

ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED

NOV 14 2016

U.S. COURT OF
FEDERAL CLAIMS

ALLIANT HEALTH PLANS, INC.,
)
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Plaintiff,
)
)
v.
)
THE UNITED STATES OF AMERICA,
)
Defendant.

)

No. 16-1491 C

COMPLAINT

Plaintiff Alliant Health Plans, Inc. (“Plaintiff” or “Alliant”) brings this action against Defendant, the United States of America (“United States,” or “Government”), and alleges the following:

INTRODUCTION

1. Alliant brings this action to recover amounts that the Government owes Alliant under the Government's mandatory risk corridors payment obligations established by Section 1432 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 and its implementing federal regulations.

2. In March 2010, the United States enacted The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, and The Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (collectively, the "ACA").

3. The ACA significantly changed the health insurance market nationwide in several ways. Those changes included the following:

(a) ACA-compliant insurance policies and health plans are required to carry certain coverages and other provisions (the "Mandatory Policy Provisions");

- (b) Only products in compliance with the ACA's requirements constitute "Qualified Health Plans" (sometimes "QHP"); and
- (c) Insurers and other qualified entities providing Qualified Health Plans (collectively, "Issuers") are prohibited from denying coverage, setting premiums or adjusting other provisions based on health status or medical history (collectively, the "No Underwriting Requirements");
- (d) QHPs would be available for purchase through exchanges to be established (the "Health Insurance Marketplaces").

4. Because of the ACA's changes to the laws governing health insurance and the absence of experience with ACA-compliant coverages and Health Insurance Marketplaces, Issuers lacked sufficient information to allow them confidently to set premium rates for Qualified Health Plans. Specifically, Issuers lacked information regarding the number and likely health expenses of new enrollees into Qualified Health Plans.

5. To encourage Issuers to offer Qualified Health Plans despite this uncertainty, Section 1342 of the ACA established a temporary "Risk Corridors Program." The Risk Corridors Program was enacted to accomplish the following:

- (a) To encourage Issuers to offer Qualified Health Plans, which necessarily included the Mandatory Policy Provisions and No Underwriting Requirements;
- (b) To allow Issuers of Qualified Health Plans to accept and weather the financial challenges and risks posed by setting premium rates for a population about which the Issuers lacked information and for whom the Mandatory Policy Provisions and No Underwriting Requirements applied; and
- (c) To discourage Issuers from depressing consumer participation in QHPs by setting prices high enough to cover the unknown and unmitigated risks of issuing QHPs, where such pricing might be higher than necessary in light of actual future experience.

6. The Risk Corridors Program contained two related mandatory terms for all Issuers of Qualified Health Plans: (a) any Issuer agreeing to operate on a Health Insurance Marketplace would receive compensation from the Government if its allowable costs exceeded the target

amount by a certain percentage; and (b) Issuers were required to pay the Government if their allowable costs were less than the target amount by a certain percentage.

7. The ACA renders the Government legally responsible for making specific payments to Issuers if their Qualified Health Plans' costs exceed target amounts during the first three years of operation (calendar years 2014 to 2016). While an Issuer will still bear a financial loss if its allowable costs exceed the target amount, the Risk Corridors Program will mitigate some of those losses. If a Qualified Health Plan's allowable costs for any plan year are between 103 and 108 percent of the target amount, the Government must pay the Issuer 50 percent of the amount in excess of 103 percent of the target amount; and if a Qualified Health Plan's allowable costs for any plan year are more than 108 percent of the target amount, the Government must pay the Issuer the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount. Conversely, if a Qualified Health Plan's allowable costs for any plan year are less than 97 percent of the target amount, the Issuer must pay the Government a percentage of the excess.

8. This action respectfully seeks to compel the Government to abide by its statutory obligations under the ACA and its implementing federal regulations, and to pay Alliant amounts owed under the Risk Corridor Program for calendar year ("CY") 2014 and CY 2015.

JURISDICTION AND PARTIES

9. This Court has jurisdiction over this action under the Tucker Act, 28 U.S.C. § 1491(a)(1). Alliant's claims are based upon the Government's violations of a money-mandating Act of Congress and a money-mandating regulation of an Executive Department of the United States.

10. Alliant is a non-profit corporation organized and existing under the laws of the State of Georgia. Alliant offers Qualified Health Plans under the ACA in Georgia. Alliant is a QHP issuer as defined in 45 C.F.R. § 155.20 (previously defined as an "Issuer").

11. The United States Department of Health and Human Services ("HHS") is an Executive Agency of the United States, tasked with administering the Section 1342 Risk Corridors Program. Responsibility for that program was delegated within HHS to the Centers for Medicare & Medicaid Services ("CMS").

FACTUAL ALLEGATIONS

The ACA's Risk Corridors Program

12. The ACA required the Secretary of HHS to establish the Risk Corridors Program for the sharing of gains and losses between the Government and QHPs for CY 2014 through CY 2016. *See* 42 U.S.C. § 18062.

13. Section 1342 of the Affordable Care Act states in relevant part:

(a) In General. – ***The Secretary shall establish and administer*** a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act.

(b) Payment Methodology. –

(1) Payments out. – ***The Secretary shall provide*** under the program established under subsection (a) that if –

(A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, ***the Secretary shall pay*** to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and

(B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, ***the Secretary shall pay*** to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

(2) Payments in. – ***The Secretary shall provide*** under the program established under subsection (a) that if –

(A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, ***the plan shall pay*** to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and

(B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, ***the plan shall pay*** to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

Pub. L. No. 111-148 § 1342 (emphasis added).

14. As directed by the ACA, HHS implemented the Risk Corridors Program in the Code of Federal Regulations. In relevant part, 45 C.F.R. § 153.510 states:

(b) *HHS payments to health insurance issuers. QHP issuers will receive payment* from HHS in the following amounts, under the following circumstances:

(1) When a QHP's allowable costs for any benefit year are more than 103 percent but not more than 108 percent of the target amount, ***HHS will pay*** the QHP issuer an amount equal to 50 percent of the allowable costs in excess of 103 percent of the target amount; and

(2) When a QHP's allowable costs for any benefit year are more than 108 percent of the target amount, ***HHS will pay*** to the QHP issuer an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

(c) *Health insurance issuers' remittance of charges.* ***QHP issuers must remit charges*** to HHS in the following amounts, under the following circumstances:

(1) If a QHP's allowable costs for any benefit year are less than 97 percent but not less than 92 percent of the target amount, ***the QHP issuer must remit charges*** to HHS in an amount equal to 50 percent of the difference between 97 percent of the target amount and the allowable costs; and

(2) When a QHP's allowable costs for any benefit year are less than 92 percent of the target amount, ***the QHP issuer must remit charges*** to HHS in an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the difference between 92 percent of the target amount and the allowable costs.

45 C.F.R. § 153.510 (emphasis added).

15. Congress did not impose any financial limits or conditions on the Government's obligation to fund payments to QHPs under the Risk Corridors Program in either Section 1342 or any other section of the ACA, nor are any such limits in the implementing regulations.

16. Congress has not amended or repealed Section 1342 since enactment of the ACA.

17. 45 C.F.R. § 153.510(d) imposes a 30-day deadline for a QHP fully to remit payments to HHS when the QHP's allowable costs in a calendar year are less than 97 percent of the QHP's target amount.

18. The ACA and the implementing regulations are silent on when HHS must tender full risk corridors payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount.

19. During the proposed rulemaking that ultimately resulted in adoption of the 30-day payment deadline for QHPs, CMS and HHS recognized that the deadline for the Government's payment of risk corridors payments to QHPs should be identical to the deadline for a QHP's

remittance of charges to the government. *See* 76 Fed. Reg. 41929, 41943 (July 15, 2011); 77 Fed. Reg. 17219, 17238 (Mar. 23, 2012).

HHS Has Acknowledged Its Obligation to Make Full Risk Corridors Payments

20. On March 23, 2012, CMS and HHS stated:

While we did not propose deadlines in the proposed rule, we . . . suggested . . . that HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. *QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.*

77 Fed. Reg. 17219, 17238 (Mar. 23, 2012) (emphasis added).

21. On March 11, 2013, HHS stated, "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 Fed. Reg. 15409, 15473 (Mar. 11, 2013).

22. On March 11, 2014, HHS stated, "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 Fed. Reg. 13743, 13829 (Mar. 11, 2014). HHS did not revoke, revise or question its prior recognition that it must "remit payments as required under section 1342 of the Affordable Care Act." 78 Fed. Reg. 15409, 15473 (Mar. 11, 2013).

23. On April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," which stated:

We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall. Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current

year payments. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014). HHS did not revoke, revise or question its prior recognition that it must "remit payments as required under section 1342 of the Affordable Care Act." 78 Fed. Reg. 15409, 15473 (Mar. 11, 2013).

24. On May 27, 2014, HHS stated, "HHS recognizes that the Affordable Care Act requires the Secretary to make full [Risk Corridors Program] payments to issuers." 79 Fed. Reg. 30239, 30260 (May 27, 2014).

25. In the 2015 Appropriations Act, Congress blocked funding for payments under the Risk Corridors Program from several particular sources:

None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services – Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).

128 Stat. 2130, 2491 (Dec. 16, 2014).

26. The 2016 Appropriations Act included language identical to the language quoted above in the 2015 Appropriations Act. 129 Stat. 2242, 2624.

27. Neither Congress's block of particular sources of funding nor the absence of a specific appropriation to fund the Risk Corridors Program CY 2014 and CY 2015 defeated or otherwise abrogated the Government's statutory obligation to make full and timely payments to QHPs under the Risk Corridors Program.

28. On February 27, 2015, HHS again confirmed its obligation to make full payments under the ACA's Risk Corridors Program, "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In the unlikely event that risk corridors collections, including any potential carryover from the prior years, are insufficient to make risk corridors payments for the 2016 program year, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." 80 Fed. Reg. 10749, 10779 (Feb. 27, 2015).

29. On October 1, 2015, HHS and CMS announced that they intended to prorate payments to QHPs for CY 2014 under the Risk Corridors Program:

Based on current data from QHP issuers' risk corridors submissions, issuers will pay \$362 million in risk corridors charges, and have submitted for \$2.87 billion in risk corridors payments for 2014. **At this time, assuming full collections of risk corridors charges, this will result in a proration rate of 12.6 percent.**

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015) (emphasis in original).

30. On September 9, 2016, HHS and CMS announced (a) that they would continue to prorate payments owed to QHPs under the Risk Corridors Program for CY 2015 and CY 2016 and (b) that they would comingle collections under the Risk Corridors Program for CYs 2014 and 2015 and would distribute the collections for all amounts owed under the Risk Corridors Program for CY 2014 before any distribution for CY 2015:

[B]ased on our preliminary analysis, HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments . . . Collections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments, then for 2015 benefit year risk corridors payments, then for 2016 benefit year risk corridors payments.

Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016). However, HHS reaffirmed "that the Affordable Care Act requires the Secretary to make full payments to Issuers. HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016).

31. HHS and CMS have failed to provide any statutory authority for their decisions (a) not to make full and timely payments under the Risk Corridors Program for CY 2014 and CY 2015 and (b) to comingle funds for all three years and to divert those funds to pay amounts owed for CY 2014.

Alliant Is Owed Payments Under the Risk Corridors Program for CY 2014

32. Alliant's allowable costs for CY 2014 exceeded the target amount, which resulted in the Government being required to pay Alliant \$125.18 under the Risk Corridors Program.

33. The Government made payments to Alliant under the Risk Corridors Program for CY 2014 totaling \$15.60 as of the date of the filing of this Complaint. This amount represents only 12.46 percent of the CY 2014 risk corridors payments owed to them.

34. The Government owes Alliant \$109.58 under the Risk Corridor Program for CY 2014.

Alliant Is Owed Payments Under the Risk Corridors Program for CY 2015

35. Alliant is owed \$10,736,275 for CY 2015 under the Risk Corridors Program.

36. On September 9, 2016, HHS and CMS announced that they anticipated they would not pay QHPs any amounts owed under the Risk Corridors Program for CY 2015 at this time.

37. CMS's statements that it would not fund payments under the Risk Corridors Program to the extent not covered by collections under the Program constitute a repudiation and anticipatory breach of the Government's obligations under the ACA.

COUNT ONE

Violation of Statutory and Regulatory Mandate to Make Payments

38. Alliant realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

39. The Government is obligated under Section 1342 of the ACA and 45 C.F.R. § 153.510(b) to pay Issuers of QHPs in accordance with the Risk Corridors Program.

40. Alliant is a QHP under the ACA and, based on Alliant's adherence to the ACA and their submission of their allowable costs and target costs to CMS, satisfy the requirements for payment from the United States under Section 1342 of the ACA and 45 C.F.R. § 153.510(b).

41. The United States has failed to make full payments for CY 2014 and has failed to make any payments to Alliant for CY 2015.

42. The United States' failure to provide timely payments to Alliant is a violation of Section 1342 of the Affordable Care Act and 45 C.F.R. § 153.510(b), and Alliant has been damaged thereby.

COUNT TWO

Breach of Implied-in-Fact Contract

43. Alliant re-alleges and incorporates paragraphs 1 through 42 of the Complaint as if set forth fully herein.

44. Alliant and CMS entered into an implied-in-fact contract requiring CMS to make payments to Alliant in accordance with the Risk Corridors Program. Specifically, Alliant agreed

to sell and provide Qualified Health Plans in 2014 and 2015, subject to state and federal laws, regulations, and policies, in exchange for, *inter alia*, timely payments under the Risk Corridors Program.

45. The terms of the offer and acceptance were unambiguously specified in the ACA and CMS's implementing regulations.

46. CMS agreed to this implied contract by and through its own words and actions, and the parties' implied-in-fact contract is confirmed by the Parties' statements, actions, and performance.

47. Alliant satisfied its contractual obligations by selling and providing Qualified Health Plan coverage to qualifying individuals in 2014 and 2015.

48. The Government breached its contractual duty to Alliant by paying only \$15.60 of the total of \$125.18 to which Alliant is entitled in Risk Corridor Payments for 2014.

49. The Government breached its contractual obligations to Alliant by not paying any of the \$10,736,275 owed for CY 2015 under the Risk Corridors Program.

50. The mere failure of Congress to appropriate funds does not defeat the Government's contractual obligations. The Government is obligated to make full payment to Alliant in the amount of \$10,736,275 for CY 2015.

COUNT THREE

Alternative Claim: Violation of Statutory and Regulatory Mandate by Using CY 2015 Funds to Pay CY 2014 Obligations

51. Alliant re-alleges and incorporates paragraphs 1 through 50 of the Complaint as if set forth fully herein.

52. Alliant asserts this Count Three only to the extent that this Court finds that the Government is not obligated to make payments under the Risk Corridors Program in excess of amounts collected under that Program.

53. Even if the Government is not obligated to make payments under the Risk Corridors Program in excess of amounts collected under that Program, accounts collected for CY 2015 cannot be used to fund payments under the Risk Corridors Program attributable to CY 2014. All amounts collected for CY 2015 must be used exclusively to make payments for CY 2015.

PRAYER FOR RELIEF

Wherefore, Alliant requests the following relief:

- A. That the Court awards Alliant monetary relief in the amounts to which Alliant is entitled under Section 1342 of the ACA and 45 C.F.R. § 153.510(b); to wit, \$10,736,384.58, principal;
- B. That the Court award pre-judgment and post-judgment interest at the maximum rate permitted under the law;
- C. That the Court award appropriate declaratory relief, including but not limited to a declaration and judgment that Defendant's conduct alleged in the Compliant violates the laws alleged in the Complaint;
- D. That the Court award such court costs, litigation expenses, and attorneys' fees as are available under applicable law; and
- E. That the Court award such other and further relief as the Court deems proper and just.

Dated: November 11, 2016

Respectfully submitted,

MORRIS, MANNING & MARTIN, L.L.P.

/s/ Lewis E. Hassett

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