoOpportunity Health. Although the government indicated a willingness to settle the matters early in litigation, it has been vigilantly defending them. In addition to financial considerations, political factors may affect the decision to defend or settle these cases. On one hand, the Trump administration has sharply criticized the law it is defending in these cases, but on the other hand, settling the claims could be viewed as a bailout for the insurance companies. Still, bailout may be more desirable than the risk of market collapse associated with nonpayment. Many insurers have faced significant adverse results from the uncertainty around the risk corridors program.

As more decisions are issued in these cases, insurers should get a clearer idea of the likelihood of government payouts. The U.S. Court of Appeals for the Federal Circuit may weigh in to resolve the conflicting guidance from the Court of



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Federal Claims, as Land of Lincoln appealed its unfavorable decision and the government is likely to appeal the *Moda* decision. Until then, Stradley’s Insurance Practice Group is available to answer any questions about the risk corridors program, the ACA or other regulatory matters.

- ¹ Centers for Medicare & Medicaid Services, Risk Corridor Payment for the 2014 Benefit Year (Nov. 19, 2015), available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.
- ² Centers for Medicare & Medicaid Services, Risk Corridor Payment and Charge Amounts for the 2015 Benefit Year (Nov. 18, 2016), available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf>.
- ³ *Moda Health Plan, Inc. v. U.S.*, No. 16-649C, 2017 WL 527588 (Fed. Cl. Feb. 9, 2017).
- ⁴ *Land of Lincoln Mut. Health Ins. Co. v. U.S.*, 129 Fed. Cl. 81 (2016).



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People News

Stradley Ronon received top marks in several practice areas in the 2017 U.S. News – Best Lawyers “Best Law Firms” (<http://www.stradley.com/insights/news/2017/01/stradley-ronon-listed-in-us-news>) publication, including 13 national rankings and 13 top-tier rankings in Philadelphia. The firm’s insurance law practice group was one of the practice areas ranked both nationally and in the top tier in Philadelphia.



Sam Arena has been elected to a two-year term as a member of the governing body of the American Bar Association Tort Trial & Insurance Practice Section (TIPS), TIPS Section Council.



Sam and **Nicole Stover** co-authored a chapter in the Fourth Edition of *Financial Institution Bonds*, published by the American Bar Association. The chapter, titled “Insuring Agreement (B): On Premises Coverage,” provides analysis and commentary regarding the On Premises coverage found in the Surety & Fidelity Association of America’s Financial

Institution Bond and the Insurance Services Office’s Financial Institution Crime Policy.

Twenty-three Stradley Ronon attorneys were named to the recently released 2017 edition of *The Best Lawyers in America*, regarded as a definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer-review evaluation. **Sam Arena** and **Steve Davis** from the insurance practice group were included on this list.



Steve Davis moderated a panel entitled, “Insurance Department General Counsel Discussion,” at the American Property Casualty Insurance Association’s Northeast General Counsel Seminar in Philadelphia.



Jana Landon was part of the panel at the AON Financial Services Group National Conference discussing cybersecurity litigation trends. She was also a panelist for, “Attorney Ethics/Social Media/Data Privacy,” at the Eastern District of Pennsylvania Bankruptcy Conference in Philadelphia. Jana was also part of the panel, “Evolving Cyber Threats,” at the Association of Insurance Compliance Professionals Annual Conference in Orlando, Florida. Jana was a featured speaker at the Chamber of Commerce of Southern New Jersey’s “Cybersecurity Workshop” in Voorhees, New Jersey.



Craig Blackman and Jana presented the seminar, “How to Protect Your Nonprofit from Cyber Attacks” (<http://www.stradley.com/insights/news/2016/07/cyber-risk-seminar>), in Philadelphia. The

session was moderated by **Catherine M. Ward**.

Stradley Ronon was honored as the top litigation department (<http://www.stradley.com/services/practices/litigation>) among Pennsylvania’s midsize law firms in *The Legal Intelligencer*’s “Legal & Litigation Departments of the Year” (<http://www.stradley.com/~media/Files/Publications/2016/LDOY%20Supplement%20-%20Nov%202016.pdf>) supplement. The publication chose the winners “based on the big victories and important cases that demonstrated why clients chose them when litigation was on the table.” Stradley Ronon was praised for its “emphasis on efficiency” and ability to determine the issues most important to a client.

Upcoming Cyber Event

Jana Landon is moderating a cybersecurity panel entitled **Beyond Breach: Everything You Need to Know About Cyber** on March 23 at Philly I-Day. Philly I-Day (<http://www.insurancesociety.org/events>) is the Delaware Valley’s premier educational and networking event for insurance and risk management professionals.