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ACA Risk Corridor Funding Falls Short, Litigation Ensues

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Health insurance companies have filed at least five lawsuits against the federal government recently for failing to pay billions of dollars in disbursements owed under the risk corridors program, a temporary premium stabilization mechanism of the Affordable Care Act. The litigation was triggered by Congress' failure to appropriate funds for the program for fiscal years 2015 and 2016. The lack of appropriations also jeopardizes billions of dollars of cost-sharing reimbursements owed to health plans under a separate ACA program. In House of Representatives v. Burwell, the D.C. federal district court recently enjoined the Centers for Medicare and Medicaid Services (CMS) from reimbursing cost-sharing subsidies owed to health plans under Section 1402 of the ACA but left open the possibility of insurers recovering the reimbursements through litigation. The decision by health insurers to litigate the risk corridors funding shortfall and the import of the Burwell decision are best understood in the context of the broader political struggle concerning ACA implementation, which continues to create uncertainty and risk for participating health plans.

Congress Failed to Appropriate Funds for the Risk Corridors Program

The risk corridors program is one of three premium stabilization policies under the ACA (collectively, the "Three Rs"), which are intended to smooth and reduce risk to health insurers, particularly during the early years of ACA implementation when the level of risk associated with new enrollees is unpredictable.[1] Specifically, the risk corridors program is designed to reduce the amount of gains and losses to health care plans by requiring plans with higher than expected profit margins to remit profits above a certain threshold to the government, while providing that the government, in turn, will reimburse plans that prove to be less profitable.[2] However, Congress included riders in 2015 and 2016 spending legislation that prohibited the government from paying risk corridors amounts to health plans beyond the amounts collected from more profitable plans.[3] As a result, risk corridors payments to insurers for the 2014 benefit year were limited to $362 million (or 12.6 percent) of the $2.87 billion requested by insurers.[4]

The Burwell Decision Frames the Latest ACA Battleground While Leaving Room for Health Insurers to Recover Underpayments

Risk corridors payments are not the only ACA disbursements subject to an appropriations controversy. In late 2014, the Republican-controlled House filed a complaint against the secretaries of the

Department of Health and Human Services and the Treasury, alleging that the Obama administration, through CMS and the Department of Health and Human Services and the Department of the Treasury, (hereafter, the "administration") unlawfully spent $3 billion in taxpayer dollars under the ACA cost sharing program, which requires insurers offering qualified plans on the health care marketplace to reduce deductibles, coinsurance, copayments and other charges to eligible individual insureds while requiring that the secretary of HHS reimburse insurers in an equal amount.[5] The House alleged that there was not a proper appropriation to support such reimbursements and sought declaratory and injunctive relief, contending that, without judicial intervention, $175 billion would be unlawfully disbursed to health plans over the next 10 years.[6]

After making a threshold ruling that the House had standing to pursue its complaint, on May 12, 2016, the District Court found that Congress had not made appropriations for the cost-sharing reimbursements and that, accordingly, the secretaries violated the Constitution when they paid qualified health plans for 2014 subsidies.[7] Notably, the Burwell court acknowledged that health plans are required to make the payments at issue, while specifically stating that insurers "are supposed to get their money back" pursuant to statutory language indicating that the government "shall make periodic and timely payments to the issuer equal to the value of the reductions."[8] Notwithstanding this language, the Burwell court issued an injunction against further reimbursements without a valid appropriation.[9]

The injunction is stayed pending appeal by either party, and the U.S. Department of Justice has confirmed it will take the issue to the Court of Appeals, which means that insurance rate-setting or exchange participation for 2017 will not be affected by a cutoff in congressional funding that would occur if or when the Burwell decision is implemented.[10] Neither will the 2017 budget be finalized before insurance companies set rates.[11] However, the Burwell decision does create uncertainty regarding funding in the long run.[12] Securing appropriations is not likely to occur absent a shift in congressional power and priorities, and to the extent that appropriations for ACA remain subject to the annual budgeting process, ACA stakeholders will continue to be subject to changing political tides.

In defending the Burwell action, the administration did not dispute that it is required to pay insurers. Moreover, the administration argued that the "absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation," which, if successful, would permit them to recover from the Judgment Fund (for which there are federal appropriations).[13] Although the House disputed the premise that insurers can successfully obtain payment via litigation where there is no appropriation, the court in Burwell expressly did not address this issue — a significant fact for health plans seeking recompense for payments they expected to receive under the ACA.[14]

Health Insurers Initiate Litigation to Recover Risk Corridors Underpayments

Indeed, multiple lawsuits have now been brought against the federal government by health insurers seeking reimbursement under the risk corridors program. First, in February 2016, Oregon-based insurer Health Republic filed a class action against the United States in the U.S. Court of Federal Claims on behalf of all insurers shortchanged by the deficit in risk corridors payments.[15] Health Republic alleges a single claim for "violation of statutory and regulatory mandate to make payments" under the ACA and its implementing regulations, and seeks reimbursement of up to $5 billion it contends will be outstanding at the end of the 2015 benefit year.[16] The government's response to the Health Republic complaint is due on June 24.

Thereafter, in the context of the liquidation of an Iowa co-op, CoOpportunity Health, the Iowa Insurance Commissioner sought a declaratory judgment that any debts owed the federal government should be offset by the $130 million owed to CoOpportunity under the risk corridors program.[17] Following attempts to reach a presuit resolution, the Iowa Insurance Department was told by the Department of Justice that "further negotiations would be futile."[18]

In May 2016, Highmark affiliates and First Priority Life Insurance Co. also filed a lawsuit against the United States in the Court of Federal Claims, seeking nearly $223 million in risk corridors payments while asserting claims under breach of contract theories as well as the takings clause of the U.S. Constitution.[19] Highmark maintains that it pursued "all avenues to enforce the government's obligations" before filing suit.[20] Just last week, Blue Cross and Blue Shield of North Carolina and Moda Health Plans, an Oregon insurer, brought two more cases in Federal Claims Court against the United States, seeking nearly $120 million and nearly $180 million, respectively, in risk corridor underpayments for 2014 as well as relief for expected 2015 underpayments. Like Highmark, the complaints by BCBSNC and Moda includes claims for breach of contract. The government must respond to the Highmark complaint by July 18 and responses to Moda and BCBSNC are presently due on August 1.

The government may argue that its obligations are not owed until 2017, at which time payments will be made for the final 2016 benefit year of the program.[21] This would permit the government to fund the current shortfall with amounts received in future program years. Highmark fronted this contention, however, by alleging that this position is without support in the statute or implementing regulations and that the statutory language requires full annual payments for each of the three years of the program's life.[22] Health plans will further point to the fact that where allowable costs are less than the specified target amount, the implementing regulations for the risk corridors program require plans to remit the full amount payable to HHS within thirty days and that health plans were justified in expecting prompt payment in light of the language of the statute, implementing regulations and proposed and final rules concerning the risk corridors program.[23]

Rate Hikes, Increased Borrowing and Exits from the Exchanges

In addition to the aforementioned litigation, health plans have taken other steps in reaction to challenges with the ACA and exchange products. Not unexpectedly, some insurers are requesting significantly higher rates (as much as 48 percent increases) for plans they sell on the exchanges going forward, an outcome the administration expressly contemplated would occur if it was barred from making cost-sharing reimbursements to insurers as a result of Burwell.[24] Highmark announced that the risk corridors funding shortfall has not negatively impacted premium rates for its ACA products, but it changed its product offerings for 2017 to offset the risk of exchange enrollees, including offering fewer products, narrower provider networks, higher premiums and lower reimbursement for certain providers.[25] To alleviate cash-flow pressure caused by the ACA, U.S. health insurance carriers have also nearly doubled the amount of borrowed money on their statutory balance sheets, increasing that figure from just under $3.3 billion in first-quarter 2011 to approximately $6.4 billion at year-end 2015.[26] Finally, a number of insurers have exited the public exchanges, including the nation's largest health insurer, UnitedHealth Group, which announced that it will exit most of the 34 states where it currently offers plans on the ACA insurance exchanges.[27] Also included in the exodus are 13 nonprofit co-ops (of the original 23) that have closed their doors following significant losses, including Health Republic, CoOpportunity Health, and, most recently, Ohio co-op InHealth Mutual, which lost roughly $80 million last year.[28]

Further Congressional Action Suggests that Challenges to ACA Implementation are not Over

The Burwell decision and the pending risk corridors cases showcase a new legal and political battleground concerning the ACA as health plans and policymakers contend with the question of federal funding. Indeed, Congress proposed a reconciliation bill late last year that, although vetoed by the president, would have reduced federal spending on health care in part by repealing the exchange subsidies in 2018.[29] However, the risk corridors program and the cost-sharing subsidies are not the only ACA policies that are under fire. The reinsurance program — another temporary premium stabilization mechanism under the ACA — yielded significantly more receipts than distributions for 2014 ($8.7 billion versus $7.9 billion).[30] Nonetheless, in March, through the House Energy and Commerce Committee, Congress took the position that the dispersal of $5 billion in reinsurance proceeds to health plans is against the law, contending that these funds rightfully belong to the U.S. Treasury.[31] Congress also sent letters to health insurers seeking information regarding the reinsurance program, noting that "given the collaborative relationship between insurance companies and their regulators, there have been questions raised about the role of insurance companies in securing and negotiating reinsurance payments from CMS."[32] And, on May 16, 2016 Congress, again through the House Energy and Commerce Committee, sent letters to 11 co-ops expressing concern that CMS has not taken the appropriate steps to ensure their financial solvency and ability to repay federal loans and sought communications between CMS and the co-ops concerning the issue of whether reinsurance payments to insurers are prioritized over the U.S. Treasury.[33]

Conclusion

The continuing political turmoil surrounding the ACA and its implementation has led to unexpected consequences for both health plans and their members. The question of federal appropriations is at the center of the Burwell lawsuit and the risk corridors litigations. However, payments under the reinsurance program and federal loans to the co-ops are also subjects of congressional scrutiny and/or opposition, suggesting that hurdles for ACA stakeholders will remain in place as long as the ACA continues to be a site of political contention. In light of the billions of dollars at stake and the increased pressure and uncertainty for health plans, it is not surprising that some health insurers have opted to seek redress through the courts, which may create a reciprocal pressure with respect to the appropriations debate and the broader political controversy regarding ACA implementation.

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[1] For background concerning risk corridors and the other ACA premium stabilization programs, see Ursula Taylor, Spreading the Risk under the Patient Protection and Affordable Care Act: The Three Rs and Lessons from Another Industry's Reinsurance Mechanism, 12-2 ABA Health eSource (Oct. 2015).

[2] Id.

[3] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227 ("None of

the funds made available by this act ... may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors)."); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225 (same).

[4] The Three Rs: An Overview, Centers for Medicare & Medicaid Services (Oct. 1, 2015).

[5] Compl., United States House of Representatives v. Burwell, No. 14-1967 (RMC), Dkt. No. 1, at 3.

[6] Id. at 3-4.

[7] House v. Burwell, (D. D.C. May 12, 2016).

[8] Id. at *4.

[9] Id. at *7.

[10] Lisa Schencher, Modern Healthcare (May 13, 2015).

[11] Id.; see 42 U.S.C. § 18031(c)(6)(B) (providing for "annual open enrollment periods" in advance of "calendar years" for plans on the Exchanges); 42 U.S.C. § 18031(e)(2) (providing for review of premiums for certification of Exchange plans).

[12] Schencher, supra note 10.

[13] Defendants' Mem. In Support of Their Mot. for Sum. J., Burwell, Dkt. No. 55-1, at 20.

[14] Plaintiff's Opp. to Defendants' Mot. for Sum. J., Burwell, Dkt. No. 66, at 19-20.

[15] Class Action Compl., Health Repub. Ins. Co. v. United States, No. 16-259 C (Fed. Cl. Feb. 24, 2016), Dkt. No. 1

[16] Id. at 59-63.

[17] Compl., Gerhart v. Watkins, No. 16-cv-00151 (S.D. Iowa May 3, 2016), Dkt. No. 1.

[18] AIS Health, Highmark Sues, Says Feds Owe $223M in Corridors Payments (May 30, 2016).

[19] Compl., Highmark, Inc. v. United States, No. 16-587 C (Fed. C. May 17, 2016), Dkt. No. 1.

[20] AIS Health, supra note 18; Highmark Files Suit Against Federal Government Alleging Breaches of Risk Corridors Obligations Under Patient Protection and Affordable Care Act (ACA), Highmark Inc. Press Release.

[21] See Compl., Highmark at ¶¶ 160-61; Centers for Medicare and Medicaid Services, Risk Corridors and Budget Neutrality, April 11, 2014.

[22] See Compl., Highmark at ¶¶ 160-64; 42 U.S.C. § 18062(b)(1).

[23] 45 C.F.R. § 153.510(d); see also Centers for Medicare and Medicaid Services, Bulletin, "Risk

Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015); Risk Corridors Establishment and Payment Methodology, 78 Fed. Reg. 15473 (Mar. 11, 2013); Risk Corridors Establishment and Payment Methodology, 77 Fed. Reg. 17238 (Mar. 23, 2012).

[24] Wes Venteicher, Highmark, UPMC propose higher Obamacare rates, Pittsburgh Tribune-Review (May 25, 2016); Steve Jordon, Blue Cross Blue Shield of Nebraska Seeks Premium Increase of Nearly 35 Percent for Individuals, World-Herald News Service (May 27, 2016); Defendants' Mem. In Support of Their Mot. for Sum. J., Burwell, Dkt. No. 55-1, at *17-20 (noting that HHS estimated that silver-plan premiums would increase by more than 20 percent to make up for loss of cost-sharing reduction payments).

[25] See AIS Health, supra note 18.

[26] A.M. Best Special Report: Health Insurers Increase Borrowing Due to the Patient Protection and Affordable Care Act Impact (May 23, 2016).

[27] UnitedHealth Group to Exit Obamacare Exchanges in All But a 'Handful' of States, Washington Post (April 19, 2016).

[28] Dan Diamond, Ohio Co-Op Dies, Resurrecting Questions About Program, Politico Pulse (May 27, 2016).

[29] Summaries for the Restoring Americans' Healthcare Freedom Reconciliation Act of 2015 (Jan. 19. 2016).

[30] For background on the reinsurance program, see Taylor, supra note 1. See also Summary Report on Transmittal Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2014 Benefit Year at 5, HHS, CMS (June 30, 2015).

[31] See Sandra Durkin, Ursula Taylor & Jason Dubner, Emerging Disputes Over Risk Sharing Under the ACA, Law360 (April 18, 2016); 42 U.S.C. §§ 18061-63 (2010).

[32] See Letters to AHIP and Insurance Companies Regarding Reinsurance Payments from CMS (March 9, 2016).

[33] See https://energycommerce.house.gov/news-center/letters/letters-11-co-ops-seeking-updates-their-viability.