Receipt number 9998-4133868

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
AUG 16 2017
U.S. COURT OF
FEDERAL CLAIMS

NANCY G. ATKINS, in her capacity as Liquidator of Kentucky Health Cooperative, Inc.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 17-1108 C

COMPLAINT

Plaintiff, Nancy G. Atkins, in her capacity as Liquidator of Kentucky Health Cooperative, Inc. ("Plaintiff" or "Liquidator"), brings this action seeking damages and other relief based upon the United States Government's (1) violation of Section 1341 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18061) and the regulation that implements Section 1341 (45 C.F.R. § 153.230); (2) breach of contract through improper setoff; and (3) breach of Reinsurance payment obligations under an implied-in-fact contract. In support of this action, Plaintiff states and alleges as follows:

NATURE OF ACTION

1. In March 2010, the Government enacted the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), 124 Stat. 119 and the Health Care and Education Reconciliation Act, Pub. L. 111-152, (March 30, 2010), 124 Stat. 1029 (collectively the "Affordable Care Act" or "ACA").

2. The ACA represented a major shift in healthcare regulation and coverage in the country. It ushered in a host of market-wide reforms and requirements affecting the private

health insurance industry. Among other things, it addressed the scope of covered services, availability of coverage, renewability of coverage, out-of-pocket costs for consumers, pricing, and other coverage determinants. It limits health insurance product variation and restricts pricing and underwriting practices. For example, by placing restrictions on the premium spread based on the age of the policy holder, the ACA ensures that premiums are based on a community rating (*i.e.*, the risk pool posed by the entire community) instead of an assessment of an individual's health status. The ACA also provides for guaranteed issuance of coverage and renewability of coverage.

3. The ACA requires individuals to purchase coverage if they are not otherwise insured and also created an elaborate system of federal subsidies that were supposed to offset the cost of coverage. Another hallmark of the ACA is its establishment of health insurance exchanges, which are online marketplaces where individuals and small groups may purchase health insurance. The ACA's individual mandate coupled with the availability of federal subsidies dramatically increased the number of individuals—many previously uninsured—purchasing health insurance. Created by Title I, Subtitle D of the ACA, the health insurance exchanges "are designed to bring together buyers and sellers of insurance, with the goal of increasing access to coverage" offered in a competitive marketplace.

4. To further facilitate affordability and access to competitive health insurance through the exchanges (also referred to as "marketplaces"), Congress created the Consumer Operated and Oriented Plan ("CO-OP") program in ACA Section 1322. ACA Section 1322(a)(2) explicitly states that "the purpose of the CO-OP program [is] to foster the creation of qualified nonprofit health insurance issuers to offer qualified health plans in the individual and small group markets . . . ." A qualified health plan ("QHP") is a health plan that meets certain

standards established by the Centers for Medicare & Medicaid Services ("CMS") in order to be sold to consumers through the exchanges. Congress intended for CO-OP insurers to increase competition among health insurers and to provide consumers with a nonprofit option for high-quality care with integrated service delivery. The ACA requires CO-OP insurers to derive substantially all of their business from the individual and small-group markets—the markets served by the exchanges.

5. Additionally, the ACA requires health plans in the individual and small group markets to cover essential health benefits ("EHBs"), which include items and services in the following ten benefit categories: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services including behavioral health treatment; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and (10) pediatric services, including oral and vision care. In many cases, the EHBs are an expansion of what was covered pre-ACA. Benefits previously subject to copays or other cost-sharing mechanisms are now mandated to be provided at no cost to the insured.

6. The health insurance exchanges presented new risks for health insurers. To minimize this risk, the ACA featured three marketplace premium stabilization programs: risk adjustment, reinsurance, and a temporary "risk corridors" program for each of the 2014, 2015, and 2016 benefit years (a "benefit year" is the calendar year for which a health plan provides coverage for health benefits).

7. The Reinsurance program, created by Section 1341 of the ACA, is essentially a means of limiting risks associated with high-cost enrollees for insurers on the exchanges, by

redistributing a general fund (comprised of mandatory collections *from* all insurers, on and off of the exchanges) *to* those insurers who insured the most costly enrollees in a given year.

8. Under the Reinsurance program, the Department of Health and Human Services ("HHS") collected (during each of the years the program was in effect) Reinsurance contributions (a monthly per-enrollee fee established by regulation) from health insurance issuers and third-party administrators, and was then required to make Reinsurance payments to all eligible insurance issuers. Eligibility for payment was keyed to costs for individual enrollees: if an insurer's cost for any single enrollee was above a certain dollar threshold, called an "attachment point," it was entitled to a Reinsurance payment for that enrollee.

9. CMS set the attachment point for each of the three years the program was in effect. For the 2014 and 2015 benefit years, the attachment point was $45,000. A proportion of costs above the attachment point is required to be reimbursed, based on the "coinsurance rate" and subject to a "reinsurance cap" of $250,000 (above which, costs are not subject to reimbursement).

10. As relevant here, Kentucky Health Cooperative, Inc. ("KYHC") provided health insurance to its members on the Kentucky marketplace in 2015. Pursuant to Section 1341 of the ACA and CMS's implementing regulation, KYHC is entitled to a Reinsurance payment of $35,150,774.64 for the 2015 benefit year. That money is presently due. To date, however, KYHC has been paid $0 under the Reinsurance program for the 2015 benefit year.

11. The Government does not contest the amount due, but asserts that it is not obligated to pay KYHC the 2015 Reinsurance payment because, according to the Government, KYHC is in default on a federal loan (authorized by another provision of the ACA, and provided to CO-OP insurers to offset startup costs).

12. The Government has no legal right to withhold the Reinsurance payment. To the contrary, the Government's actions are directly at odds with governing law.

13. By this lawsuit, Plaintiff seeks immediate full payment of the Reinsurance payment to which it is entitled—as the Liquidator of KYHC—from the Government under the ACA for benefit year 2015.

JURISDICTION

14. This Court has jurisdiction over the subject matter of this action pursuant to the Tucker Act, 28 U.S.C. § 1491. The statutory cause of action giving rise to this Court's Tucker Act jurisdiction is Section 1341, a money-mandating statute that requires payment from the federal government to issuers, like KYHC, that satisfy certain criteria. Section 153.230 is a money-mandating regulation that implements Section 1341 and thus also obligates payment from the Government to issuers that satisfy certain criteria.

15. In the alternative, the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101 *et seq.*, a money-mandating statute, provides Plaintiff a cause of action that gives rise to this Court's jurisdiction pursuant to the Tucker Act.

16. This controversy is ripe because CMS has failed to pay KYHC the full amount KYHC is owed for 2015 benefit year as required by Section 1341 and Section 153.230.

PARTIES

17. Plaintiff Nancy G. Atkins is the Commissioner of the Kentucky Department of Insurance and is the Liquidator of KYHC pursuant to KRS 304.22-200 and an Order of the Franklin Circuit Court, in the matter captioned as *H. Brian Maynard, in his capacity as Commissioner of the Kentucky Department of Insurance and Rehabilitator of Kentucky Health Cooperative, Inc. v. Kentucky Health Cooperative, Inc.* (Civil Action No. 15-CI-1144).

Commissioner Atkins brings this suit in her capacity as the current court-appointed Liquidator of KYHC.

18. KYHC is a corporation organized under the laws of Kentucky with its principal place of business in Louisville, Kentucky.

19. KYHC operated as a member-led QHP issuer on the exchange in Kentucky. It was organized as a non-profit under the CO-OP program in ACA Section 1322 (described below) and offered comprehensive health insurance benefits to individuals, families, and businesses in Kentucky.

20. In total, KYHC provided insurance coverage to approximately 51,000 individuals on the exchanges in Kentucky during benefit years 2014 and 2015 through the individual and small-group markets.

21. The defendant is the Government, acting at times through CMS (or CMS's parent agency HHS). Unless otherwise noted, references in this Complaint to CMS include HHS where applicable.

FACTUAL ALLEGATIONS

I. CONGRESS AUTHORIZED AND HHS ESTABLISHED VARIOUS PROGRAMS AND MECHANISMS PURSUANT TO THE ACA TO FACILITATE THE FORMATION, OPERATION, AND FUNDING OF INSURERS LIKE KYHC.

A. Establishment of CO-OPs

22. To facilitate affordability and access to competitive health insurance through the exchanges (also referred to as "Marketplaces"), Congress created the CO-OP program in ACA Section 1322. ACA Section 1322(a)(2) explicitly states that, "the purpose of the CO-OP program [is] to foster the creation of qualified nonprofit health insurance issuers to offer qualified health plans in the individual and small group markets." The ACA requires CO-OP

insurers to derive substantially all of their business from individual and small group markets.

B. Funding for CO-OPs

23. The ACA also authorized two loan types "to persons applying to become qualified nonprofit health insurance issuers" under the CO-OP program:

a) Start-up loans "to provide assistance to such person in meeting its start-up costs;" and

b) Solvency loans "to provide assistance to such person in meeting any solvency requirements of States in which the person seeks to be licensed to issue qualified health plans."

42 U.S.C. § 18042(b)(1).

24. CO-OPs received the Start-up and Solvency Loans from CMS pursuant to 42 U.S.C. § 18042(b)(a)(A)-(B) and subject to terms set out in the loan agreements.

25. The Government was the sole funder of the Start-up and Solvency Loans.

C. The Reinsurance Program

26. Section 1341 of the Affordable Care Act, as codified at 42 U.S.C. § 18061, created the Reinsurance program. In relevant part that Section states:

> (1) IN GENERAL – In establishing the Federal standards under section 18041(a) of this title, the Secretary, in consultation with the National Association of Insurance Commissioners (the "NAIC"), shall include provisions that enable States to establish and maintain a program under which—
>
> (A) health insurance issuers, and third party administrators on behalf of group health plans, are required to make payments to an applicable Reinsurance entity for any plan year beginning in the 3-year period beginning January 1, 2014 (as specified in paragraph (3); and
>
> (B) the applicable Reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make Reinsurance payments to health insurance issuers described in subparagraph (A) that cover high risk individuals in the individual market (excluding

> grandfathered health plans) for any plan year beginning in such 3-year period.
>
> (2) HIGH-RISK INDIVIDUAL; PAYMENT AMOUNTS – The Secretary shall include the following in the provisions under paragraph (1):
>
> > (A) Determination of high-risk individuals – The method by which individuals will be identified as high risk individuals for purposes of the Reinsurance program established under this section. Such method shall provide for identification of individuals as high-risk individuals on the basis of—
> >
> > > (i) a list of at least 50 but not more than 100 medical conditions that are identified as high-risk conditions and that may be based on the identification of diagnostic and procedure codes that are indicative of individuals with pre-existing, high-risk conditions; or
> > >
> > > (ii) any other comparable objective method of identification recommended by the American Academy of Actuaries.

Pub. L. No. 111-148, § 1341(b)(1), (2). Section 1341 also includes a provision dealing with "required contributions," a method of determining the amount most non-group and group health plan issuers are required to contribute to the Reinsurance program for each plan year beginning January 1, 2014. *Id.* § 1341(b)(3). HHS established a methodology to collect a per enrollee amount from most non-group and group health plan issuers and third-party administrators based on plan enrollment. 45 C.F.R. § 153.400.

27. Following the statute's mandate that HHS determine how high-risk enrollees are identified,[1] HHS determined that Reinsurance payments would be made to individual market plans with high-cost enrollees. HHS, "Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment, Proposed Rule." 76 Fed. Reg. 41930 (July 16, 2012).

28. HHS implemented the Reinsurance program in the Code of Federal Regulations

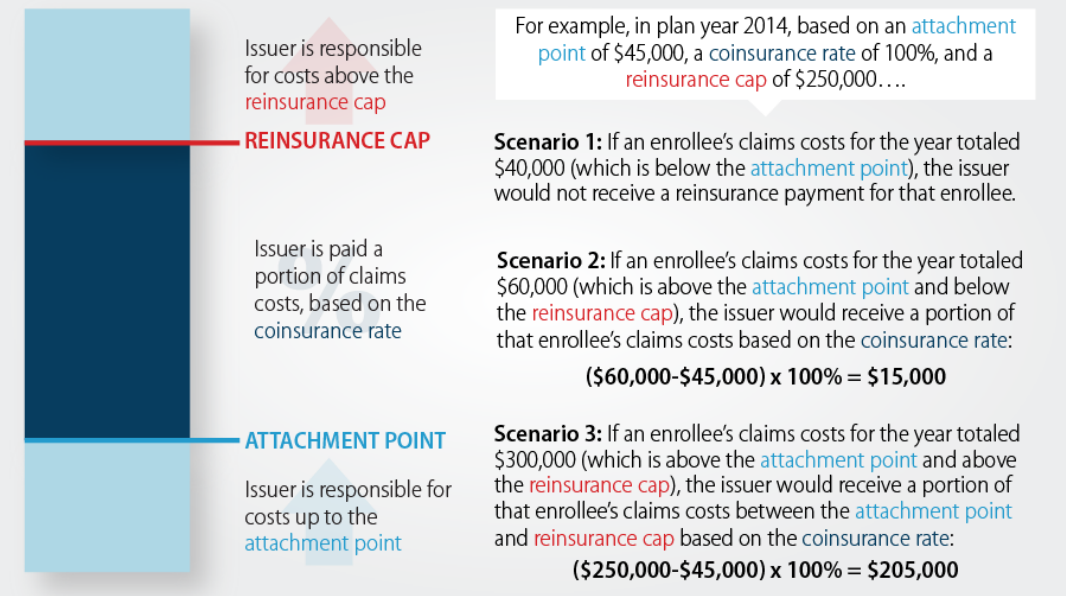
[1] 42 U.S.C. 18061(b)(2)(A)

at 45 C.F.R. § 153.200 *et* seq. In relevant part, Section 153.230 states:

> (a) General requirement. A health insurance issuer of a non-grandfathered individual market plan becomes eligible for Reinsurance payments when its claims costs for an individual enrollee's covered benefits in a benefit year exceed the attachment point.

Essentially, if an enrollee's total claims exceed a specified level (the "attachment point"), the insurer would be paid a proportion of claims costs (the "coinsurance rate") beyond the attachment point until total claims costs reached a cap (the "reinsurance cap").

29. The Reinsurance program's payment parameters are illustrated below:



Uberoi, K. Namrata and Edward C. Liu, Congressional Research Serv., "The Patient Protection and Affordable Care Act's (ACA's) Transitional Reinsurance Program" (Nov. 16, 2016).

30. HHS published the attachment point, coinsurance rate, and reinsurance cap—the payment parameters of the Reinsurance program—in the annual payment notice. CMS, "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, Exchange Standards for Employers (CMS-9989-FWP) and Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (CMS-9975-F) Regulatory Impact Analysis,"

(March 2012) *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/hie3r-ria-032012.pdf.

31. The payment parameters for plan years 2014, 2015, and 2016 were:

Year	Attachment Point	Coinsurance Rate	Reinsurance Cap
2014	$45,000	100%	$250,000
2015	$45,000	55.1%	$250,000
2016	$90,000	50%	$250,000

II. KYHC RECEIVED FEDERAL FUNDING UNDER THE ACA TO OPERATE AS A CO-OP, AND PARTICIPATED IN THE REINSURANCE PROGRAM.

32. KYHC was one of 23 CO-OPs created under the ACA and certified by CMS as a QHP to participate on the Kentucky exchange.

33. KYHC was established and operated as a Kentucky company licensed by the state of Kentucky to issue health insurance plans in Kentucky.

34. KYHC applied for federal funding to operate as a CO-OP, and in early 2012, CMS approved KYHC's business plan and application to operate as a QHP issuer, and authorized federal funding to KYHC to operate as a CO-OP as defined in 42 U.S.C. § 18042(a)(1)–(2).

35. KYHC and CMS subsequently executed QHP Issuer Agreements for benefit years 2014 and 2015, which contained KYHC's obligations as a CO-OP offering QHPs on the Kentucky exchange, and CMS's reciprocal obligations to undertake all reasonable efforts to support QHP functions.

A. KYHC Enters Into a Loan Agreement with the Government

36. On March 27, 2012, CMS and KYHC executed a Loan Agreement. Ex. 1.

37. The Loan Agreement defined the "Lender" as HHS/CMS and "Borrower" as KYHC. *Id.* at 2.

38. The Loan Agreement contemplated a maximum Start-Up Loan of $11,985,800 and a maximum Solvency Loan of $46,845,700. *Id.* The amounts were subsequently increased through three separate amendments, resulting in a maximum Start-Up Loan of $21,996,872 and a maximum Solvency Loan of $124,497,000. *Id.* at 85-94. The two Loans were cross-defaulted and cross-collateralized. *Id.* at 15 § 3.3.

39. The Loan Agreement defined "Start-Up Loan" as "the Loan to Borrower for costs associated with establishing a CO-OP that is governed by this Agreement, and the particular requirements of Appendix 2 – Start-Up Loan Promissory Note." *Id.* at 14. "Solvency Loan" was defined as "the Loan provided to Borrower in order to meet State solvency and State Reserve Requirements that is governed by this Agreement, and the particular requirements of Appendix 3 – Solvency Loan Promissory Note." *Id.* The Loan Agreement defined the term "Loans" to mean both the Start-up Loan and the Solvency Loan together. *Id.* at 12.

40. The Loan Agreement provided that "each of [the two Loans] shall be on par with the other for security purposes, and each of which shall be governed and controlled for all purposes by this Agreement, including its Appendices." *Id.* at 15 § 3.1.

41. As for the purpose of the Loans, the Loan Agreement stated, "[t]he Loans are being provided by Lender to Borrower for the establishment of a CO-OP. The Loans are intended to permit Borrower to offer health plans primarily in the individual and small group markets as described in 45 CFR Part 156." *Id.* § 3.2.

42. The Loan Agreement expressly recognized that HHS' claim for repayment of the loan amounts is ***subordinate*** to the claims of policyholders and other claimants, stating in part:

> 3.4 Security for the Loans
>
> The Loans and other Obligations will be general obligations of Borrower. Because the intent of the Loans, and the Solvency Loan in particular, is to provide financing to Borrower that meets the definition of "risk based capital" for State Insurance Law purposes, the Loans will have a claim on cash flow and reserves of Borrower ***that is subordinate*** to (a) claims payments, (b) Basic Operating Expenses, and (c) maintenance of required reserve funds while Borrower is operating as a CO-OP under State Insurance Laws.

Id. § 3.4 (emphasis added).

43. The Loan Agreement also specifically subjected the repayment of the Start-Up Loan and the Solvency Loan to the Borrower's "ability to meet State Reserve Requirements and other requisite surplus note arrangements." *Id.* at 19-20 §§ 4.4, 5.1.

44. The Promissory Note for the Solvency Loan similarly states, "the Note Holder agrees that the payment of principal and interest hereunder is expressly subordinated to claims of creditors and members of Borrower, including a) policyholders of Borrower; b) claimant and beneficiary claims of policies issued by Borrower; c) all other classes of creditors other than surplus note holders; d) Operating expenses of Borrower, and e) and reserve and solvency requirements as determined by applicable State law." *Id.* at 70-71.

45. The Promissory Note also provides that the repayment of the Solvency Loan shall only be made "with the prior approval of the Kentucky Insurance Commissioner or his designee." *Id.* at 70.

46. The Loan Agreement is "governed by the laws and common law of the United States . . . and by the laws of the Commonwealth of Kentucky to the extent the same do not

conflict with applicable Federal law." *Id.* at 44 § 19.2.

47. Beginning on June 26, 2012 and continuing through January 28, 2015, CMS made thirteen separate disbursements to KYHC under the Start-up Loan for a total of $19,568,223.[2]

48. Beginning on March 25, 2013 and continuing through December 23, 2014, CMS made eight separate disbursements to KYHC under the Solvency Loan for a total of $124,497,900. Each disbursement specified, "[n]o payment of principal and/or interest shall be made without authorization and approval by the insurance Commissioner of the state of domicile." *E.g.*, Ex. 2 at 4.

49. In a letter regarding KYHC's Solvency Promissory Note in connection with the Loan Agreement, the Kentucky Department of Insurance recognized such limitations, stating that "[s]urplus notes are recognized as surplus because of their highly restrictive nature. The holder of the surplus note agrees to the lowest priority for repayment in the event of a receivership, and payments under a surplus note can only be made from earned surplus upon the prior approval of the Department." Ex. 1 at 83.

50. The fact that KYHC received funding and was subject to the federal CO-OP program did not alter the fact that KYHC was established and operated as a Kentucky company licensed by the state of Kentucky to issue health insurance plans in Kentucky.

51. The Loan Agreement required KYHC to offer QHPs in accordance with a host of requirements. *E.g.*, *id.* at 24-26 §§ 7.1, 7.2.

52. In accordance with the conditions set forth in the Loan Agreement and the QHP

[2] The agreed-upon total funding amount was $21,996,872, but CMS only disbursed $19,568,223. Ex. 1 at 95.

Issuer Agreements, KYHC participated in the Reinsurance program as a CO-OP and offered QHPs on the Kentucky Exchange during the 2014 and 2015 benefit years.

III. THE GOVERNMENT IMPROPERLY WITHHELD REINSURANCE PAYMENTS DUE TO KYHC.

A. The Government Owes Reinsurance Payments to KYHC

53. On June 30, 2015, CMS published the amounts that issuers are owed under the Reinsurance program, as well as the amount of required Reinsurance contributions collected from issuers, for benefit year 2014. CMS, "Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2014 Benefit Year" (June 30, 2015), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RI-RA-Report-Draft-6-30-15.pdf.

54. Under the ACA and HHS' implementing regulations, and as specified in CMS's report, KYHC was owed $58,246,745.30 under the Reinsurance as a result of its high-cost enrollees in benefit year 2014, and CMS made full payment of this amount.

55. Similarly, on June 30, 2016, CMS published the amounts that issuers are owed under the Reinsurance program, as well as the amount of required Reinsurance contributions collected from issuers, for benefit year 2015. CMS, "Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2015 Benefit Year" (June 30, 2016), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/June-30-2016-RA-and-RI-Summary-Report-5CR-063016.pdf.[3]

[3] This initial report indicated that CMS owes KYHC $35,192,461.31, but this number was revised to $35,150,774.64 in the amendment to the report. *See* CMS, "Amendment to the Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment (Continued...)

56. Under the ACA and HHS' implementing regulations, and as specified in CMS's report, KYHC is owed $35,150,774.64 under the Reinsurance program as a result of its high-cost enrollees in benefit year 2015. CMS has made no payment for benefit year 2015.

B. KYHC Enters Liquidation

57. During 2014 and 2015, KYHC experienced severe and sustained financial difficulties.

58. On November 10, 2014, KYHC and the Government entered into a Third Amendment to Loan Agreement wherein the Solvency Loan amount was increased from $59,497,900 to $124,497,900. Ex. 1 at 92-94.

59. Ultimately, the Kentucky Department of Insurance performed a financial analysis of KYHC's December 31, 2014 annual statement. During this analysis it was noted that KYHC reported a net loss of $50,445,923 for calendar year 2014. Total reported capital and surplus as of December 31, 2014 was $65,226,070, as shown in audited financial statements that were not prepared according to generally accepted accounting principles. Several hazardous financial condition indicators were triggered as a result of this analysis.

60. On October 29, 2015, the Franklin Circuit Court, acting pursuant to the Kentucky Insurers Rehabilitation and Liquidation Act, found in Chapter 304.33 of the Kentucky Revised Statutes, entered an order placing KYHC into rehabilitation. The subsequent efforts of Plaintiff to rehabilitate KYHC proved futile, and ultimately a petition was filed in the Franklin Circuit Court seeking an order of liquidation.

61. On January 15, 2016, the Franklin Circuit Court of Franklin County, Kentucky,

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Transfers for the 2015 Benefit Year" (December 6, 2016) ("2015 Payment Report"), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/DDC_RevisedJune30thReport_v2_5CR_120516.pdf.

placed KYHC into liquidation. Ex. 3. The Liquidation Order stated, among other things, that the Liquidator and Special Deputy Liquidators were authorized to institute legal proceedings and to collect all debts and monies due and claims belonging to KYHC.

62. The Liquidation Order expressly prohibits any "creditors [or] . . . other entities (including . . . federal government entities) . . . [from u]sing any self-help remedy (including, but not limited to, setting-off monies owed) . . . ." *Id.* at 15.

C. The Government Improperly Sets Off and Places an Administrative Hold on Reinsurance Payment Due to KYHC

63. On February 11, 2016, CMS issued "Termination of the Kentucky Health Cooperative Loan Agreement" ("Termination Notice"). Ex. 4.

64. The Termination Notice referenced the Liquidation Order and stated that CMS is terminating the Loan Agreement because KYHC's insolvency constitutes default under section 15.1 of the Loan Agreement, and KYHC did not provide CMS with a plan to remedy such default as required under section 15.2. *Id.* at 1. The Notice then stated that the unpaid principal amount of the loans, the accrued interest thereon, and other amounts payable under the Loan Agreement were immediately due and payable, subject to section 15.3 of the Loan Agreement. *Id.*

65. However, the Notice failed to address other critical aspects of the Liquidation Order. First, the Liquidation Order prohibits any party that has contracted with KHYC from "declaring a default or terminating the existing contract on account of any contractual provisions which provides that insolvency, these liquidation proceedings, or any action by the Commissioner with respect to KYHC constitutes an event of default." Ex. 3 at 14 ¶ 40.

66. Second, the Liquidation Order prohibits setoffs by any entity, including federal government entities. *Id.* at 13 ¶ 39.

67. Despite these specific prohibitions, CMS proceeded to place an administrative hold on payments due to KYHC under the ACA, including Reinsurance payments. In a letter dated March 8, 2016, CMS stated that such payment hold was implemented "at the request of the United States Department of Justice (DOJ), which represents the interests of the Federal government in these wind-down proceedings pursuant to Federal law." Ex. 5.

68. CMS subsequently sent an offset notice on September 29, 2016, stating that it has offset the remaining balance of KYHC's outstanding Start-up Loan—$19,568,223. Ex. 6. CMS further noted that since KYHC may owe CMS additional amounts, it will continue to hold payments to KYHC and exercise offset to recover any amounts owed to CMS. *Id.*

IV. THE OFFSET OF REINSURANCE PAYMENT DUE TO KYHC VIOLATED THE LOAN AGREEMENT.

A. The Offset Violated the Loan Agreement

69. The Government's attempt to prioritize amounts owed to the United States by KYHC, by offsetting the Start-up Loan amount against the payments owed to KYHC, including the Reinsurance payment, and placing an administrative hold on those payments, is impermissible under the Loan Agreement between HHS and KYHC. The Loan Agreement expressly recognizes that HHS' claim for repayment of the loan amounts is subordinate to the claims of policyholders and other claimants:

> 3.4 Security for the Loans
>
> The Loans and other Obligations will be general obligations of Borrower. Because the intent of the Loans, and the Solvency Loan in particular, is to provide financing to Borrower that meets the definition of "risk based capital" for State Insurance Law purposes, the Loans will have a claim on cash flow and reserves of Borrower ***that is subordinate*** to (a) claims payments, (b) Basic Operating Expenses, and (c) maintenance of required reserve funds while Borrower is operating as a CO-OP under State Insurance Laws.

Ex. 1 at 15 § 3.4 (emphases added).

70. KYHC's obligation to repay the Start-Up Loan and the Solvency Loan was "subject to Borrower's ability to meet State Reserve Requirements and other solvency regulations or requisite surplus note arrangements." *Id.* at 19-20, 22 §§ 4.4, 5.6.

71. Given KYHC's insolvent condition, it did not have the ability to meet State Reserve Requirements or other solvency regulations. As such, KYHC was not required to repay the loans until other creditors were paid.

72. KYHC owes a substantial amount of money to various creditors. By placing an administrative hold on the Reinsurance payment due to KYHC, the Government in essence jumped priority over other creditors to the KYHC estate, in violation of the Loan Agreement's provisions protecting higher priority creditors and in violation of state insurance laws.

73. The McCarran-Ferguson Act gives states the primary authority to regulate the insurance industry, and in the absence of a directly contradictory federal law specifically relating to the business of insurance, state law generally preempts other federal laws on this issue. *See* 15 U.S.C. § 1012.

74. The ACA does not contradict Kentucky law regarding the business of insurance, but rather expressly acknowledges the applicability of state law under a clause titled "No interference with States regulator authority." 42 U.S.C. § 18031(d) ("Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title.").

75. In fact, Congress directed the Secretary of HHS to promulgate regulations "with respect to the repayment of [loans to CO-OPs] *in a manner that is consistent with State solvency regulations and other similar State laws that may apply*." 42 U.S.C. § 18042(b)(3) (emphasis added).

76. The ACA provided that "[i]n promulgating such regulations, the Secretary shall provide that such loans shall be repaid within 5 years and such grants shall be repaid within 15 years, *taking into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements* that must be constructed in a State to provide for such repayment prior to awarding such loans and grants." *Id.* (emphasis added).

77. In accordance with this mandate, HHS published proposed regulations implementing the ACA, noting that solvency and financial health of insurers is a "State-regulated function." 76 Fed. Reg. 43,237, 43,244 (July 20, 2011).

78. In response to comments on the proposed regulations regarding plans to avert insolvency, HHS responded, "[i]n the potential case of insurer financial distress, a CO-OP follows the same process as traditional issuers and must comply with all applicable State laws and regulations." 76 Fed. Reg. 77,392, 77,396 (Dec. 13, 2011).

79. Moreover, under the Loan Agreement, the Government is bound by applicable Kentucky law as it relates to the liquidation of KYHC. *See* Ex. 1 at 44 § 19.2 ("This Agreement will be governed by the laws and common law of the United States . . . and by the laws of the Commonwealth of Kentucky to the extent the same do not conflict with applicable Federal law.").

80. Accordingly, under the McCarran-Ferguson Act, and pursuant to the provisions of the Loan Agreement, the Government is bound by applicable Kentucky law as it relates to the liquidation of KYHC.

81. Under Kentucky law, the Franklin Circuit Court has jurisdiction over the liquidation of KYHC. KRS 304.33-030(13); KRS 304.33-190(2); KRS 304.44-200.

82. The Franklin Circuit Court, in accordance with Kentucky law, issued a

Liquidation Order prohibiting any form of setoff by any entity, including federal government entities. Ex. 3 at 13 ¶ 39 ("No lender, banks, savings and loan association, other institution (***including any state or federal governmental entity***), person or other entity shall exercise ***any form of set-off, alleged set-off, lien, any form of self-help whatsoever*** or refuse to transfer any funds or assets to the Liquidator's or Special Deputies' control without further order of this Court.") (emphases added).

83. The Liquidation Order further prohibits any entity (***including any federal government entity***) and any person, except for the Liquidator, "seeking to establish or enforce any claim, right or interest against or on behalf of KYHC" from using "***any self-help remedy*** (including but not limited to, setting-off monies owed) . . . or interfering with . . . any property or assets of KYHC's estate . . . ." *Id.* at 15 ¶ 44 (emphases added).

84. The Government's administrative hold and offset on payments owed to KYHC are precisely the types of self-help remedy explicitly prohibited by the Liquidation Order and Kentucky law.

* * * * *

85. KYHC offered QHPs on the Kentucky Exchange as a CO-OP during the 2014 and 2015 benefit years in accordance with the Loan Agreement and the QHP Issuer Agreements with CMS. At the end of benefit year 2015, KYHC was owed money based on its participation in the Reinsurance program. HHS has improperly offset and placed an administrative hold on the Reinsurance payment due to KYHC and is refusing to pay any portion of it. The full amount of $35,150,774.64 is owed and presently due to Plaintiff as the liquidator. By this lawsuit, Plaintiff seeks the immediate payment in full of Reinsurance receivable for the 2015 benefit year.

CLAIM FOR RELIEF

COUNT I

(Violation of Statutory and Regulatory Mandate to Make Payments)

86. Plaintiff re-alleges and incorporates the above Paragraphs 1-85 as if fully set forth herein.

87. As part of its obligations under Section 1341 of the ACA and its obligations under 45 C.F.R. § 153.230, the Government is required to pay any individual market plan issuer certain amounts according to its regulatory formula.

88. KYHC was a CO-OP under the ACA offering individual market plans and, based on its adherence to the ACA and its submission of Reinsurance contributions to CMS, satisfied the requirements for payment from the United States under Section 1341 of the ACA and 45 C.F.R. § 153.230.

89. The Government has failed, without justification, to fulfill its obligations under Section 1341 of the ACA and 45 C.F.R. § 153.230.

90. The Government's failure to provide timely payments to KYHC is a violation of Section 1341 of the ACA and 45 C.F.R. § 153.230, and Plaintiff has been harmed by this failure.

COUNT II

(Improper Setoff in Breach of a Contract)

91. Plaintiff re-alleges and incorporates the above Paragraphs 1-90 as if fully set forth herein.

92. The Government improperly set off and placed an administrative hold on the Reinsurance payment due to KYHC, which reduced payments that will be made to higher

priority creditors, prioritizing itself over other creditors of the KYHC estate.

93. These self-help remedies violated the terms of the Loan Agreement between KYHC and CMS, under which the Government's claims are subordinate to other creditors of KYHC.

94. The terms of the Loan Agreement did not entitle the Government to repayment of the loan amounts unless KYHC was able to meet State Reserve Requirements and other solvency regulations.

95. Through the setoff and the administrative hold, the Government breached the subordination provisions of the Loan Agreement by obtaining payment at the expense of KYHC's policyholders and other creditors to whom the Government had expressly subordinated itself.

96. The setoff and the administrative hold also violated the governing law provision of the Loan Agreement, under which the Government subjected itself to Kentucky Law as it relates to the liquidation of KYHC.

97. Under the applicable Kentucky laws and the Liquidation Order, repayment of the Start-up Loan and the Solvency Loan is subordinated to the claims of KYHC's liquidators, and any form of setoff or self-help remedies by the Government is prohibited.

98. The Government's illegal setoff in breach of the Loan Agreement harmed Plaintiff in the amount of at least $35,150,774.64.

COUNT III

(Breach of Implied-In-Fact Contract to Make Payments)

99. Plaintiff re-alleges and incorporates by reference the above Paragraphs 1-98 as if fully set forth herein.

100. KYHC entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely Reinsurance payments to KYHC in exchange for KYHC's agreement to become a QHP issuer and participate in the Kentucky Exchanges.

101. Section 1341 of the ACA and HHS' implementing regulations (45 C.F.R. § 153.230), constitute a clear and unambiguous offer by the Government to make full and timely Reinsurance payments to health insurers, including KYHC, that agreed to participate as QHP issuers in the ACA marketplaces and were approved as certified QHP issuers by the Government at the Government's discretion. This offer evidences a clear intent by the Government to contract with KYHC.

102. KYHC accepted the Government's offer by agreeing to become a QHP issuer, accepting the obligations, responsibilities, and conditions the Government imposed on QHP issuers under the ACA including, *inter alia*, 45 C.F.R. §§ 153.10 *et seq*. and 155.10 *et seq.*, and proceeded to provide health insurance in the Kentucky marketplace. KYHC satisfied and complied with its obligations and conditions that existed under the implied-in-fact contract.

103. The Government's agreement to make full and timely Reinsurance payments was a significant factor material to KYHC's decision to participate in the Kentucky marketplace.

104. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance, and statements following KYHC's acceptance of the Government's offer, including the execution by the parties of the Loan Agreement and QHP Issuer Agreement each year.

105. The implied-in-fact contract was also supported by mutual consideration: given

the Reinsurance program's partial mitigation of the risks posed by the ACA's new exchanges through sharing of risk among insurers on the exchanges by redistributing collections from all providers to those insurers who insured the most costly enrollees in a given year, the program was a real benefit that significantly influenced KYHC's decision to agree to become a QHP issuer and participate in the Kentucky marketplace. KYHC, in turn, provided a real benefit to the Government by agreeing to become a QHP issuer, complying with the obligations and conditions of the QHP Issuer Agreements and the Loan Agreement, and participating in the marketplace. Adequate insurer participation was crucial to the Government achieving the overarching goal of the ACA exchange programs—to make health insurance coverage available for all Americans by protecting consumers from increases in premiums due to health insurer uncertainty.

106. The Government induced KYHC to participate in the Kentucky marketplace for benefit year 2014 by including the Reinsurance program in Section 1341 of the ACA and its implementing regulations, by which the Government established a risk sharing mechanism among issuers thereby mitigating KYHC's losses.

107. HHS and CMS acknowledged and published the full Reinsurance payment amount of $35,150,774.64 that the Government concedes it owes KYHC for benefit year 2015. *See* 2015 Payment Report.

108. The Government's failure to make full and timely Reinsurance payment to KYHC, and now the Liquidator on KYHC's behalf, through an improper setoff and an administrative hold, is a material breach of the implied-in-fact contract, and KYHC has been damaged by this failure. Plaintiff therefore brings a claim for damages of $35,150,774.64 against the Government founded upon the Government's violation of an implied-in-fact

contract.

PRAYER FOR RELIEF

Plaintiff requests the following relief:

A. That the Court award Plaintiff monetary relief in the amount to which Plaintiff is entitled, as the Liquidator on KYHC's behalf, under Section 1341 of the ACA and 45 C.F.R. § 153.230 and that has been improperly withheld by the Government: $35,150,774.64.

B. That the Court award pre-judgment and post-judgment interest at the maximum rate permitted under the law;

C. That the Court award such court costs, litigation expenses, and attorneys' fees as are available under applicable law; and

D. That the Court award such other and further relief as the Court deems proper and just.

Dated: August 16, 2017

Respectfully submitted,

/s/ Stephen McBrady
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CERTIFICATE OF SERVICE

I certify that on August 16, 2017, a copy of the forgoing complaint was filed electronically using the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant's Counsel via the Court's ECF system.

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