Receipt number 9998-3632391

ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
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U.S. COURT OF
FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA and BLUECHOICE HEALTHPLAN OF SOUTH CAROLINA, INC.,	)	
Plaintiffs,	)	
v.	)	No. 16-1501 C
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

COMPLAINT

Plaintiffs Blue Cross and Blue Shield of South Carolina and BlueChoice HealthPlan of South Carolina, Inc. (collectively, "Plaintiffs" or "BCBSSC"), by and through its undersigned counsel, brings this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and alleges the following:

INTRODUCTION

1. BCBSSC brings this action to obtain payment of amounts owed by Defendant pursuant to the mandatory risk corridor payment obligations prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing federal regulations.

2. The United States has specifically admitted its obligations to pay the full amount of risk corridor payments owed, but Defendant has failed to pay and has announced that it will make no payment in 2016 for amounts due for calendar year 2015 ("CY 2015").

3. The risk corridor program is one of three premium-stabilization programs provided for by the ACA. The risk corridor program reflected the fact that the ACA created a

new health insurance market to cover many individuals who were not previously insured, and that insurers who agreed to sell insurance to individuals through that new market would face significant uncertainty, including about who would enroll, and the extent of their health care needs and resulting claims costs. As a result, insurers, including Plaintiffs had no previous experience or reliable data to meaningfully assess the risks and set the premiums for this new population of insureds under the ACA.

4. Under the risk corridors program specified by the ACA, insurers issuing Qualified Health Plans ("QHPs"), such as Plaintiffs ("QHPI"), and the federal government share in the risk associated with the new marketplace's uncertainty for each of the years the program is in effect: 2014, 2015 and 2016. If the amount a QHPI collects in premiums in any one of these years exceeds its medical expenses by a certain target amount, the QHPI will make a payment to the Government. If annual premiums fall short of this target, however, Congress required the Government to make risk corridor payments to the QHPI under a formula prescribed in Section 1342.

5. The temporary risk corridors program was designed to ease the transition between the old and new health insurance marketplaces and help stabilize premiums for consumers, and was modeled on a similar program in Medicare Part D signed into law by President George W. Bush.

6. This action seeks damages from the Government of at least $19,042,984, which represents the amount of risk corridor payments Defendant owes to Plaintiffs for CY 2015 pursuant to the statutory risk corridor payment obligation. Plaintiffs also anticipate the Government will owe risk corridor payments to them for CY 2016.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because Plaintiffs bring claims for damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress and a money-mandating regulation of an executive department.

8. The actions and/or decisions of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") at issue in this lawsuit were conducted on behalf of the Defendant United States within the District of Columbia.

PARTIES

9. Plaintiff BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA ("BCBSSC" or "Plaintiff"), is a fully taxed South Carolina mutual insurer and an independent licensee of the Blue Cross and Blue Shield Association. BCBSSC's principal place of business is located in Columbia, South Carolina. BCBSSC offered and continues to offer health insurance coverage through certified QHPs offered through the Federally-facilitated Exchange Marketplace in South Carolina for CY 2014, CY 2015, and CY 2016.

10. Plaintiff BLUECHOICE HEALTHPLAN OF SOUTH CAROLINA, INC. ("BlueChoice" or "Plaintiff"), is a wholly owned subsidiary of BCBSSC with headquarters located in Columbia, South Carolina. BlueChoice offered and continues to offer health insurance coverage through certified QHPs offered through the Federally-facilitated Exchange Marketplace and Federally-facilitated Small Business Health Options Program in South Carolina for CY 2014, CY 2015, and CY 2016.

11. Defendant is THE UNITED STATES OF AMERICA. The Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") are agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

12. In 2010, Congress enacted the ACA, Public Law 111-148, 124 Stat. 119.

13. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S.

14. The ACA provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U.S.C. § 300gg–1(a).

15. The ACA also bars insurers from charging higher premiums on the basis of a person's health. 42 U.S.C. § 300gg.

16. Beginning on January 1, 2014, individuals and small businesses were permitted to purchase private health insurance through competitive statewide marketplaces called Affordable Insurance Exchanges, Health Benefit Exchanges, "Exchanges," or "Marketplaces." ACA Section 1311 establishes the framework for the Exchanges. *See* 42 U.S.C. § 18031.

17. Plaintiffs offered certified QHPs to individuals and enrollees on the FFE and FF-SHOP in the Marketplace in South Carolina in CY 2014, CY 2015, and CY 2016.

The ACA's Premium-Stabilization Programs

18. To help protect health insurers against risk selection and market uncertainty, the ACA established three premium-stabilization programs, which began in 2014: temporary reinsurance and risk corridor programs to give insurers payment stability as insurance market reforms began, and an ongoing risk adjustment program that makes payments to health insurance issuers that cover higher-risk populations (*e.g.*, those with chronic conditions) to more evenly spread the financial risk borne by issuers.

19. This action only addresses the temporary, three-year risk corridors program, which began in CY 2014 and expires at the end of CY 2016.

20. Congress's overarching goal of the premium-stabilization programs, along with other Exchange-related provisions and policies in the ACA, was to make affordable health insurance available to individuals who previously did not have access to such coverage, and to help ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

21. Congress also sought to provide certainty and protect against adverse selection in the health care market (when a health insurance purchaser understands his or her own potential health risk better than the health insurance issuer does) while stabilizing premiums in the individual and small group markets as the ACA's market reforms and Exchanges began in 2014.

22. The financial protections that Congress provided in the statutory premium-stabilization programs, including the mandatory risk corridor payments, provided QHPIs with the assurance, backed by federal law and the full faith and credit of the United States, to become participating health insurers in their respective states' ACA markets, at considerable cost to the QHPs, despite the significant financial risks posed by the uncertainty in the new health care markets.

The ACA's Risk Corridors Program

23. Section 1342 of the ACA requires the Secretary of HHS to establish a temporary risk corridors program that provides for the sharing in gains or losses resulting from CY 2014 through CY 2016 between the Government and certain participating health plans in the individual and small group markets, modeled on the risk corridor program implemented for the Medicare Part D prescription drug benefit program. *See* 42 U.S.C. § 18062.

24. The risk corridors program applies only to participating plans that agreed to accept the responsibilities and obligations of QHPIs. All insurers that elect to enter into agreements to become QHPIs are required by Section 1342(a) of the ACA to participate in the risk corridors program.

25. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the Exchanges during the first few years, health insurers may not be able to predict their risk accurately, and their premiums may reflect costs that are ultimately lower or higher than predicted.

26. Congress intended the ACA's temporary risk corridors provision as an important safety valve for consumers and insurers as millions of Americans would transition to new coverage in a brand new Marketplace, protecting against the uncertainty that health insurers, like Plaintiffs, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the federal government and issuers of QHPs in each of the first three years of the Marketplace.

BCBSSC and BlueChoice are QHPs

27. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, Plaintiffs agreed to become QHPIs, and to enter into Qualified Health Plan Certification Agreements with CMS, a federal agency within HHS.

The Risk Corridors Payment Methodology

28. Under the risk corridors program, the federal government shares risk with QHP health insurers by collecting charges from a health insurer if the insurer's QHP premiums exceed claims costs of QHP enrollees by a certain amount, and by making payments to the insurer if the

insurer's QHP premiums fall short by a certain amount, subject to certain adjustments for taxes, administrative expenses, and other costs and payments.

29. Congress, through Sections 1342(b)(1) and (2) of the ACA, established the payment methodology and formula for the payments in and the payments out to determine the amounts the QHPIs must pay to the Secretary of HHS and the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

30. Section 1342(b) states:

(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.

42 U.S.C. § 18062(b).

31. To determine whether a QHPI pays into, or receives payments from, the risk corridors program, HHS compares allowable costs (essentially, claims costs subject to adjustments for health care quality, health IT, risk adjustment payments and charges and reinsurance payments) and the target amount – the difference between a QHPI's earned premiums and allowable administrative costs.

32. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY 2016, QHPIs with allowable costs that are less than 97 percent of the QHPI's target amount are required to remit charges for a percentage of those cost savings to HHS, while QHPIs with allowable costs greater than 103 percent of the QHPI's target amount will receive payments from HHS to offset a percentage of those losses.

33. Section 1342(b)(1) provides the specific payment formula from HHS to QHPIs whose costs in a calendar year exceed their original target amounts by more than three percent.

34. Section 1342(b)(1)(A) requires that if a QHPI's allowable costs in a calendar year are more than 103 percent, but not more than 108 percent, of the target amount, then "the Secretary [of HHS] shall pay" to the QHPI an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount.

35. Section 1342(b)(1)(B) further requires that if a QHPI's allowable costs in a calendar year are more than 108 percent of the target amount, then "the Secretary [of HHS] shall pay" to the QHPI an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the allowable costs in excess of 108 percent of the target amount.

36. Alternatively, Section 1342(b)(2) sets forth the amount of charges that must be remitted to HHS by QHPIs whose costs in a calendar year are more than three percent below their original target amounts.

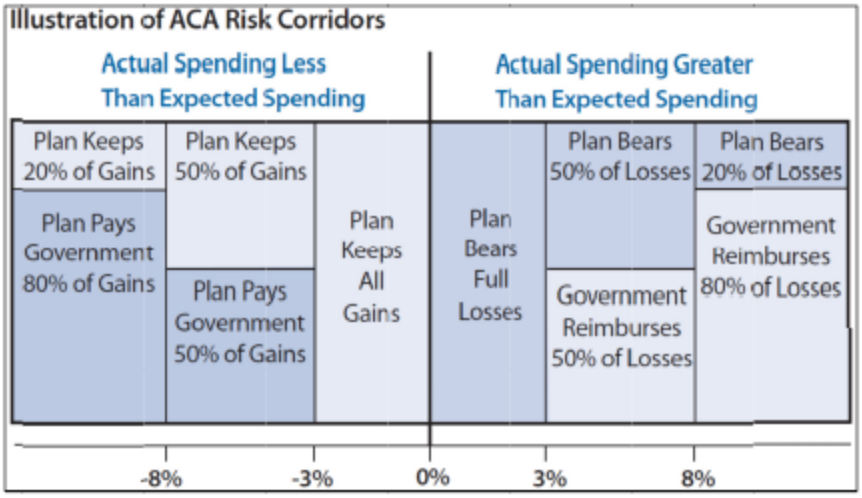
37. Section 1342(b)(2)(A) requires that if a QHPI's allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs.

38. Section 1342(b)(2)(B) requires that if a QHPI's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" 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.

39. Through this risk corridors methodology, QHPIs keep all gains and bear all losses that they experience within three percent of their target amount for a calendar year. For example, a QHPI that has a target amount of $10 million in a given calendar year will not pay a risk corridors charge or receive a risk corridors payment if its allowable charges range between $9.7 million and $10.3 million for that calendar year.

40. HHS and CMS provided specific examples of risk corridors payment and charge calculations beyond the three percent threshold – published in the Federal Register dated July 15, 2011, at 76 FR 41929, 41943 – which illustrate risk corridor payments the Government must pay under different allowable cost, target amount, and gain and loss scenarios. *See* 76 FR 41929, 41943 (July 15, 2011).

41. The American Academy of Actuaries provided an approximate illustration of the risk corridors payment methodology – excluding the charge or payment of 2.5 percent of the target amount for gains and losses greater than eight percent – as follows:



Source: American Academy of Actuaries, *Fact Sheet: ACA Risk-Sharing Mechanisms* (2013), *available at* http://actuary.org/files/ACA_Risk_Share_Fact_Sheet_FINAL120413.pdf,

42. As detailed below, in CY 2015, Plaintiffs experienced allowable-cost losses of more than three percent of its target amounts in the South Carolina ACA Individual and Small Group Markets, making Plaintiffs entitled to receive mandatory risk corridor payments required under Section 1342.

43. Congress did not impose any financial limits or restraints on the Government's mandatory risk corridor payments to QHPIs in either Section 1342 or any other section of the ACA.

44. Congress also did not limit in any way the Secretary of HHS's obligation to make full risk corridor payments owed to QHPIs, due to appropriations, restriction on the use of funds, or otherwise in Section 1342 or anywhere else in the ACA.

45. Congress has not amended Section 1342 since enactment of the ACA.

46. Congress has not repealed Section 1342.

47. HHS and CMS are thus mandated to pay 100% of the risk corridor payments due to Plaintiffs for CY 2015.

48. On March 11, 2013, HHS publicly affirmed that the risk corridors program is not statutorily required to be budget neutral. HHS further confirmed that, "Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013).

49. In executing the Qualified Health Plan Certification Agreements with CMS, Plaintiffs relied upon HHS's commitments to make full risk corridor payments annually to it as required in Section 1342 of the ACA regardless of whether risk corridor payments to QHPIs are actually greater than risk corridor charges collected from QHPs for a particular calendar year.

50. The United States, however, has not made payment, and has announced that it will not make payment in 2016, of the required risk corridor payment amounts for CY 2015.

HHS's Risk Corridors Regulations

51. Congress directed HHS to administer the risk corridors program enacted in Section 1342. *See* 42 U.S.C. § 18062(a). Accordingly, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153.

52. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation that is mathematically identical to the statutory formulation in Section 1342 of the ACA, using the identical thresholds and risk-sharing levels specified in the statute. *See* 45 C.F.R. § 153.510.

53. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk corridor payment amounts that QHPs "will receive":

> (b) *HHS payments to health insurance issuers*. QHPIs 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.

54. Furthermore, 45 C.F.R. § 153.510(c) prescribes the circumstances under which QHPs "must remit" charges to HHS, as well as the means by which HHS will determine those charge amounts:

(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.

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

> (d) *Charge submission deadline.* A QHP issuer must remit charges to HHS within 30 days after notification of such charges.

56. CMS did not impose a deadline for HHS to tender full risk corridor payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount.

57. During the proposed rulemaking that ultimately resulted in adoption of the 30-day charge-remittance deadline for QHPIs at 45 C.F.R. § 153.510(d), however, CMS and HHS stated that the deadline for the Government's payment of risk corridor payments to QHPIs should be identical to the deadline for a QHP's remittance of charges to the Government. *See* 76 FR 41929, 41943 (July 15, 2011); 77 FR 17219, 17238 (Mar. 23, 2012).

58. On July 15, 2011, CMS and HHS printed the following in its proposed rule in the Federal Register:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that the payment deadlines should be the same for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011).

59. On March 23, 2012, CMS and HHS printed the following in its final rule in the Federal Register:

> 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 FR 17219, 17238 (Mar. 23, 2012) (emphasis added).

60. Nothing in 45 C.F.R. Part 153 limits CMS's obligation to pay QHPIs the full amount of risk corridor payments due based on appropriations, restrictions on the use of funds, or otherwise.

61. BCBSSC relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become a QHPI in South Carolina and accept the obligations and responsibilities of a QHP, believing that the Government would pay the full risk corridor payments owed to it within 30 days after it had been determined that Plaintiffs experienced losses sufficient to qualify for risk corridor payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

62. The United States should have paid Plaintiffs the full CY 2015 risk corridor payments due, but has failed to do so, and has announced that it will not do so in calendar year 2016.

63. The United States has failed or refused to make full and timely risk corridor payments to Plaintiffs for CY 2015 as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

HHS and CMS's Recognition of Risk Corridors Payment Obligations

64. Since Congress's enactment of the ACA in 2010, HHS and CMS have repeatedly publicly acknowledged, confirmed, and thereby admitted the statutory and regulatory obligations to make full and timely risk corridor payments to qualifying QHPs.

65. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," stating that under the risk corridors program, "qualified health plan issuers with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of those losses." HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011).

66. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (77 FR 17219). Although HHS did not propose deadlines for making risk corridor payments, HHS stated that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." 77 FR 17219, 17238 (Mar. 23, 2012).

67. When HHS implemented a final rule on March 11, 2013, regarding HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15409), HHS confirmed, "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 FR 15409, 15473 (Mar. 11, 2013).

68. In HHS's response letter to the U.S. Government Accountability Office ("GAO") dated May 20, 2014, HHS again admitted that "Section 1342(b)(1) . . . establishes . . . the formula to determine . . . the amounts the Secretary must pay to the QHPs if the risk corridors

threshold is met." Letter from William B. Schulz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014).

69. On June 18, 2014, HHS sent to U.S. Senator Sessions and U.S. Representative Upton identical letters stating that, "As established in statute, . . . [QHP] plans with allowable costs at least three percent higher than the plan's target amount will receive payments from HHS to offset a percentage of those losses." Letter from Sylvia M. Burwell, Secretary, HHS, to U.S. Senator Jeff Sessions (June 18, 2014).

70. On February 27, 2015, HHS's implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), further confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." 80 FR 10749, 10779 (Feb. 27, 2015).

71. On November 19, 2015, CMS issued a public announcement further confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and stating that "HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligation of the United States for which full payment is required." Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), attached hereto at Exhibit A.

The United States' Failure to Make Payment

72. In the 2015 Appropriations Act, Congress limited HHS's ability to use the funds appropriated by the appropriations act to make risk corridor payments. The following text was included at Section 227 of the 2015 Appropriations Act:

> *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. 2491 (emphasis added).

73. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014, and its restriction on the use of the funds "made available by this Act," did not modify or repeal Section 1342 of the ACA, and did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including Plaintiff.

74. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, HHS and CMS announced that it intended to prorate the risk corridors payments owed to many QHPs, for CY 2014, because HHS would make payments equal to the amounts collected from QHP issuers who paid money to the United States.

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), attached hereto at Exhibit B.

75. HHS and CMS further announced on October 1, 2015, that they would be collecting full risk corridors charges from QHPs in November 2015, and would begin making the prorated risk corridor payments to QHPs starting in December 2015. *See id.*

76. On December 18, 2015, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

77. In the 2016 Appropriations Act, Congress again limited the use of appropriations to make risk corridor payments

> 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).

129 Stat. 2624 (emphasis added).

78. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014, and its restriction on the use of the funds "made available by this Act," did not modify or repeal Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs.

BCBSSC's Risk Corridors Charge Amounts for CY 2014

79. Under the risk corridor formula, BCBSSC was required to remit risk corridors charges to the Secretary of HHS, pursuant to the statutory and regulatory formula, because its costs were more than 3% below its "target amount" for 2014, and it accordingly shared those savings with the government.

80. Accordingly, Plaintiffs remitted payment of the full amount of those charges for CY 2014 totaling more than $8.1 million, without any proration. The amount of Plaintiffs' payments are set forth below:

Plaintiff	HHS Risk Corridor Amount (Individual Market)	HHS Risk Corridor Amount (Small Group Market)
Blue Cross and Blue Shield of South Carolina	$5,288,866.75	$529,578.40
BlueChoice Health Plan of South	$2,329,264.72	$21,230.33

Carolina, Inc.		

BCBSSC's Risk Corridors Payment Amounts for CY 2015

81. BCBSSC was required to submit and finalize its premiums for CY 2015 in early 2014, well before it had any meaningful data upon which to base pricing decisions for 2015. Despite lacking significant experience and data sufficient to formulate its premium, BCBSSC submitted a premium, and offered health insurance products to individuals through the Exchange in CY 2015.

82. For 2015, BCBSSC's costs were more than 3% above its target amount. On July 29, 2016, Plaintiffs submitted data to Defendant showing that they were owed a risk corridor receivable totaling $19,042,984 from the United States.

83. On September 9, 2016, CMS announced it would make no payment for CY 2015 risk corridor receivables, but confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and stated that "HHS will record risk corridor 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), attached hereto at Exhibit C.

84. The Government is expected to officially announce CY 2015 risk corridors payment and charge amounts in November, 2016.

COUNT I
Violation of Federal Statute and Regulation

85. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

86. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridor payments to QHPs in accordance with the payment formula set forth in the statute.

87. HHS and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" risk corridor payments to QHPs in accordance with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

88. HHS and CMS's regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit charges to HHS within 30 days after notification of such charges.

89. HHS and CMS's statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridor "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011); 77 FR 17219, 17238 (Mar. 23, 2012.

90. Plaintiffs were QHPs in CY 2015, and were qualified for and entitled to receive mandated risk corridor payments from the Government.

91. Plaintiffs are entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridor payments from the Government for CY 2015.

92. On July 29, 2016, Plaintiffs submitted data to CMS showing a total risk corridor receivable of $19,042,984 for Plaintiffs collectively.

93. The United States has failed to make full and timely risk corridor payments to BCBSSC for CY 2015.

94. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or

otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including Plaintiffs.

95. The Government's failure to make full and timely risk corridor payments to Plaintiffs for CY 2015 constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

96. Plaintiffs also anticipate the Government will owe risk corridor payments to them for CY 2016.

97. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), Plaintiffs have been damaged in the amount of at least $19,042,984, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II
Taking Without Just Compensation
in Violation of the Fifth Amendment to the U.S. Constitution

98. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

99. The Government's actions complained of herein constitute a deprivation and taking of Plaintiffs' property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

100. BCBSSC has a vested interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridor payments. BCBSSC had a reasonable expectation of receiving the full and timely risk corridor payments payable to it under the statutory and regulatory formula.

101. The Government interfered with and has deprived Plaintiffs of property interests and its reasonable investment-backed expectations to receive full and timely risk corridor payments.

102. The Government's action in withholding, with no legitimate governmental purpose, the full and timely risk corridor payments owed to BCBSSC constitutes a deprivation and taking of Plaintiffs' property interests and requires payment to Plaintiffs of just compensation under the Fifth Amendment of the U.S. Constitution.

103. BCBSSC is entitled to receive just compensation for the United States' taking of its property in the amount of at least $19,042,985, together with interest, costs of suit, and such other relief as this Court deems just and proper.

104. The Government's actions complained of herein constitute a deprivation and taking of Plaintiffs' property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

COUNT III
Breach of Implied-In-Fact Contract

105. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

106. In the alternative, Plaintiff entered into valid implied-in-fact contracts with the Government regarding the Government's obligation to make full and timely risk corridor payments to BCBSSC for CY 2015 in exchange for BCBSSC's agreement to become a QHPI and participate in the South Carolina ACA Exchanges.

107. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's admissions regarding their obligation to make risk corridor payments were made by representatives of the Government who had actual authority to bind the

United States, and constituted a clear and unambiguous offer by the Government to make full and timely risk corridor payments to health insurers, including Plaintiff, that agreed to participate as QHPs in the CY 2015 ACA Exchanges.

108. BCBSSC accepted the Government's offer by agreeing to become a QHPI and to participate in and accept the uncertain risks imposed by the ACA Exchanges.

109. By agreeing to become QHPIs, Plaintiffs agreed to provide health insurance on particular exchanges established under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPIs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*.

110. BCBSSC certified its agreement by executing the QHP Agreements and the attestations required by the Government, including the attestations regarding risk corridor payments and charges.

111. BCBSSC satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contracts.

112. The Government's agreement to make full and timely risk corridor payments was a significant factor material to BCBSSC's agreement to become a QHPI and participate in the CY 2014, CY 2015, and CY 2016 ACA Exchanges.

113. The parties' agreement is further confirmed by the parties' conduct, performance and statements following Plaintiffs' acceptance of the Government's offer, the execution by the parties of the CY 2014, CY 2015, and CY 2016 QHPI Agreements, BCBSSC's execution of attestations including the attestations regarding risk corridor payments and charges, and the

Government's repeated assurances that full and timely risk corridor payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013).

114. Each of the implied-in-fact contracts were authorized by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

115. The risk corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced BCBSSC's decision to agree to become a QHPI and participate in the CY 2014, CY 2015, and CY 2016 ACA Exchanges.

116. BCBSSC, in turn, provided a real benefit to the Government by agreeing to become a QHPI and participate in the CY 2014, CY 2015, and CY 2016 ACA Exchanges, despite the uncertain financial risk.

117. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the ACA Exchange programs: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

118. The Government induced BCBSSC to participate in the CY 2015 ACA Exchanges by including the risk corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health insurers financially against risk selection and market uncertainty.

119. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or

otherwise abrogate the United States' contractual obligation to make full and timely risk corridor payments to Plaintiffs.

120. The Government's failure to make full and timely CY 2015 risk corridor payments to BCBSSC is a material breach of the implied-in-fact contracts.

121. As a result of the United States' material breaches of its implied-in-fact contract that it entered into with BCBSSC regarding the CY 2015 ACA Exchanges, Plaintiffs have been damaged in the amount of at least $19,074,984, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against the Defendant, the United States of America, as follows:

(1) Awarding damages sustained by Plaintiffs, in the amount of at least $19,074,984, as a result of the Defendant's failure to make payments required by Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the CY 2015 risk corridor payments;

(2) Should the Court determine, that the Government is liable to Plaintiffs for monetary damages for failure to make full and timely risk corridor payments for CY 2015, and thus enter judgment against the United States, Plaintiffs further requests that the Court declare, as incidental to that monetary judgment, that based on the Court's legal determinations as to the Government's CY 2015 risk corridor payment obligations, the Government must make full and timely CY 2016 risk corridor payments to Plaintiffs if Plaintiffs experience qualifying losses during those years;

(3) Awarding all available interest, including, but not limited to, post-judgment interest, to Plaintiffs;

(4) Awarding all available attorneys' fees and costs to Plaintiffs; and

(5) Awarding such other and further relief to Plaintiffs as the Court deems just and equitable.

Dated: November 11, 2016

Respectfully submitted,

McDERMOTT WILL & EMERY LLP

By:*/s/ Joshua D. Rogaczewski*
Ankur J. Goel+ (*application pending)*
Joshua D. Rogaczewski
McDERMOTT WILL & EMERY LLP
500 North Capitol Street, N.W.
Washington, DC 20001-1531
+1 202 756 8000

Christopher M. Murphy+
McDERMOTT WILL & EMERY LLP
227 West Monroe Street
Chicago, IL 60606-5096
+1 312 372 2000

+ Of Counsel to Plaintiffs