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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
JUL 6 2017
U.S. COURT OF
FEDERAL CLAIMS

Nancy G. Atkins, in her capacity as Liquidator of Kentucky Health Cooperative, Inc.,	
Plaintiff,	
v.	Case No. 17-906 C
THE UNITED STATES OF AMERICA,	
Defendant.	

COMPLAINT

Plaintiff, Nancy G. Atkins, in her capacity as Liquidator of Kentucky Health Cooperative, Inc. ("Plaintiff" or "Liquidator"), brings this action against the United States Government ("Defendant" or "Government") seeking damages and other relief for the Defendant's (1) violation of Section 1342 of the Patient Protection and Affordable Care Act ("Section 1342") and 45 C.F.R. § 153.510(b) ("Section 153.510"); and (2) breach of its risk corridors program ("RCP") 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 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 RCP is required by statute to be modeled after a similar program enacted as part of the Medicare Prescription Drug, Improvement, and Modernization Act signed into law in 2003 (*i.e.*, Medicare Part D).

8. Specifically, Section 1342 of the ACA contains two related mandatory terms for all issuers of QHPs on an exchange to partially mitigate risk: (1) any health insurer selling a QHP on an exchange (a "QHP issuer") would receive reimbursement from the Government if its losses exceeded a certain defined amount due to high utilization and high medical costs; and (2) the QHP issuers would pay the Government a percentage of any gains they made in excess of similarly defined amounts. The ACA's framework thus compares "allowable costs" (essentially claims costs and adjustments for quality improvement activities, reinsurance, and risk adjustment charges or payments) with a "target amount" (the QHP's premium less its allocable administrative costs). If the ratio of a QHP issuer's allowable costs to the target amount is greater than 1, it experiences losses; but if the ratio is less than 1, it experiences gains.

9. In other words, the RCP specifically guarantees that if an insurer's allowable costs "for any plan year" exceeded the target amount, the U.S. Department of Health & Human Services ("HHS"), CMS's parent agency, "shall pay to the plan" a portion of such excess allowable costs pursuant to the payment-calculation formula set forth in the ACA. And, conversely, plans that incur allowable costs below the target amount in the benefit year "shall pay" a portion of the differential to the Government.

10. The only significant precondition for the Government's payment obligations is the calculation of revenue and cost data submitted to CMS by the QHP issuers.

11. Through the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. No. 113-235) ("2015 Spending Law") and, a year later, the Consolidated Appropriations Act, 2016 (Pub. L. No. 114-113) ("2016 Spending Law"), Congress passed laws that prevented CMS and HHS, through appropriations riders, from using certain accounts to fund the obligated risk corridors payments. Specifically, these laws prevented CMS from using the Federal Hospital

Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, as well as funds transferred from other accounts funded by the 2015 Spending Law and 2016 Spending Law to the CMS Program Management account for fiscal years 2015 and 2016, to fund the obligated risk corridors payments.

12. The practical effect of the 2015 Spending Law was that CMS did not pay QHP issuers their full risk corridor receivable amounts due for benefit year 2014. During 2014, QHP issuers incurred almost $2.9 billion in losses that were compensable under the risk corridors provisions of the ACA. This amount is not disputed by HHS. However, due to the 2015 Spending Law, over $2.5 billion of the mandatory risk corridor payments for 2014 were not paid.

13. The QHP issuers on the whole incurred even greater compensable losses in benefit year 2015 that CMS has not paid as a result of the 2016 Spending Law.

14. Nevertheless, Congress did not otherwise restrict availability of federal funds and did not amend Section 1342 to limit, much less eliminate, the Government's RCP payment obligations to insurers under the ACA.

15. Kentucky Health Cooperative, Inc. ("KYHC") was a non-profit corporation organized under the laws of Kentucky with its principal place of business in Louisville, Kentucky. On October 29, 2015, the Franklin Circuit Court placed KYHC into rehabilitation until January 15, 2016, when KYHC was placed into liquidation. KYHC was a QHP issuer under the ACA.

16. In benefit years 2014 and 2015, KYHC provided health insurance to its members on the state-based marketplace in Kentucky.

17. In total, CMS has conceded that KYHC is owed $77,074,941.10 under the RCP for its participation in the marketplace for benefit year 2014. In addition, CMS has conceded

that KYHC is owed $77,311,836.24 for its participation in the same marketplace for benefit year 2015. *See* CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf ("2014 Payment Memo"); CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf ("2015 Payment Memo").

18. To date, however, CMS has stated publicly in sub-regulatory guidance that it will not make full payment for benefit years 2014 and 2015 until a later—but as-of-yet undetermined—date, if at all.

19. RCP payments for the 2014 and 2015 benefit years are presently due to KYHC. By this lawsuit, Plaintiff seeks full payment of the RCP payments to which KYHC is entitled from the Government under the ACA for benefit years 2014 and 2015. The law is clear, and the Government must abide by its statutory obligations. Plaintiff respectfully asks the Court to compel the Government to do so.

JURISDICTION

20. 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 1342, a money-mandating statute that requires payment from the federal government to QHP issuers, like KYHC, that satisfy certain criteria. Section 153.510(b) is a money-mandating regulation that implements Section 1342 and thus also obligates payment from the federal government to QHP issuers that satisfy certain criteria.

21. 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.

22. This controversy is ripe because CMS has failed to pay KYHC the full amount it is owed for benefit years 2014 and 2015 as required by Section 1342 and Section 153.510.

PARTIES

23. Plaintiff is the Commissioner of the Kentucky Department of Insurance ("KY DOI") 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 Nancy G. Atkins, in her 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 court-appointed Liquidator of KYHC.

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

25. KYHC was a member-led QHP issuer on the exchange in Kentucky. It was organized as a non-profit under the CO-OP model and offered comprehensive health insurance benefits to individuals, families, and businesses in Kentucky.

26. 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.

27. Defendant is the Government, acting through CMS (or CMS's parent agency, HHS). Unless otherwise noted, references in this Complaint to CMS include HHS where applicable.

FACTUAL ALLEGATIONS

I. The Affordable Care Act Established a "Risk Corridors" Program With Two-Way Payment Obligations.

28. The Affordable Care Act established three insurance premium stabilization programs to address uncertainties in the marketplaces, commonly referred to as the "Three Rs": (1) a three-year risk corridors program; (2) a three-year reinsurance program; and (3) a permanent risk adjustment program. Both the reinsurance and risk corridors programs began in 2014 and concluded at the end of 2016.

29. Section 1342 of the Affordable Care Act, as codified at 42 U.S.C. § 18062, created the risk corridors program. In relevant part that Section states:

> (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 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 the allowable costs in excess of 108 percent of the target amount.

Pub. L. No. 111-148, § 1342 (emphasis added). Section 1342 also includes a provision dealing with "payments in," requiring QHP issuers to pay amounts to HHS if the plans' actual costs are

less than its targeted costs. *Id.* § 1342(b)(2). For both the "payments out" and "payments in" provisions, the terms "allowable costs" and "target amount" are defined by the statute. *Id.* § 1342(c).

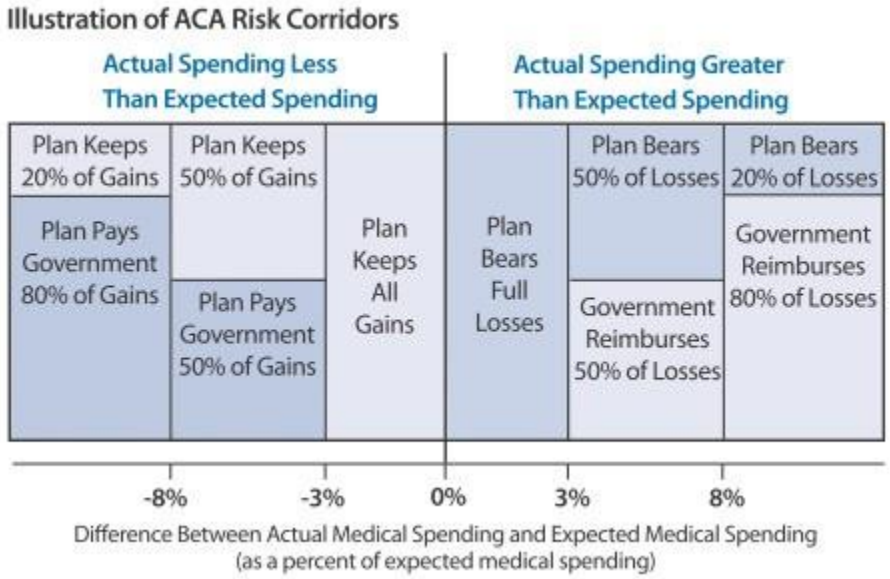
30. HHS implemented the RCP in the Code of Federal Regulations at 45 C.F.R. § 153.510. In relevant part, Section 153.510 states:

> (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.

(Emphases added.)

31. This regulation and other regulations adopted by HHS further mandate certain data reporting requirements and deadlines applicable to the QHP issuers. 45 C.F.R. §§ 153.510, 153.530. Following verification by HHS of the QHP issuers' data submissions, HHS is required to pay the insurers based on their plans' excess expenses (one amount for expenses greater than 103 percent and another amount for expenses greater than 108 percent of each QHP issuer's target amount).

32. The QHP issuers' and the Government's respective risk corridors payment obligations pursuant to Section 1342 are graphically depicted in the following chart from the American Academy of Actuaries:



33. The purpose of the RCP—in conjunction with the others of the Three Rs—was to induce health insurer participation in the health insurance exchanges by partially mitigating their risk of loss. Congress recognized that this could only work effectively if the payment obligations were honored on an annual benefit or plan year basis.

34. Section 1342 does not establish a fund into which QHP issuers must make payments due or from which payments must be made under the RCP, *i.e.*, the statute does not create a single account to service both payments in and payments out. Nor does the statute provide that the RCP must be budget neutral. In other words, payments out are ***not*** subject to payments in and vice versa. The statute is clear that the Government will share in the losses for plans with higher-than-anticipated costs so that if, hypothetically, all plans have higher-than-anticipated costs, the Government would need to make payments even though there would be no insurer payments coming in. The program could not have been subject to budget neutrality for the reason stated in the preceding paragraph. Had the program been cabined by budget neutrality requirements, the Government would have shared no risk of loss. HHS's timely and complete payment to plans under the RCP is essential to realizing Congress's intent with respect to the

ACA.

35. Indeed, Section 1342 is expressly modeled for just that reason on the Medicare Part D program, which is also not required to be budget neutral. *See* 42 C.F.R. § 423.336.

II. QHP Issuers Participated in Exchanges in Reliance on the Risk Corridors Program.

36. As noted above, the ACA's health insurance exchanges became operational for the 2014 benefit year. For KYHC to participate in the Kentucky marketplace for the 2014 benefit year, it had to submit its premiums to the Government by May 2013. Its commitment to participate in the marketplace was fixed and irrevocable in or around September 2013, when it entered into a QHP Issuer Agreement with CMS for participation in the marketplace. KYHC and other insurers entered onto the exchanges with the express understanding—based on the plain text of Section 1342—that if their allowable costs "for any ***plan year***" exceeded the target amount, the Secretary "***shall pay to the plan***" the amounts set forth in the ACA (*i.e.*, amounts to partially, not completely, offset issuers' cost overruns). The implementing regulations at 45 C.F.R. § 153.510 expressly reiterated this ACA requirement, stating that when a QHP's allowable costs "for any ***benefit year***" exceeded the target amount, "***HHS will pay the QHP issuer***" the amounts set forth in the ACA. The Government gave no indication at that time that it would subsequently fail to pay its conceded risk corridors obligations or hold payments due for a particular plan year until a later and indefinite date.

37. Health insurers relied on the statutorily mandated RCP and its commitment to make payments in establishing and operating their plans. It was not until October 2015, long after health insurers established plans, incurred costs, and agreed to participate for the ***last*** year of the RCP, that the Government first indicated that it would pay only 12.6 percent of its obligations under the RCP for the 2014 (i.e., ***first***) benefit year. *See* CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), *available at*

https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf. Similarly, it was not until September 2016 that CMS first indicated that it anticipated that "no funds [would] be available at this time for 2015 benefit year risk corridors payments." *See* CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF. CMS then confirmed in November 2016 that it would not pay *any* portion of its obligations under the RCP for the 2015 benefit year. *See* 2015 Payment Memo.

III. The Risk Corridors Program Faces Challenges After Enactment.

38. Since its enactment, Congress has not amended the RCP or the Government's obligations under the ACA's RCP. Despite this, the Government has frustrated the intended purpose of the program, *i.e.*, timely and complete payment to QHP issuers in order to satisfy the statutory agreement to share the risk of losses between the Government and QHP issuers.

39. The first such step was in March 2014, when HHS unexpectedly took the position in sub-regulatory guidance that the RCP would be self-funding or "budget-neutral." Each spring, HHS publishes an annual rulemaking articulating the payment policies and requirements for participation in the ACA marketplaces, the so-called annual Payment Rule. Specifically, in the preamble to the 2015 Payment Rule, and related guidance issued in April 2014, HHS indicated that it would attempt to administer the RCP in a budget-neutral manner and would offset liabilities with future collections.

40. The preamble to the 2015 Payment Rule, issued in March 2014, stated:

> [w]e intend to implement this program in a budget-neutral manner, and may make future adjustments, either upward or downward to this program (for example, as discussed below, we may modify the ceiling on allowable administrative costs) to the extent necessary to achieve this goal.

HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014).

41. Then, in April 2014, CMS issued a statement asserting:

> 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.

CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf ("April 11 Guidance").

42. HHS never raised during the rulemaking on its Section 1342 implementing regulation (which was promulgated on March 23, 2012) that it would administer the RCP in a budget-neutral manner. Indeed, in its 2014 Payment Rule, issued March 11, 2013, HHS stated that "[t]he risk corridors program is not statutorily required to be budget neutral." HHS Notice of Benefit and Payment Parameters for 2014 ("2014 Payment Rule"), 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013). Further, Congress stated expressly in Section 1342 that the RCP was to be "based on" the Medicare Part D risk mitigation program, which is not budget neutral. *See* GAO, Report 15-447 (April 2015) at 14, *available at* http://www.gao.gov/assets/680/670161.pdf ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions.").

43. Subsequently, the Government announced by agency fiat (in the form of sub-regulatory guidance, not subject to public notice and comment) in the spring of 2014 that it would aspire to administer the risk corridors program in a "budget-neutral" manner

notwithstanding the lack of any statutory basis for doing so. The Government then reiterated that new position for years 2015 and 2016 pointing to the April 11, 2014 "Risk Corridors and Budget Neutrality" guidance, suggesting that any decision on how the Government would complete the statutorily required payments under the RCP would be left to some indeterminate date in the future.

44. The Government's budget neutrality approach is not supported by law. Neither Section 1342 nor Section 153.510 provides that the risk corridors payments will come from the payments made to the Government by other insurers (*i.e.*, payments in). Nor does either provision contemplate permitting the Government to postpone payments that are owed until the following year's collections are accounted for (or, should recent post-hoc positions taken by HHS prevail, some indeterminate date in the future, if at all).

45. On November 19, 2015, Defendant stated that, "HHS is recording those amounts that remain unpaid following our 12.6 percent payment this winter ***as a fiscal year 2015 obligation of the United States Government for which full payment is required***." *See* 2014 Payment Memo (emphasis added). The statement was extraordinary in that the agency *conceded* that it owed KYHC and other QHP issuers payment under the RCP, *failed* to pay the amounts due, and offered instead to short-pay the health plans "12.6 percent" of what is owed.

IV. Congress Did Not Appropriate Funds for the Risk Corridors Program.

46. In December 2014, Congress passed the 2015 Spending Law, which prohibited the use of Medicare and certain other trust funds for fiscal year 2015 for risk corridors payments. The two funds specifically mentioned in the 2015 Spending Law as sources from which risk corridors payments may not be drawn are designated throughout Division G of the 2015 Spending Law to fund other programs and initiatives under HHS. But the 2015 Spending Law did not eliminate the use of all funds in the CMS Program Management account, such as fees

received by HHS for the federally facilitated exchanges. It also did not apply to years other than the fiscal year ending September 30, 2015. Most notably, Congress did not amend Section 1342 to require budget neutrality or to alter the underlying risk corridors obligations of the Government.

47. The 2015 Spending Law was enacted on December 16, 2014, nearly a year after KYHC began offering insurance on the newly reformed and ACA-compliant Kentucky exchange. Faced with this new development, KYHC continued to abide by its obligations to the Government and its insured participants.

48. In December 2015, Congress passed the 2016 Spending Law. As in the 2015 Spending Law, the 2016 Spending Law prohibited CMS from using trust funds and other accounts for the fiscal year ending September 30, 2016 to fund risk corridors payments. But, like the 2015 Spending Law, *it did not amend Section 1342 to require budget neutrality or alter the underlying risk corridors obligations of the Government*.

49. On September 9, 2016, CMS issued a memorandum reiterating the agency's understanding that the Government owed "full" payment to insurers. *See* CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF. That memorandum was followed by testimony of CMS Acting Administrator Andrew Slavitt before the House Energy and Commerce Committee on September 14, 2016. Among other things, Mr. Slavitt stated without equivocation in response to a question posed by Representative Morgan Griffith that, notwithstanding the lack of an appropriation to fund the payments due insurers under Section 1342, it was "*an obligation of the federal government*" to remit full

payment to insurers.[1]

V. KYHC Suffered Substantial Harm as a Result of the Government's Failure to Pay Amounts Owed.

A. KYHC Experienced Financial Distress.

50. KYHC was one of the CO-OPs founded pursuant to the ACA in order to inject competition into the insurance market through non-profit, consumer-focused health plans. The ACA requires CO-OPs to derive substantially all of their business from the individual and small group markets and to offer QHPs. The ACA authorized HHS to award $6 billion in loans and grants to CO-OPs to help establish them. When it enacted the American Taxpayer Relief Act of 2012 (Pub. L. No. 112-240, H.R. 8, 126 Stat. 2313) (Jan. 2, 2013), Congress decreased this funding and prevented CMS from making new loan awards or entering into new loan agreements with CO-OPs.

51. Section 1342 of the ACA requires the Government to reimburse KYHC for a percentage of its higher-than-expected allowable costs incurred as a result of its participation in the marketplaces pursuant to the statutory formula, just as Section 1342 requires KYHC or any other QHP issuer to pay CMS a percentage of realized lower-than-expected allowable costs.

52. The RCP is one of the principal marketplace premium stabilization programs created by the ACA. It is designed to *limit* the effects of adverse selection and to partially *mitigate* new health insurance risks in the context of a reformed regulatory framework. While it might be a post-hoc aspiration *of HHS*, for convenience as the program administrator, that the RCP operates in a budget neutral manner that allows it to simply redistribute the premium revenues paid back into the program (from plans with lower-than-expected allowable costs) to

[1] *See* Press Release, The Energy and Commerce Committee, Obamacare Insurance Bailout Scheme (Sept. 20, 2016), *available at* https://energycommerce.house.gov/news-center/press-releases/ec-leaders-press-administration-lawsuit-scheme-circumvent-congress-and.

those plans with higher-than-expected allowable costs, the RCP was specifically crafted *by Congress* to avoid that linkage. Under Section 1342, outgoing payments are not contingent on incoming payments.

53. On November 19, 2015, CMS conceded the amounts that it owes to insurers (and is owed by insurers) for benefit year 2014 as a result of the RCP. *See* 2014 Payment Memo. The calculations are separated into individual market and small group market sectors. For benefit year 2014, as CMS concedes, KYHC was *owed* $77,074,941.10 under the RCP.

54. On or about December 2015, CMS made an initial payment of $9,725,213.20 to KYHC for the amount CMS concedes that it owes to KYHC for benefit year 2014, which amounts to approximately 12.6 percent of the total owed. Since its initial payment, CMS made additional payments amounting to $2,560,229.94. In total, KYHC has received $12,285,443.14—or approximately 15.9 percent—of the amount CMS concedes that it owes KYHC for benefit year 2014.

55. On September 9, 2016, HHS stated that all benefit year 2015 collections would be used to pay outstanding liabilities for the 2014 benefit year. That is, there would be no payments made for the 2015 benefit year. *See* CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), *available at* https://www.cms.gov/cciio/programs-and-initiatives/premium-stabilization-programs/downloads/risk-corridors-for-2015-final.pdf.

56. On November 18, 2016, CMS conceded the amounts that it owes to insurers (and is owed by insurers) for benefit year 2015 as a result of the RCP. *See* 2015 Payment Memo. The calculations are separated into individual and small group markets. For benefit year 2015, KYHC was owed $77,311,836.24 under the RCP. To date, CMS has paid no portion of the full amount CMS concedes that it owes to KYHC for benefit year 2015.

B. KYHC Was Placed in Rehabilitation and Then Liquidation by the Franklin Circuit Court Under the Kentucky Insurers Rehabilitation and Liquidation Law, KRS Chapter 304.33.

57. KY DOI 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. Total reported capital and surplus as of December 31, 2014 was $65,226,070. Several hazardous financial condition indicators were triggered as a result of this analysis.

58. Absent payment of RCP receivables by Defendant, KYHC was forced to treat those unpaid receivables as non-admitted assets, impairing its financial condition. *See* Nat'l Ass'n of Ins. Comm'rs, INT 15-01: ACA Risk Corridors Collectability (Nov. 5, 2015), *available at* http://www.naic.org/documents/committees_e_app_eaiwg_related _int_1501_risk_corridors.pdf. Thus, on October 6, 2015, KY DOI completed a report summarizing the results of a targeted financial examination of KYHC. The report recommended reducing KYHC's 2014 and 2015 plan years risk corridors receivable from $81,600,000 to $9,642,095 (a reduction of $71,957,905). The non-admission of the unfunded portion of the risk corridors receivable decreased Total Capital and Surplus by $71,957,905 to -$10,938,882. Based on these findings, the report recommended that KY DOI take formal action to prevent KYHC from writing new insurance policies for the 2016 and subsequent plan years.

59. On October 29, 2015, the Franklin Circuit Court, acting pursuant to the Kentucky Insurers Rehabilitation and Liquidation Act (hereinafter the "Liquidation Act"), found in Chapter 304.33 of the Kentucky Revised Statutes, entered an order placing KYHC into rehabilitation ("Rehabilitation Order"). Subsequent efforts to rehabilitate KYHC proved futile and, ultimately, H. Brian Maynard (Plaintiff's predecessor as Commissioner of KY DOI and Liquidator) filed a petition with the Franklin Circuit Court seeking an order of liquidation.

60. On January 15, 2016, the Franklin Circuit Court placed KYHC into liquidation

(the "Liquidation Order"). The Liquidation Order stated, among other things, that the Liquidator was authorized to institute legal proceedings and to collect all debts and monies due and claims belonging to KYHC.

VI. The Government Owes Plaintiff 2014 Risk Corridors Payments.

61. In September 2013, KYHC and CMS executed a QHP Issuer Agreement for KYHC's participation as a QHP issuer in the Kentucky marketplace.

62. Consistent with CMS regulations and KYHC's agreements with CMS, KYHC began selling QHPs to consumers in Kentucky in or around September 2013 with coverage effective January 1, 2014.

63. Pursuant to its obligations under the ACA and 45 C.F.R. §§ 153.500 *et seq.*, KYHC complied with its statutory requirements throughout the year and submitted all required data for the risk corridors calculations by the statutory deadline of July 31, 2015. *See* 45 C.F.R. § 153.530(d).

64. On October 1, 2015, HHS announced that funds paid by QHP issuers into the RCP (payments in) would only be sufficient to cover 12.6 percent of risk corridors payment requests (payments out). CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf. Based on the Government's own official calculation, QHP issuers generated $362 million in risk corridors gains for the Government, but QHP issuers suffered $2.87 billion in compensable risk corridors losses. The 12.6 percent that HHS anticipated could initially be paid reflected a prorated redistribution of the $362 million received from the insurers that were required to pay the Government for the 2014 program year.

65. As a result, although CMS conceded that KYHC is entitled to $77,074,941.10

from the RCP for the 2014 benefit year, the agency has only paid $12,285,443.14 of this amount (including its initial payment and its subsequent payment).

66. With respect to its partial payments for benefit year 2014, HHS stated that it was "recording those amounts that remain[ed] unpaid following [its] 12.6% payment this winter as [a] fiscal year 2015 obligation of the United States Government for which full payment is required." *See* 2014 Payment Memo.

67. HHS's unilateral decision to pay only a small fraction of the amounts that it owes KYHC contradicts the express language of Section 1342, which states that if a plan's allowable costs "for any ***plan year***" exceeds the target amount, the Secretary "***shall pay to the plan***" the amounts set forth in the ACA. The implementing regulations at 45 C.F.R § 153.510 expressly reiterate when a QHP's allowable costs "for any ***benefit year***" exceeded the target amount, "***HHS will pay the QHP issuer***" the amounts set forth in the ACA.

68. HHS stated on November 19, 2015, that "[t]he remaining 2014 risk corridors claims will be paid out of 2015 risk corridors collections, and if necessary, 2016 collections." *See* 2014 Payment Memo. HHS concluded that in the event of a shortfall for the 2016 program year, HHS "***will explore other sources of funding for risk corridors payments, subject to the availability of appropriations***. This includes working with Congress on the necessary funding for outstanding risk corridors payments." *Id.* (emphasis added). HHS has, therefore, failed to pay an "obligation of the United States Government for which full payment is required," and seeks to leave its payment of this debt completely open-ended and unsatisfied.

69. The Government, by failing to meet its payment obligations under the RCP in violation of Section 1342, abrogated its responsibility with respect to one of the key features of the ACA, *i.e.*, providing market-stabilization in the new exchanges.

70. The Government's failure to pay money due under the RCP gives rise to financial difficulties for issuers like KYHC. Withholding RCP payments defeats the very purpose of the RCP: partial mitigation of the risks and obligations that QHP issuers like KYHC assumed by providing health coverage under the ACA.

VII. The Government Owes Plaintiff 2015 Risk Corridors Payments.

71. In October 2014, KYHC and CMS executed a QHP Issuer Agreement for KYHC's participation as a QHP issuer in the Kentucky marketplace.

72. Consistent with CMS regulations and KYHC's agreements with CMS, KYHC began selling QHPs to consumers in Kentucky on or about November 15, 2014, with coverage effective January 1, 2015.

73. As it did in relation to its 2014 risk corridors payments, KYHC complied with its statutory requirements and submitted to HHS all data required to show it was entitled to payment by HHS in the amount of $77,311,836.24 for benefit year 2015.

74. Yet again, however, HHS has stated that it will not make a payment as required by the ACA for benefit year 2015. Similar to the 2015 Spending Law, the 2016 Spending Law prevents CMS and HHS from making risk corridors payments from certain funding sources. As a result, HHS indicated that it will continue to treat the RCP as "budget neutral" (although there is no basis in the ACA for doing so), and will use any funds received from QHP issuers for the 2015 risk corridors results to first pay down the $2.5 billion shortfall from 2014.

75. Despite the clear statutory mandate and its own multiple admissions of its obligations to the contrary, HHS stated that it will not make *any* payments to QHP issuers for benefit year 2015.

* * * * *

76. The Government's obligations under the ACA's risk corridors program have

never been amended. Section 1342 mandates payment to QHP issuers under certain conditions without regard to budget neutrality. Notwithstanding subsequent agency pronouncements, and the 2015 and 2016 Spending Laws limiting the availability of certain funds to make payments owed to QHP issuers under the risk corridors program, which occurred after QHP issuers such as KYHC entered the market, CMS's implementing regulation (Section 153.510) reflects the mandatory nature of the payments without regard to budget neutrality and the Government is obligated to make RCP payment in accordance with Section 1342.

77. KYHC relied upon the RCP when it entered the ACA exchanges for plan years 2014 and 2015. At the end of plan year 2014, KYHC was *owed* money based on its participation in both the individual and small group markets. HHS paid only a small fraction of the total that was due. The remainder in the amount of $64,789,497.96 is owed and presently due. Similarly, the $77,311,836.24 losses sustained under the RCP for benefit year 2015 are owed and presently due to Plaintiff under the express terms of Section 1342 of the ACA. By this lawsuit, Plaintiff seeks the immediate payment in full of risk corridors receivables for the 2014 and 2015 benefit years.

CLAIM FOR RELIEF

COUNT 1

(Violation of Statutory and Regulatory Mandate to Make Payments)

78. Plaintiff re-alleges and incorporates the above Paragraphs 1-77 as if fully set forth herein.

79. As part of its obligations under Section 1342 of the ACA and its obligations under 45 C.F.R. § 153.510(b), the Government is required to pay any QHP issuer certain amounts exceeding the target costs they incurred in 2014 and 2015.

80. KYHC was a QHP issuer under the ACA and, based on its adherence to the ACA and its submission of allowable costs and target costs to CMS, satisfies the requirements for payment from the United States under Section 1342 of the ACA and 45 C.F.R. § 153.510(b).

81. The Government has failed, without justification, to perform as it is obligated under Section 1342 of the ACA and 45 C.F.R. § 153.510(b), and has affirmatively stated that it will not do so.

82. The Government's failure to provide timely payments to KYHC is a violation of Section 1342 of the ACA and 45 C.F.R. § 153.510(b), and KYHC has been harmed by these failures.

83. Congress's failure to appropriate sufficient funds for risk corridor payments due, without modifying or repealing Section 1342 of the ACA, did not annul the Government's statutory obligation to make full and timely risk corridors payments to KYHC. The Government is obligated to make full payment to Plaintiff using the Judgment Fund. Plaintiff is entitled to full payment from the Judgment Fund of the $64,789,497.96 in unpaid 2014 risk corridors payments and $77,311,836.24 in unpaid 2015 risk corridors payments.

COUNT II

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

84. Plaintiff re-alleges and incorporates by reference the above Paragraphs 1-83 as if fully set forth herein.

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

86. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's repeated admissions regarding their obligation to make risk corridor payments were made or ratified by authorized representatives of the Government, including, but not limited to, Kevin Counihan, Director of Consumer Information and Insurance Oversight ("CCIIO") and CEO of the Health Insurance Marketplaces; Andrew Slavitt, Acting Administrator of CMS; or other CMS officials, all of whom had actual authority to bind the Government. Section 1342, CMS's implementing regulations, and the repeated admissions by agency officials with authority to bind the Government constitute a clear and unambiguous offer by the Government to make full and timely risk corridor 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.

87. 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 proceeding to provide health insurance in the Kentucky marketplace. KYHC satisfied and complied with its obligations and conditions which existed under the implied-in-fact contract.

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

89. 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 QHP Issuer Agreements each year, 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.*, 2014 Payment Rule, 78 Fed. Reg. at 15,473.

90. The implied-in-fact contract was also supported by mutual consideration: the RCP's partial mitigation of the risks posed by the ACA's new exchanges through reimbursement of QHP issuers' cost overruns was a real benefit that 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 participating in the marketplace, as 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.

91. The Government induced KYHC to participate in the Kentucky marketplace for benefit year 2014 by including the RCP in Section 1342 of the ACA and its implementing regulations, by which the Government committed to partially mitigating KYHC's cost overruns by sharing in the risk of KYHC's losses.

92. The Government repeatedly acknowledged its commitments to share risk with QHP issuers and its obligations to make full and timely risk corridors payments to qualifying QHP issuers through its conduct and statements to the public and to KYHC and other similarly situated QHP issuers. *See, e.g.*, Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. 17,220, 17,238 (Mar. 23, 2012). These acknowledgements were made or ratified by representatives of the Government who had express or implied actual authority to bind the Government.

93. The Government also induced KYHC to commit to the Kentucky marketplace for

benefit year 2015 during and after HHS and CMS's announcement in 2014 of their intention to implement the RCP in a budget neutral manner by repeatedly giving assurances to QHP issuers, including KYHC, that risk corridors collections will be sufficient to cover all of the Government's risk corridors payments, and that QHP issuers will receive full payments regardless of the collection amount. *See, e.g.*, April 11 Guidance ("We anticipate that risk corridors collections ***will be sufficient*** to pay for all risk corridors payments.") (emphasis added); Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2015) ("***In the unlikely event of a shortfall*** for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, ***HHS will use other sources of funding for the risk corridors payments***, subject to the availability of appropriations.") (emphases added).

94. HHS and CMS acknowledged and published the full risk corridors payment amount of $77,074,941.10 that the Government concedes it owes Plaintiff for benefit year 2014. *See* 2014 Payment Memo.

95. HHS and CMS also acknowledged and published the full risk corridors payment amount of $77,311,836.24 that the Government concedes it owes Plaintiff for benefit year 2015. *See* 2015 Payment Memo.

96. Congress's failure to appropriate sufficient funds for risk corridor payments due, without modifying or repealing Section 1342 of the ACA, did not annul the Government's contractual obligation to make full and timely risk corridor payments to KYHC. The Government is obligated to make full payment to Plaintiff using the Judgment Fund. Plaintiff is entitled to full payment from the Judgment Fund of the $64,789,497.96 in unpaid 2014 risk corridors payments and $77,311,836.24 in unpaid 2015 risk corridors payments.

97. The Government's failure to make full and timely risk corridor payments to KYHC, and now the Liquidator on KYHC's behalf, 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 $142,101,334.20 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 amounts to which Plaintiff is entitled under Section 1342 of the Affordable Care Act and 45 C.F.R. § 153.510(b): $64,789,497.96 (for benefit year 2014) and $77,311,836.24 (for benefit year 2015).

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: July 6, 2017

Respectfully submitted,

/s/ Stephen McBrady
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CERTIFICATE OF SERVICE

I certify that on July 6, 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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