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September 28, 2018

**Via Electronic Filing/Served via ECF**

The Hon. Carol R. Edmead  
Supreme Court of the State of New York, County of New York  
60 Centre Street, Room 532  
New York, New York 10007

Re: Maria T. Vullo v. Health Republic Insurance of New York, Corp. (Health Republic)  
Index No. 450500/2016  
November 29, 2018 Conference

Dear Justice Edmead:

In my June 18, 2018 letter, I asked that the Court schedule a conference in order for the Liquidator to update this Court and Health Republic's former policyholders with respect to:

1. the status of approximately 186,346 Explanation of Benefits (EOBs) determinations;
2. the status of appeals taken from those EOB determinations;
3. the status of any discussions with the Federal government with respect to *Vullo v. United States of America (Fed. Cl. No. 17-1185C)*; and
4. whether the Liquidator would post the MagnaCare Application that led to this Court's March 29, 2018 order approving Magna's Care's administrative claim for \$355,576 .

On July 3<sup>rd</sup>, the Bureau's General Counsel wrote advising that the "Bureau [did] not believe that a court conference [was] necessary at [that] time." Letter from Bureau General Counsel John Kelley, dated July 3, 2018, a copy of which is attached under Tab 1. Mr. Kelly wrote that this Court had indicated that the next conference should be held "before December 15<sup>th</sup>." and that the "Bureau did not think any recent developments warrant[ed] a conference" before mid-December.

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Nevertheless, Mr. Kelly's letter, which was later posted on the Health Republic website, did address several items that I raised in my June 18<sup>th</sup> letter:

Items 1 and 2. EOBs. According to Mr. Kelly, the deadlines for appeals of EOBs has expired. Mr. Kelly reported that "less than 1% of EOBs [had] been appealed and" by July 3<sup>rd</sup>, the Bureau [had] been able to resolve appeals without reference to a referee or the IMEDECS evaluations." Mr. Kelly "anticipate[d] a full, detailed report to the Court when the process is completed."

3. *Vullo v. U.S.* In the *Vullo* action, the Liquidator seeks to recover \$575 million dollars that the Liquidator claims the Federal government owes Health Republic under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA). *Vullo v. United States of America*, (Fed. Cl. No. 17-1185C) ¶¶.3-7). Mr. Kelly reported that the *Vullo* suit had been stayed pending the outcome of appeals taken in two other cases discussed in my June 18, 2018 letter and in an article I wrote for Law360: *Health Republic's Curious Liquidation, Part 14* (February 13, 2018), a copy of which is attached under Tab 2

With respect to the appeals, the Federal Government won on the consolidated appeals to the Federal Circuit. Mr. Kelly reported that the losing "claimants in both cases [*i.e.*, the not-for-profit COOPs that were not paid by the Federal Government under the ACA] are expected to seek *en banc* review by the Federal Circuit or a writ of *certiorari* to the United States Supreme Court." According to Mr. Kelly, it would have been "premature" to discuss the Liquidator's strategy in June, but he advised that a fuller report might follow "after the appeals are finalized."

4. Magna Care. Mr. Kelly said nothing about the Magna Care application that led to the Court's approving the \$355,576 claim.

Mr. Kelly went on to write that I am not a "party" to the Health Republic liquidation proceedings and that the Bureau continues to "object to [my] interject[ing] myself into the proceedings . . ." Mr. Kelly then offered that the Bureau did not "think a status conference [was] needed" and that it should be scheduled "closer to the end of the year."

Although the Court denied my amicus application, the Court did enter an order allowing me to write to the Court and bring "discrete issues" to the Court's attention." Order entered on November 21, 2016, Health Republic Docket, Item 63. The Bureau and Mr. Kelly were and are free to ignore my letters and requests, but I'm happy they didn't. The Kelly letter supplied quite a bit of information.

On July 5<sup>th</sup>, the Court e-mailed to advise that a tentatively scheduled conference had been called off and that the Court would "adhere to its schedule that the next status conference shall be held "before December 15<sup>th</sup>." That conference is now scheduled for November 29, 2018. The Court also noted that the liquidation proceeding had been proceeding "expeditiously, with utmost transparency, with full on-line disclosure \* \* \* and with "due care that non-English-speaking interested parties are fully informed."

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All of that is true, but what's missing from the Health Republic website is a plain English statement from the Bureau with respect to:

- where matters stand with respect to the EOBs and the appeals taken from the EOBs
- whether the Liquidator will abandon her suit against the Federal government if the losing parties don't get *en banc* relief or don't reach the United States Supreme Court; and
- when Health Republic policyholders can expect to be paid on their claims.

Policyholders can see on the website that administrative expenses for the estate continue to mount, but a policyholder would struggle to place these figures in context. For example, the website contains a "Synopsis of Liquidation Proceeding and Claims Process" that concludes with this statement: "The Liquidator likely will not have a clear picture of the amount of Health Republic's assets that will be available for distribution, or the amount of Policy claims that will be allowed against Health Republic's estate, until at least 2017." What's a Policy holder to make of that statement as we approach 2019?

The Website contains a series of FAQs, but very little hard information. For example, FAQ No. 7 asks "Has health Republic determined how much money is available to pay claims and when claims will be paid." The answer: "No. At this time, it is not possible to provide an accurate estimate of the amount of assets that may ultimately be available for distribution to Health Republic's claimants." The answer goes on to allude to the ACA's "risk adjustment, reinsurance, and risk corridors programs," which I suspect mystifies most policyholders, but doesn't refer to the litigation pending in the U.S. Court of Appeals for the Federal Circuit.

Under the heading "Key Documents," a policyholder can find the Administrative Expenses spreadsheet that shows that the estate's expenses have now topped \$12 million dollars, but it would be difficult for a policyholder to understand what spending all this money has accomplished. Of course, a policyholder could attend all court conferences, but that's unrealistic. Or the policyholders could read the transcripts of the hearings, but no transcript of the February 14<sup>th</sup> hearing on the Liquidator's Administrative Expenses Report was prepared or at least no transcript has been posted.

In other words, a framework for information or data exists thanks to this Court's directions to maintain a website, update the administrative expenses on a monthly basis, post bills and engagement letters, and promote transparency. The Liquidator, however, has never explained on the website her goals for concluding the liquidation, much less when anyone, other than the estate's administrators and service providers, will be paid. The website also features a timeline, again thanks to the Court, but that time line shows "investigation and follow up of affirmative claims," as well as the "resolution of Federal claims," extending into the indefinite forever.

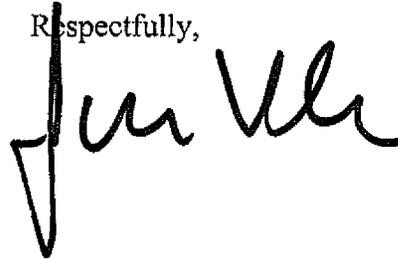
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Perhaps this will be addressed at the November 29, 2018 conference.

Again, I thank Your Honor for allowing me to write to the Court and raise these matters.

Finally, I advise the Court that I'm retiring from the Firm and will be attending the November 29, 2018 conference as a very "ordinary citizen."

Respectfully,

A handwritten signature in black ink, appearing to read "John Kelly". The signature is written in a cursive style with a large, prominent initial "J".

cc: Laura Evangelista, Executive Deputy Superintendent, New York Department of Financial Services (via email).  
David Axinn, Special Deputy Superintendent, New York Liquidation Bureau (via e-serve, e-mail, and regular mail)  
John P. Kelly, General Counsel, New York Liquidation Bureau (via e-mail)  
Timothy Butler, Esq. (via e-mail)  
David Young, Esq. (via e-mail)  
Senator James L. Seward (via e-mail to Legislative Director)  
Senator Kemp Hannon (via e-mail to Legislative Director)

# TAB 1



**New York  
Liquidation Bureau**

MARIA T. VULLO  
Superintendent as Receiver

By Electronic Filing

July 3, 2018

The Honorable Carol R. Edmead  
Justice of the Supreme Court of the  
State of New York  
60 Centre Street, Part 35, Room 438  
New York, N.Y. 10007

Re: Health Republic Insurance of New York, Corp. in Liquidation  
Index No. 450500/2016

Dear Justice Edmead:

The Liquidation Bureau does not believe that a court conference is necessary at this time. After the Liquidator's status report on Health Republic was presented and approved on February 14, 2018, Your Honor indicated that the next status conference should be held "before December 15th." Accordingly, our intention has been to seek a conference in November or early December. We do not think any recent developments warrant a conference now.

The adjudication of claims (EOBs) is continuing in accordance with the approved Adjudication Procedures. All deadlines for appeals of EOBs have now expired, and the Bureau is working to resolve the appeals that remain open. Less than 1% of EOBs have been appealed and, to date, the Bureau has been able to resolve appeals without reference to a referee or the IMEDECS evaluators. We anticipate a full, detailed report to the Court when the process is completed.

Health Republic's action against the United States on claims under the Affordable Care Act has been stayed pending the outcome of appeals (in the *Moda Health* and *Land of Lincoln* matters) on related "risk corridor" claims in the Federal Circuit Court of Appeals. The stay is subject to re-evaluation at the end of this month.

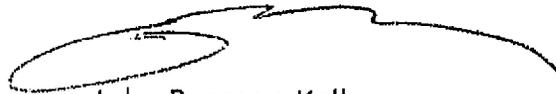
Health Republic is not a party to the two recent decisions in *Moda Health* and *Land of Lincoln* and the claimants in both cases are expected to seek *en banc* review

by the Federal Circuit or a writ of certiorari to the United States Supreme Court. It is premature, therefore, to discuss the impact of these cases on Health Republic and a fuller report can be made after the appeals are finalized.

As to other matters in Mr. Veach's letters, since he is not a party to the liquidation and does not represent a party, the Liquidation Bureau has objected to his interjection of himself into the Health Republic proceedings. Your Honor has recognized this and has indicated that the Bureau need not respond to Mr. Veach's letters. We do not think his current request for a conference is appropriate, and we do not think a status conference is needed in light of our intention to schedule one, as Your Honor has directed, closer to the end of the year.

Of course, the Liquidator will always respond to the Court's questions in any manner directed by the Court. We only ask that the Court indicate the matters to be addressed so that we can properly prepare.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Pearson Kelly", with a large, sweeping flourish extending to the right.

John Pearson Kelly  
General Counsel  
The New York Liquidation Bureau

# **TAB 2**



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## Health Republic's Curious Liquidation: Part 14

By **James Veach** (February 13, 2018, 5:49 PM EST)

This series follows and discusses the unusual liquidation process of Health Republic Insurance of New York. Catch up on previous installments of this series [here](#).

In Part 13, we addressed the explanations of benefits (EOBs) that the liquidator has been issuing since August 2017. We also reviewed the liquidator's "partial" audited financial statement for Health Report, a statement that covers the period from May 11, 2016, through Dec. 31, 2016.



James Veach

We promised that in Part 14 we would turn to the liquidator's "Report on the Status of the Liquidation of Health Republic Insurance of New York, Corp. and Request for Authority to Distribute Assets," which the liquidator will ask the court to approve on Feb. 14, 2018. We also promised to discuss impediments to any actual payment of policyholder and health care provider claims.

As we approach the second anniversary of Health Republic's liquidation, I'm concluding this series. I thank readers, former policyholders, legislative aides, reporters and others who have commented on and supplied information (and constructive criticism) for these articles, as well as Law360 for providing a platform.

I also want to acknowledge Justice Carol Edmead, recently appointed associate justice to the Appellate Term,<sup>[1]</sup> for allowing me to write to the court concerning Health Republic and to ask questions during conferences and hearings. Without Justice Edmead's insistence on transparency, these articles would have been a lot less interesting.

### **A Status Report on the Liquidation, Of Sorts**

On several occasions, representatives from the New York Liquidation Bureau, which serves as the superintendent's agent in Health Republic's liquidation proceeding, have alluded to the bureau's filing a status report, in addition to the Bureau's ad hoc presentations offered up at Justice Edmead's direction.<sup>[2]</sup> The bureau has now produced its report, which you can find on Health Republic's website under Docket Item 121 (Ex. A – court report).<sup>[3]</sup>

Relying on the report, the liquidator will ask the court on Feb. 14 to approve the more than \$10 million spent by the liquidator since May 11, 2016. The liquidator will also ask, tongue-in-cheek, for the court's "authorization to make a partial distribution of Health Republic's assets ... ."<sup>[4]</sup> Your author will be out of the country on Valentine's Day, but encourages others with an interest in Health Republic's liquidation to come to 60 Centre Street (Part 35, Room 438) at 10:00 A.M. and listen as some of the matters discussed below are considered in connection with the liquidator's Report.

### **What the Status Report Does Not Address**

Like that "curious incident" of the dog that didn't bark in the night,<sup>[5]</sup> it's what the report doesn't

discuss that's revealing.

First, the report skips over the six-month period from the date on which Health Republic's board of directors consented to the entry of an order of liquidation, i.e., Oct. 27, 2015, until the company was placed under court supervision on May 11, 2016. Instead, the report begins with the bland observation that "approximately 18 months into the liquidation, many of the critical functions of the liquidation have been completed." [6] To my knowledge, neither the superintendent nor the New York Department of Financial Services (DFS) has produced any accounting of the money spent or the actions taken during the six months between the date on which the board essentially stepped down — Oct. 27, 2015 — and the entry of the liquidation order on May 11, 2016 (gap period). [7]

The gap period comes up in the report in several contexts. For example, according to the report and the vendor expenses set out on Health Republic's website at [healthrepublicny.org](http://healthrepublicny.org), the liquidator has paid the accounting firm of Eisner & Amper (E & A) at least \$746,374 to audit Health Republic's financial statements, "[reconcile] Health Republic's financial records," and prepare audit reports for 2015 and 2016. [8]

With respect to the 2016 audit, the report claims that E & A "performed an audit of Health Republic's modified cash basis financial statements as of December 31, 2016, and for the period May 11, 2016 (date of liquidation) through December 31, 2016 ... ." [9] In other words, although E & A's 2015 audit report covered all of 2015, E & A's 2016 audit report ignores the period from Jan. 1, 2016, through May 10, 2016, a time in which many Health Republic vendor contracts were executed and, presumably, considerable money was spent.

The report notes that in October 2017, the Office of the Inspector General of the Department of Health and Human Services (HHS) notified the liquidator that the "Federal Audit Clearing House" had accepted E & A's 2015 audit. [10] We'll see whether HHS's inspector general accepts E & A's 2016 audit report, even though it covers only two-thirds of the year.

Thanks to Justice Edmead's persistence, Health Republic's members/policyholders (policyholders) can see on the website a month-by-month accounting of money spent on consultants, outside counsel, advisers, third-party administrators, auditors, accountants and the bureau itself. Policyholders, however, will not find, either in the report or on the Health Republic website, any information on how much of the estate's money was spent during the gap period. It's important, therefore, to keep in mind that the report confines itself to the 18 months during which Health Republic's assets have been managed by the bureau; the report does not address funds spent during the gap period.

Second, the report fails to name names and often uses the passive voice to obscure who did what to whom. It includes a few paragraphs on events preceding the superintendent's petition to liquidate Health Republic, [11] but doesn't identify who took what action. Here's an example: "Health Republic's board of directors consented to the appointment of an independent monitor to oversee the company's affairs, and an external corporate restructuring firm was engaged to manage the wind-up of the business." [12]

A sentence like this begs questions. Who proposed hiring an "Independent monitor?" Was it the DFS and the board merely went along? And who at the DFS oversaw the independent monitor's hiring? Superintendent Maria T. Vullo? Her predecessor, Acting Superintendent Anthony Albanese? Someone else? Did the job of serving as an "independent monitor" go out to bid?

In a similar vein, what precipitated the "engage(ment)" of the "external corporate restructuring firm"? Was that job bid out? Did the board ever work with the "restructuring firm?" Or did the "restructuring firm" work only with someone at the DFS? Presumably, the "restructuring firm" referred to in the report is Alvarez & Marsal, [13] but why should the report's readers have to guess?

Third, the report discloses that the superintendent has finally sued the federal government in the United States Court of Federal Claims, but the bureau did not attach to its report a copy of the complaint. [14] Nor did the bureau provide any additional information about the suit other than to

advise that the Court of Federal Claims (in the District of Columbia) has stayed the suit until the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decides two appeals pending before the Court of Appeals.[15]

The report at least reveals that the superintendent is "seeking to recover \$575 million owed to Health Republic under ACA [Patient Protection and Affordable Care Act],"[16] but it does not discuss the theory of the suit or describe any of the government's offsetting and administrative holds that prompted the suit. Nor does the report address why the superintendent waited so long to sue the government, even though the chair of the New York Senate Insurance Committee asked about suing the government as far back as February 2016.[17]

Even though the superintendent engaged two outside law firms to prepare an action against the government and literally dozens of shuttered or liquidated co-ops have already sued the government, Health Republic's liquidator did not commence her action until Sept. 1, 2017. Even then, to my knowledge, neither the bureau nor the superintendent issued a press release or otherwise announced the suit.

Health Republic's policyholders and the public can find the complaint via PACER,[18] if they sign up and qualify to use PACER, and thus see what wasn't visible before, i.e., the set-offs taken by the federal government against moneys purportedly due Health Republic. (I attached a copy of the complaint to my most recent letter to the court, which may eventually be posted on the docket portion of the Health Republic website.) Those with access to the complaint can now read some of the correspondence that the superintendent's counsel and the bureau have been exchanging with HHS and its Centers for Medicare and Medicaid Services (CMS), correspondence that we review below.

Fourth, the report's remarkably self-laudatory description of the bureau's handling of the Health Republic estate ignores the court's struggle to drag information out of the bureau and its representatives over the course of almost a dozen conferences and hearings. For example, the report claims that during the "Initial Intake" of Health Republic, the liquidator "was responsible for ... [p]reparing an opening balance sheet,"[19] but that obscures how the opening balance sheet came to be prepared.

Early on in the liquidation proceedings, your author asked the court to direct the liquidator to prepare and post a balance sheet in order for policyholders to get some idea about the value of their claims. Outside counsel for the liquidator initially argued against producing a balance sheet on the ground that a "vast majority of the assets of [Health Republic]" would come from litigation against third-parties, including the government, and that an estimate of the value of those assets would invite speculation.[20]

Justice Edmead overrode counsel's objections and the bureau posted on the website a simple balance sheet, prepared as of Sept. 30, 2016. The balance sheet shows a \$51 million "amount recoverable from federal reinsurance" and \$432 million in "accrued retrospective receivables," the latter of which was then backed out. The Sept. 30, 2016 balance sheet nowhere refers to the liquidator's potential suit against the government.[21]

Finally, the report makes a number of vague claims without supporting detail. For example, it states that the liquidator has "protected Health Republic's former members ... "[22] But from what or from whom has the liquidator "protected" them? The liquidator certainly hasn't stood with the policyholders with respect to whether they alone constitute class two creditors, as opposed to their sharing the estate's limited assets with health care providers, thus reducing policyholder payments. [23]

The report also claims that the liquidator has "collected monies owed to Health Republic,"[24] but doesn't identify from whom these "monies" were collected, how much was collected or how much it cost the estate to collect these "monies." Which brings us to the liquidator's belated suit against the government.

## **Vullo v. U.S.**

The liquidator's suit, *Maria T. Vullo, in her capacity as liquidator of Health Republic Insurance of New York, Corp. v. The United States of America*, [25] is one of almost 40 actions commenced against the federal government for failing to fund programs to support health insurers writing qualified health plans (QHPs) under the Affordable Care Act. [26] The complaint sets out the government's capital and solvency loans to Health Republic (about \$265 million) [27] and Health Republic's debts under the Risk Adjustment program (about \$272 million). [28] The complaint also sets out the amounts allegedly owed by the government to Health Republic, including \$445 million owed under the Risk Corridors program, [29] \$110 million owed under the Reinsurance program (\$110 million), [30] and \$22 million owed under the Financial Assistance program. [31]

The gist of the complaint concerns how the government has not only refused to make any further payments under the Risk Corridors program, but has also placed administrative holds on any other moneys due Health Republic under the Reinsurance and Financial Assistance programs. Or, as the liquidator alleges in her complaint: "The Government is employing an unlawful setoff methodology to withhold from Health Republic payments due under funded programs [the Reinsurance and Financial Assistance programs], while seeking to 'pay' Health Republic with balances remaining in allegedly unfunded programs [e.g., the Risk Corridors program]." [32]

The liquidator attacks the government's offsetting amounts due under its capitalization and solvency loans. The liquidator claims that under New York Insurance Law Article 74, "claims under Health Republic policies have priority over the Government's claims \* \* \* and the Government has cut the line ahead of higher-priority policy claimants." [33] Citing the loan agreements themselves, the liquidator alleges that demands for repayment of Health Republic's loans are subordinate to the claims of "policyholders and providers." [34]

In support of her arguments against the government's offsetting, the liquidator attaches to her complaint correspondence with the government, some dating back months before Health Republic ceased underwriting. This correspondence reveals at least three things.

### **Letters, We Get Letters**

First, even though New York state and its DFS were primarily responsible for determining whether Health Republic was solvent and operating safely, we see in the attached correspondence that the government apparently concluded that Health Republic was a goner either simultaneously with or even before the DFS determined that Health Republic could not survive. And the government so concluded for specific reasons not mentioned in the Superintendent's Petition to Liquidate Health Republic.

In a Sept. 25, 2015, letter from Kevin Counihan, Chief Executive Officer, Health Insurance Marketplaces, to Health Republic's then-Chief Executive Officer, Debra Friedman, Counihan writes that by July 28, 2015, the CMS had identified issues "that threatened Health Republic's viability." [35] According to his letter, the CMS asked for additional information concerning Health Republic's 2016 rate filings, as well as its 2015 regulatory filings. [36] He describes "numerous conversations with state insurance regulators" and an on-site review of Health Republic's books and records on Aug. 19-20, 2015.

According to Counihan, by mid-August 2015, the CMS had concluded that it was "unlikely that [Health Republic] [would be] able to maintain a viable CO-OP due to several issues," including:

- a lack of accurate billing, enrollment and claims payments records;
- anticipated failure to satisfy risk-based capital requirements;
- a history of call center issues;
- missed projections; and
- a Health Republic report that "reflects that an inadequate vendor management alone has resulted in nearly \$11 million in inaccurate claims payments through June 2015." [37]

Accordingly, Counihan advised Health Republic that the CMS was terminating its loan agreement between Health Republic and the CMS effective Dec. 31, 2015. [38]

The Counihan letter goes on to address what would happen if the superintendent petitioned to liquidate Health Republic.

However, if the state regulator [DFS] takes an action such as filing an order of liquidation and the judge signs the liquidation order prior to December 31, 2015, the [loan] agreement will terminate on the date the judge signs the liquidation order. [39]

It's unclear whether this threat affected the superintendent's decision to hold off on petitioning to liquidate Health Republic.

On the same date that Counihan sent his letter, Health Republic's board agreed to stop underwriting. Then on Oct. 27, 2015, the board consented to entry of an order of liquidation. Even though as early as July 2015, the CMS had notified Health Republic that the CMS had serious concerns about the "viability" of Health Republic, then-acting Superintendent Vullo waited until mid-April 2016 to place Health Republic under court supervision.

Second, the attached correspondence shows that the government, in letters addressed to Health Republic's restructuring advisor Alvarez & Marsal, outside counsel for the superintendent, and, eventually, the bureau itself, regularly advised that the government was imposing administrative holds on "payables" to Health Republic. Indeed, letters attached to the complaint show that as early as March 2016 the CMS had informed Health Republic that "due to the pending wind-down of Health Republic," the CMS had implemented an administrative hold on payables to Health Republic "under any law or program." [40] The CMS continued to write to the bureau's chief financial officer during 2017 identifying specific amounts that had been set-off against moneys that Health Republic owed under the Risk Adjustment program. [41]

Third, from the letters we learn that yet another outside law firm represented the DFS with respect to the government's offsetting and administrative holds. In May 2016, and prior to entry of the order liquidating Health Republic, attorneys at Freeborn & Peters LLP in Chicago, representing acting-Superintendent Vullo, wrote to Counihan at the CMS. [42] Two attorneys at Freeborn signed the letter and asked "that CMS reconsider its decision to impose an administrative hold" on moneys due Health Republic, and requested a meeting with "appropriate officials from CMS and DOJ" to resolve the set-off-related issues. [43] It's unclear when Freeborn ceased representing Vullo.

In other words, throughout the gap period, as well as during the initial months of the Health Republic liquidation proceeding, positions were hardening and holds were being placed on government payments to Health Republic, but without notice to policyholders or the court overseeing the liquidation.

### **Impediments to Policyholder Payments**

As soon as the liquidator filed her complaint, her counsel and counsel for the government moved to stay the Vullo suit until Jan. 12, 2018 or until the Federal Circuit decides appeals in *Land of Lincoln Mutual Health Insurance Company v. United States (Land of Lincoln)*, [44] a case in which a U.S. Court of Federal Claims had ruled against the liquidator of a failed co-op, and *Moda Health Plan Inc. v. United States (Moda)*, [45] a case in which a U.S. Court of Federal Claims ruled in favor of a surviving co-op. [46] The liquidator and the government advised the court in Vullo that appeals from the decisions in *Land of Lincoln* and *Moda* had been consolidated and would be argued before the same panel in the Federal Circuit. Counsel for the liquidator and the government asked that the Vullo action be stayed pending a decision by the Federal Circuit in the *Land of Lincoln* and *Moda* appeals. The court granted their motion and subsequently extended the stay to Feb. 12, 2018.

The Federal Circuit heard the consolidated *Moda* and *Land of Lincoln* appeals on Jan. 10, 2018. [47] Although at least 15 amicus briefs supporting *Land of Lincoln's* appeal were filed with the Federal Circuit, and even though information and positions taken in those amicus briefs were included in *Land of Lincoln's* briefs, [48] Health Republic's liquidator did not file an amicus brief. We're advised that a decision from the Federal Circuit will probably come down within the next

three to four months, but regardless of how the Federal Circuit rules, it's unlikely that the Vullo suit will be concluded anytime soon.

In addition to the likelihood that the losing parties' in the Land of Lincoln / Moda appeals will petition the United States Supreme Court for further review, the Land of Lincoln and Moda cases will not resolve all of the liquidator's issues with the government. The Vullo suit seeks moneys under the Reinsurance, Advanced Premium Tax Credit and Cost-Sharing Reduction programs, and only two of the Health Republic complaint's six causes of action concern Risk Corridor monies.

In addition, the Vullo action seeks a determination that the government's administrative holds and set-offs are "unlawful on their face under federal law, New York State law, the Loan Agreement, and the New York Supreme Court's Liquidation Order" and constitute a type of "unlawful self-help." [49] The pending Land of Lincoln and Moda appeals will not resolve any of the arguments over the government's off-setting, issues that must be resolved before any payments to policyholders or health providers can be made.

### **New York Late to the Party**

Nevertheless, the Land of Lincoln and Moda decisions do demonstrate how quickly U.S. claims courts addressed the Risk Corridors issues raised in those and other cases. In Land of Lincoln, the co-op's management and board of directors commenced suit on June 23, 2016. Shortly thereafter, the Illinois director of insurance, in her capacity as Land of Lincoln's rehabilitator, stepped in and carried the case forward.

Judge Charles Lettow, to whom the Land of Lincoln case was assigned, arranged for an accelerated schedule for submission, held a hearing on Nov. 7, 2016, and issued a decision on Nov. 10, 2016. Judge Lettow ruled in the government's favor finding that HHS reasonably interpreted the Affordable Care Act as not requiring full annual Risk Corridor payments and further finding no implied intent on the government's part to enter into a contract requiring full Risk Corridor payments. [50]

The Moda case concerned a co-op that operated in both Oregon and Alaska. Moda commenced suit in June 2016 and its case was assigned to Judge Thomas Wheeler. The government moved to dismiss Moda's complaint and Moda cross-moved for summary judgment. Before the government could respond, Judge Lettow issued his decision in Land of Lincoln. The government moved to stay the Moda case pending the outcome of the appeal in Land of Lincoln, a motion that Judge Wheeler ultimately denied. [51]

Judge Wheeler heard argument on Jan. 17, 2017. A few days later, another Federal Claims court judge, Margaret Sweeney, ruled in favor of another co-op. [52] Judge Wheeler, incorporating some of Judge Sweeney's reasoning (and rejecting most of Judge Lettow's reasoning) ruled in Moda's favor on Feb. 9, 2017.

Judge Wheeler held that Congress intended that HHS / CMS make full Risk Corridor payments to co-ops in 2014, 2015 and 2016. [53] Judge Wheeler also found, in the alternative, that the government had breached an implied-in-fact contract with Moda. Judge Wheeler, therefore, entered judgment in Moda's favor under both the Affordable Care Act and the co-op's implied contract with the government. Judge Wheeler then concluded with a flourish. "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. \* \* \* After all, to say to [Moda], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." [54]

While New York waited to file suit, the Moda and Land of Lincoln were decided, appealed, consolidated, briefed, and argued, all without New York state's having weighed in.

### **What's Next for the Health Republic Estate?**

The briefing in the consolidated Moda and Land of Lincoln appeals also revealed how much is at stake. In a joint letter to the clerk of the court, the parties advised that in January 2018 HHS had announced its Risk Corridor calculations for 2016, the final benefit year for the Risk Corridor

program. "The total amount of 'payments in' collected by HHS for [2014, 2015, and 2016] ... is approximately \$12.3 billion less than the total amount of 'payments out' calculated with respect to those years ... "[55] In other words, the government potentially owes QHP providers, including the ACA co-ops, \$12.3 billion!

A memo from HHS/CMS attached to the joint letter also shows the amounts due to all issuers of QHPs. The memo states that certain insurers, Health Republic included, were not required to submit Risk Corridor data and no data has been supplied by Health Republic for the 2016 benefit year. Nevertheless, the chart also shows that last January Health Republic should have received at least \$1,299,031.53 as an additional installment on money due it as payment for the 2014 benefit year.[56] Presumably, however, that money was immediately offset against amounts that the government claims it is owed.

It's highly unlikely that any of Health Republic's steadily shrinking assets will be distributed to policyholders (or health care providers) anytime soon. For one thing, although the liquidator maintains that the government is a Class Three creditor, and thus subordinate to all Class Two creditors (policyholders and health care providers), she and any other representative of the Health Republic estate, i.e., bureau employees, are personally liable for any moneys that the estate pays out before paying any claim owed the government.[57] Therefore, barring some extraordinary resolution of the liquidator's disputes with the government, she will not distribute the estate's assets while the estate is engaged in trench warfare with HHS/CMS.

Meanwhile, although the bureau strives with the report's charts, graphs and illustrations to show that the estate's expenses are generally trending down,[58] the bureau will continue to charge the estate, every month, not only for fees paid to vendors, e.g., outside law firms, website managers, claims handlers, referees, auditors and others, but will also charge the estate for the time spent by the bureau's employees on estate-related work, which includes a pro rata share of the cost of operating the bureau itself, e.g., the bureau's rent, insurance and retirement benefits.

According to the report,[59] the bureau's "monthly average incurred expenses" for Health Republic came to about \$136,000 a month in 2017. These base charges and the outside vendors' fees will continue month after month and year after year until all of the issues relating to Health Republic's claims against and obligations to the government are finally and completely settled.

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[1] Justice Carol Edmead Appointed to Appellate Term, New York Law Journal, February 8, 2018, p. 1.

[2] At a point when the liquidator was represented by Weil Gotshal & Manges LLP, instead of the bureau's in-house counsel, the liquidator argued against posting a basic balance sheet of the estate's assets. October 11, 2016 Trans., pp. 42-44. Later, the bureau's counsel objected to the court's request for a monthly update of a timeline for the liquidation proceeding and alluded to a "formal report" that would be presented in October 2017 or thereabouts. February 17, 2017 Trans., p. 23. Nevertheless, the court insisted that the bureau appear at a hearing for a "conversation" about the estate's expenses. See Curious Liquidation, Part 12, p. 2 and February 1, 2017 Trans., p. 23.

[3] You can find the docket on the Health Republic website, which is maintained by the Garden City Group, not the bureau, at [www.healthrepublicny.org](http://www.healthrepublicny.org) (Website).

[4] Report, p. 1.

[5] See A.C. Doyle, THE COMPLETE SHERLOCK HOLMES, Vol. 1 (Barnes & Noble Classics 2003)

Silver Blaze, pp. 413, 415.

[6] Report, p. 1.

[7] The report does include a few paragraphs on events preceding the superintendent's petition to liquidate Health Republic, Report, p. 3, but without any hint of the costs incurred during the gap period.

[8] Report, p. 5, Website: Key Documents: Administrative Expense Documents.

[9] Report, p. 5.

[10] Report, p. 5.

[11] Report, p. 3.

[12] Report, p. 3.

[13] Report, p. 6.

[14] Report, pp. 1, 11.

[15] Report, p. 11.

[16] Report, p. 11.

[17] Curious Liquidation, Part 10, p. 2.

[18] <https://www.pacer.gov/login>.

[19] Report, p. 4.

[20] October 11, 2016 Trans., pp. 42-44; Curious Liquidation, Part 6, p. 3.

[21] Website, Key Document: Balance Sheets.

[22] Report, p. 2.

[23] See Curious Liquidation, Part 6, p. 2.

[24] Report, p. 2.

[25] No. 17-1185C, U.S. Court of Federal Claims.

[26] At least 23 of these actions have been filed in the U.S. Court of Federal Claims. See G. Michell and J. Halligan, *Unfulfilled Promises: The Federal Government's Liability Under the ACA's Risk Corridor Program*, *The Insurance Receiver*, Vol. 24, No. 3, available at [www.iair.org](http://www.iair.org).

[27] Complaint, ¶ 82.

[28] Complaint, ¶¶ 78, 79.

[29] Complaint, ¶ 55.

[30] Complaint, ¶ 65.

[31] Complaint, ¶¶ 70, 72, 74.

[32] Complaint, ¶ 106.

[33] Complaint, ¶ 117.

[34] Complaint, ¶ 118.

[35] Letter from Kevin Counihan, dated Sept. 25, 2015, to Debra Friedman, Health Republic's Chief Executive Officer, with a copy to Troy Oeschner, Health Deputy Superintendent, DFS (Counihan Letter), a copy of which is attached to the Complaint as Ex. "E."

[36] Counihan Letter, p. 1.

[37] Counihan Letter, p. 2.

[38] Counihan Letter, p. 1.

[39] Counihan Letter, p. 1.

[40] Letter from Kevin Counihan to D. Smith & N. Miller (Alvarez & Marsal), dated March 8, 2016, p. 1, a copy of which is attached to the complaint as Ex. G.

[41] Letters from CMS to Ron Labenski at the bureau, copies of which are attached to the complaint as Exs. J, K, L, and M.

[42] Letter from Deborah Dorman-Rodriquez, Freeborn & Peters LLP, dated May 6, 2016 (Freeborn Letter), responding to Kevin Counihan's March 8, 2016 letter to David Smith, Neil Miller, and the "Receiver for Health Republic," copies of which are attached to the complaint as Exs. H and G.

[43] Freeborn Letter, dated May 6, 2016, Complaint Ex. H, pp. 1-2.

[44] 129 Fed. Cl. 81 (2016).

[45] 130 Fed. Cl. 436 (2017); Joint Motion to Stay Proceedings, Vullo v. U.S., No. 17-1185C, p. 2.

[46] Joint Motion to Stay Proceedings, Vullo v. U.S., No. 17-1185C, p. 2.

[47] You may listen to the argument at: [http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field\\_case\\_number\\_value=&field\\_date\\_value2%5Bvalue%5D%5Bdate%5D=2018-01-10&=Search](http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=&field_date_value2%5Bvalue%5D%5Bdate%5D=2018-01-10&=Search)

[48] Reply Brief of Appellant Land of Lincoln Mutual Health Insurance Company v. United States, U.S. Court of Appeals for the Federal Circuit, 2017-1224, pp. 18, 25.

[49] Complaint, ¶¶ 105, 107, 108, 109.

[50] Land of Lincoln, 129 Fed. Cl. at 106, 112.

[51] Moda, 130 Fed. Cl. at 449.

[52] Health Republic Insurance Company (Oregon) v. United States, 129 Fed. Cl. 757 (2017).

[53] Moda, 130 Fed. Cl. at 452-3.

[54] Moda Health, 130 Fed. Cl. at 466 quoting Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970).

[55] Counsel's Joint Letter to Clerk of Court, United States Court of Appeals, dated December 4, 2017, included as document 160 on the docket for Case 17-1224 (Joint Letter).

[56] Memorandum attached to Joint Letter, p. 14.

[57] Report, p. 21 citing 31 U.S.C. § 3713(b).

[58] Report, pp. 15-20.

[59] Report, p. 19.

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