

email alert



To: Payers, Plans, and Managed Care Practice Group Members

From: Payers, Plans, and Managed Care Practice Group Leadership

Mark Kopson, Chair

Xavier Baker, Vice Chair of Membership

Jeremy Earl, Social Media Coordinator

Robert Slavkin, Vice Chair of Publications

Leah Stewart, Vice Chair of Educational Programs

Brian Stimson, Vice Chair of Research and Website

Janice Ziegler, Vice Chair of Strategic Planning and Special Projects

Date: May 31, 2016

Billions in ACA Disbursements Hinge on *House of Representatives v. Burwell*, Risk Corridors Litigation, and Further Congressional Activity

By Ursula Taylor and Sandra Durkin*

Billions of dollars in disbursements under the Affordable Care Act (ACA) have not been paid to insurers due to shortfalls in federal appropriations, as highlighted in both the May 12, 2016 decision of the District Court for the District of Columbia in *House of Representatives v. Burwell* (*Burwell*) and in several recent lawsuits by health insurers against the federal government.

The Burwell Decision

The court in *Burwell* enjoined the Secretaries of the U.S. Department of Health and Human Services (HHS) and the U.S. Department of the Treasury from reimbursing insurers under Section 1402 of the ACA, which requires health insurers offering qualified health plans on the Exchanges to subsidize deductibles, coinsurance, co-payments, and other charges to eligible individual insureds while requiring the government to reimburse insurers in an equal amount. The court found that Congress did not appropriate funds for the subsidies, even though health insurers are statutorily obligated to make the subsidies and are "supposed to get their money back." The Secretaries argued that the government is required to pay the cost-sharing subsidies at issue and noted 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). The injunction is stayed pending appeal.

Risk Corridors Litigation

Insurers initiated litigation after Congress failed to appropriate funds for a

separate ACA program, the temporary premium stabilization program known as the “risk corridors program.”¹ The federal appropriations legislation for 2015 and 2016 expressly exempted funding for the risk corridors program.² Accordingly, the Centers for Medicare & Medicaid Services (CMS) limited risk corridors payments owed to insurers for the 2014 benefit year to \$362 million (or 12.6%) of the \$2.87 billion requested by insurers.³

In response to the funding shortfall, Health Republic Insurance Company, an Oregon-based consumer operated and oriented health plan (co-op), filed a class action in the U.S. Court of Federal Claims against the federal government on behalf of all insurers affected by the payment deficit, seeking reimbursement of up to \$5 billion for 2014 and 2015.⁴ Separately, the Iowa Insurance Commissioner, in the context of the liquidation of an Iowa co-op, sought declaratory judgment that any debts owed the federal government should be offset by \$130 million in risk corridors receivables.⁵ Finally, and most recently, Highmark sued the federal government in the Court of Federal Claims, seeking nearly \$223 million in risk corridors payments under breach of contract theories, among others.⁶ Since the court in *Burwell* did not decide the issue of whether insurers have a basis for procuring ACA payments via litigation absent a valid appropriation, this may be the focus of future litigation.

Further Congressional Action

Another temporary premium stabilization mechanism under the ACA—the reinsurance program—has been a subject of recent congressional scrutiny, despite yielding significantly more receipts than distributions for 2014 (\$8.7 versus \$7.9 billion).⁷ Specifically, in March 2016, the Energy and Commerce Committee of the House of Representatives informed CMS that the dispersal to insurers of a portion of the contributions CMS collected from other insurers participating in the program, totaling \$5 billion, is unlawful.⁸ The Committee maintains that these funds rightfully belong to the U.S. Treasury.⁹ No litigation has yet been filed.

**We would like to thank Ursula A. Taylor and Sandra J. Durkin (Butler Rubin Saltarelli & Boyd LLP, Chicago, IL) for authoring this email alert. We also would like to thank Melissa J. Hulke, CPA (Berkeley Research Group, Phoenix, AZ) for reviewing this email alert.*

¹ For background concerning risk corridors and 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), available at www.americanbar.org/publications/aba_health_esource/2015-2016/october/spreadingtherisk.html.

² 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).

³ See also Sandra Durkin, Ursula Taylor, & Jason Dubner, *Emerging Disputes Over Risk Sharing Under the ACA*, Law360 (Apr. 18, 2016), available at www.law360.com/articles/785120/emerging-disputes-over-risk-sharing-under-the-aca.

⁴ See *id.*; Class Action Compl., *Health Repub. Ins. Co. v. United States*, No. 16-259 C (Fed. Cl. Feb. 24, 2016), Dkt. No. 1.

⁵ Compl., *Gerhart v. Watkins*, No. 16-cv-00151 (D. Iowa May 3, 2016), Dkt. No. 1.

⁶ Compl., *Highmark, Inc. v. United States*, No. 16-587 C (Fed. Cl. May 17, 2016), Dkt. No. 1.

⁷ Taylor, *supra* note 5; Summary Report on Transmittal Reinsurance Payments and Permanent Risk Adjustment

Transfers for the 2014 Benefit Year at 5, HHS, CMS (June 30, 2015), available at www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RI-RA-Report-Draft-6-30-15.pdf.

⁸ Durkin, *supra* note 7, citing to Letters to AHIP and Insurance Companies Regarding Reinsurance Payments from CMS (Mar. 9, 2016) found at <https://energycommerce.house.gov/news-center/letters/letters-ahip-and-insurance-companies-regarding-resinsurance-payments-cms>.

⁹ *Id.*

Member benefit educational opportunity:

Attend the Payers, Plans, and Managed Care Practice Group sponsored luncheon, entitled "What Is Adequate? An Update on CMS and NAIC Network Adequacy Developments" (June 27), taking place at the Annual Meeting (June 27-29, Denver, CO).

© 2016 American Health Lawyers Association
1620 Eye Street NW, 6th Floor
Washington, DC 20006

