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Emerging Disputes Over Risk Sharing Under The ACA

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Just two years after the enactment of The Patient Protection and Affordable Care Act, challenges to the ACA's risk-sharing mechanisms are already beginning to emerge. These risk-sharing mechanisms, commonly referred to as the "Three Rs," are the permanent risk adjustment and the temporary reinsurance and risk corridors programs, the latter two intended to operate from 2014 to 2016. These programs are designed to shift funding between and among health plans and/or the government in an effort to smooth risks and ease insurers' transition into the new and somewhat unknown markets brought by the ACA.[1] While the ACA was the subject of political controversy and legal attacks even before its inception, challenges implicating the Three Rs — specifically, payments made under the risk corridors and reinsurance programs — are a relatively recent, albeit not unexpected, development.[2]

Risk Corridors Endure a Funding Shortfall That Engenders Class Action Litigation

The risk corridors program is enduring a number of challenges at the outset, culminating most recently in the filing of class action litigation against the federal government after a funding shortfall for the inaugural 2014 benefit year. The risk corridors program was designed to stabilize premiums by reducing the amount of gains and losses to health care payors. The program works 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.[3] The ACA does not, by its own terms, require risk corridor payments to net to zero. Accordingly, the law arguably puts the federal government on the hook for costs that outweigh revenues under the program.[4] However, the 2015 and 2016 congressional spending bills and corresponding regulations prohibited the government from using government funds to make risk corridor payments.[5] As a result, when demand for payments grossly exceeded receipts under the program, the government indicated in late 2015 that it would pay only 12.6 percent of the risk corridor payments.[6] In large part due to this dramatic shortfall, numerous consumer-operated and oriented plans ("co-ops") established under the ACA ceased offering

coverage.[7]

Thereafter, on Feb. 24, 2016, Oregon-based insurer, Health Republic, initiated the first major lawsuit involving risk corridors, a putative class action against the federal government stemming from its failure to reimburse insurers as much as $5 billion allegedly owed under the transitional program for the 2014 and 2015 benefit years.[8] According to Health Republic's complaint, the risk corridors payments under the ACA are mandatory, yet health plans participating in the risk corridors program generated only $362 million in gains for the government while incurring $2.87 billion in compensable losses in 2014 alone, and market analysts predict a similar breakdown in 2015.[9]

Health Republic's allegations are not limited to the co-ops or small health plans. Major health care payors are included among the list of damaged entities. Health Republic alleges that UnitedHealth Group, Anthem and Aetna each lost money in connection with their public exchanges (with UnitedHealth Group losing more than $720 million).[10] Health Republic seeks full reimbursement for itself and for the proposed class of qualified health providers whose losses exceeded the threshold set by the ACA, as well as injunctive relief and other damages.[11] The key issues in the class action will be whether the ACA requires the government to reimburse 100 percent of the risk corridor shortfall and whether the government's power to appropriate funding overrides any purported statutory obligation.[12]

Reinsurance Program Receives Congressional Scrutiny and Opposition

Following the devastating impact of risk corridor payment deficiencies on some insurers, the transitional reinsurance program became the next subject of scrutiny as Congress has recently sought to investigate and even thwart reinsurance payments under the program.[13] Like the risk corridors program, the purpose of the reinsurance program is to stabilize premiums.[14] Unlike the risk corridors program, which only authorizes the government to collect funds from health plans that are both qualified for the program and profitable, the reinsurance program requires all insurers to make reinsurance payments in an amount per enrollee per benefit year.[15] The ACA requires that a portion of these funds be allocated to the U.S. Department of the Treasury, and that the rest be made available as reinsurance payments to plans that enroll beneficiaries with catastrophic claims exceeding a certain threshold.[16] Also unlike the risk corridors program, contributions under the reinsurance program for the 2014 benefit year exceeded requests for payments, such that the Centers for Medicare and Medicaid Services announced that only $7.9 billion of a total of $8.7 billion in collected payments would be distributed to health insurers.[17]

Notwithstanding, or perhaps because of, the relative success of the reinsurance program, the U.S. Congressional Committee on Energy and Commerce has taken steps to stop CMS from making transitional reinsurance payments. On March 9, 2016, the committee first announced an investigation into the propriety of the payments into the program.[18] In letters to five major insurance companies — Aetna Inc., Anthem Inc., Cigna Corp., Humana Inc. and UnitedHealth Group Inc. — as well as the trade group America's Health Insurance Plans and the Blue Cross Blue Shield Association, the committee took the position that a portion of the contributions CMS collected from health insurers totaling $5 billion must be deposited into the U.S. Treasury and not used for reinsurance distributions to health insurance companies.[19] The committee further asserted that CMS would be in violation of federal law if it followed through with its plan to distribute funds that rightfully belong to the U.S. Treasury under the program.[20] The committee also requested copies of documents pertaining to the reinsurance program to assist in the investigation, 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."[21] On March 23, 2016, the

committee, along with the Congressional Committee on Ways and Means, issued a second letter, this time directly to CMS, taking the definitive position that the plan to disburse $7.7 billion in transitional reinsurance payments to health insurers in 2016 violates the law, accusing CMS of "loot[ing] billions from the Treasury to pay off insurance companies" as part of a "bailout" and an effort to prevent insurance companies from exiting the "failing and unstable Obamacare exchanges."[22] The March 23 letter does not address whether Congress intends to take any direct action with respect to health insurance companies. However, the letter included orders that CMS cease all illegal payments and submit them to the Treasury.

Following the risk corridor funding shortfall, a successful effort to preclude payments under the transitional reinsurance program would present a second significant blow to the risk sharing mechanisms of the ACA.

What is Next for Risk Sharing Under the ACA?

The risk corridor funding shortfall, the ensuing class action lawsuit against the federal government and congressional attempts to investigate and preclude payments under the reinsurance program are exemplary of the struggle within the insurance industry as both the public and private sectors adapt to changes precipitated by the Affordable Care Act. Notably, although there have not been any direct challenges to the risk adjustment program, the third of the Three Rs and the only program set to continue after 2016, this program may present the next source for contention.[23] Unlike the reinsurance and risk corridor programs, under the risk adjustment program, funds are transferred from plans with lower-risk enrollees to plans with higher-risk enrollees based on a per-plan average actuarial risk score calculated under a model similar to the model used for Medicare Advantage (Part C) and Medicare Part D plans.[24] The risk adjustment transfers net to zero within a market within a state, which means the program is completely funded by its participants.[25] While there is no potential for a government overpayment or underpayment, health care payors may seek to hold each other accountable for accurate data reporting under the program.[26] Indeed, although the remittance of payments and charges for 2014 risk adjustment transfers just occurred in the second half of 2015, smaller payors have already balked at obligations to transfer significant funds to its larger competitors.[27] In light of the scrutiny and contention arising from the first two "Rs," the transfer obligations between and among entities participating in the risk adjustment program are worthy of attention in 2016 and beyond.

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[2] For background on the Three Rs, including the purposes and mechanics of the 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] See id.

[3] See 42 U.S.C. §§ 18061-63 (2010); see also Center for Consumer Information and Insurance Oversight, Centers for Medicare and Medicare Services, Department of Health and Human Services, slide deck: Reinsurance, Risk Corridors, and Risk Adjustment Final Rule, at 11 (March 2012).

[4] Henry J. Kaiser Family Foundation, Explaining Health Care Reform: Risk Adjustment, Reinsurance and Risk Corridors (Jan. 22, 2014).

[5] 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).

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

[7] See Ameet Sachdev, How an Insurance Startup's Slowdown is Disrupting the Illinois Marketplace, Chicago Tribune (Oct. 23, 2015).

[8] See generally Class Action Compl., Health Republic Ins. Co. v. United States, No. 16-259 C (Fed. Cl. Feb. 24, 2016), ECF No.1 ("Health Republic Compl.").

[9] Health Republic Compl., 41, 48.

[10] Id., 47-49.

[11] Id., pp. 23-24.

[12] Id., 53.

[13] See Danni Kass, House GOP Investigating Insurers Over ACA Reinsurance Pay (Mar. 9, 2016).

[14] Reinsurance, Risk Corridors and Risk Adjustment Final Rule, supra note 3 at 5.

[15] Henry J. Kaiser Family Foundation, supra note 4. In 2015, the state of Ohio brought a lawsuit alleging that the federal government was constitutionally prohibited from collecting reinsurance payments from state and local entities; a federal judge dismissed the suit earlier this year, finding that the ACA requires all insurers, including state employer-sponsored health plans, to pay into the reinsurance program. Ohio v. United States, No. 2:15-cv-321, 2016 U.S. Dist. LEXIS 473 (S.D. Ohio Jan. 5, 2016).

[16] Reinsurance, Risk Corridors, and Risk Adjustment Final Rule, supra note 3, at 7.

[17] Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2014 Benefit Year, Department of Health and Human Services, Centers for Medicare & Medicaid Services, at 1, 3 (June 30, 2015).

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

[19] See id.

[20] See id. for links to all letters; e.g., Mar. 8, 2016 Letter to Cigna.

[21] See, e.g., id.

[22] See Letter to Acting Administrator of CMS (Mar. 23, 2016).

[23] See Taylor, supra note 1.

[24] 42 U.S.C. Section 1343(a); Henry J. Kaiser Family Foundation, supra note 4; Centers for Medicare & Medicare Services, Center for Consumer Information & Insurance Oversight, HHS-Operated Risk Adjustment Methodology Meeting, Discussion Paper (March 31, 2016) at 5.

[25] Taylor, supra note 1; Reinsurance, Risk Corridors, and Risk Adjustment Final Rule, supra note 3, at 13.

[26] See Taylor, supra note 1;

[27] Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance and Risk Corridors; State House News Services, Obamacare Risk Adjustment to Transfer Funds Among Insurers, WB Journal (July 1, 2015); Priyanka Dayal McCluskey, U.S. Objects to State Plan to Settle Health Insurers' Dispute, Boston Globe (March 17, 2015).