

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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

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**APPLICATION OF THE PENNSYLVANIA INSURANCE DEPARTMENT FOR LEAVE  
TO FILE A BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO THE UNITED STATES’  
MOTION TO DISMISS**

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The Commonwealth of Pennsylvania Insurance Department requests leave to file a brief as *amicus curiae* in opposition to the United States’ Motion to Dismiss filed in the above-captioned matter and avers as follows:

1. The Pennsylvania Insurance Department, led by Insurance Commissioner Teresa D. Miller (collectively, the “Department”), is charged with administering the laws regulating the business of insurance in the Commonwealth of Pennsylvania.
2. The Department is responsible for monitoring the financial solvency of insurance companies, licensing insurance companies and producers, reviewing and approving certain

insurance policy language and rates, and coordinating the rehabilitation and liquidation of insolvent insurance companies.

3. The Department's mission is to provide a premier regulatory environment that promotes a competitive marketplace and serves the best interests of Pennsylvania consumers.

4. The Department has exclusive jurisdiction over the review and approval of certain commercial health insurance rates within Pennsylvania, including those sold on the statewide health insurance marketplace established by the Affordable Care Act<sup>1</sup>, known as the Exchange.<sup>2</sup>

5. The Pennsylvania-domiciled Plaintiffs (First Priority Life Ins. Co., Inc., Highmark Inc., f/k/a Highmark Health Services, HM Health Insurance Co. d/b/a Highmark Health Ins. Co., and Highmark Select Resources Inc.) have comprised a significant portion of the Exchange market in Pennsylvania since its inception in 2014.<sup>3</sup>

6. The Department seeks leave of this Honorable Court to submit an *amicus curiae* brief in support of Plaintiff's opposition to the United States' Motion to Dismiss, because this case involves the Risk Corridors provision of the ACA (42 U.S.C. §18062), the administration of which directly implicates health insurance company solvency, market competition, and overall marketplace stability, thereby indirectly implicating health insurance premium rates.

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<sup>1</sup> The Patient Protection and Affordable Care Act, (P.L. 111-148), together with the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152), as amended, are referred to herein as "Affordable Care Act" or the "ACA." The Exchanges were created pursuant to section 1311 of the ACA, 42 U.S.C. §18031.

<sup>2</sup> Pennsylvania is an effective rate review state. 42 U.S.C. §300gg-18. *See State Effective Rate Review Programs*, Center for Consumer Information and Insurance Oversight, [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/rate\\_review\\_fact\\_sheet.html](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/rate_review_fact_sheet.html) (last visited Oct. 14, 2016).

<sup>3</sup> In 2014, Highmark Inc., Highmark Health Insurance Co., and First Priority Life Insurance Company, Inc. offered plans on the Exchange. In 2017, Highmark Inc. and Highmark Health Ins. Co. will offer on the Exchange.

7. As such, because this matter involves insurance issues that are important both to Pennsylvania consumers and the regulation of the health insurance industry as a whole, the Department has a direct interest in the outcome of this case and seeks to offer its unique perspective as to how the lack of full Risk Corridors payments uniquely affects the Pennsylvania health insurance market in terms of: (1) market stability, (2) competition, and (3) solvency.

***Market Stability***

8. Congress included the Risk Corridors provision in the ACA to promote stability in the exchange marketplace.

9. Specifically, this provision was designed to ameliorate the downside risk of covering newly-insured populations and to encourage insurers to offer products in the Exchange despite the uncertainty of costs associated with covering this new population.

10. If insurers do not receive the full payments as originally contemplated by the ACA, they may choose to exit the market or discontinue certain product offerings, thereby necessitating insureds to select a new and different plan each year.

11. In order for insurance companies to price products appropriately, and for consumers to use their health insurance benefits most effectively, a stable market is needed.

***Competition***

12. Additionally, the failure to make full Risk Corridors payments may result in fewer insurers participating in the Exchange.

13. This decrease in competition may result in a marketplace where insurers are not incentivized to keep rates affordable, plan designs responsive to consumer needs, and service at a high caliber.

*Solvency*

14. Finally, health insurers, like all insurance companies, are required to meet minimum standards with respect to risk-based capital, or RBC. The formula to calculate a health insurance company's RBC ratio is complex, but it accounts for underwriting risk.

15. The Risk Corridors provision was designed to help insurers mitigate this type of risk by creating a mechanism whereby companies that priced their products with an expectation as to the health of its many new enrollees, but found that those enrollees were much less healthy, and therefore much more expensive to cover, could recover some of the associated losses from that unforeseen risk.

16. As such, failure to make full Risk Corridors payments has the potential to affect insurer solvency.

17. The Department's expertise regarding the stability, financial health, and competitiveness of the market that it regulates may assist this Court in developing a complete understanding of the potential implications its disposition of this case will have for the health insurance landscape in the Commonwealth of Pennsylvania.

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WHEREFORE, The Pennsylvania Insurance Department, for the reasons set forth above, hereby respectfully requests that it be granted leave to file the accompanying *amicus curiae* brief in support of the Plaintiffs.

Respectfully submitted,

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*Attorneys for the Pennsylvania Insurance  
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Dated: October 14, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2016, a copy of the foregoing, the **Application of the Pennsylvania Insurance Department for Leave to File a Brief as *Amicus Curiae* in Opposition to the United States' Motion to Dismiss**, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

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