

Receipt number 9998-4151036

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED

AUG 25 2017

U.S. COURT OF
FEDERAL CLAIMS

TOM GLAUSE,)
WYOMING STATE)
INSURANCE COMMISSIONER,)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)

No. 17-1157 C

COMPLAINT

This is an action by Tom Glause, Wyoming State Insurance Commissioner, on behalf of WINhealth Partners's (WINhealth) liquidation estate. The purpose of this action is to obtain millions of dollars the United States owes the estate under the "risk corridors" program established under the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (ACA). Mr. Glause, as the receiver of the WINhealth estate, through the Wyoming Attorney General's Office, brings this action against the United States to enforce payment of this obligation and in support states:

PARTIES

1. Plaintiff Tom Glause is the Wyoming State Insurance Commissioner. Wyoming law requires the insurance commissioner's appointment as the receiver "in delinquency proceedings for a domestic or alien insurer." Wyo. Stat. Ann. § 26-28-112(a). WINhealth was a Wyoming-based health maintenance organization with its principle place

of business located at 1200 East 20th Street, Cheyenne, WY 82001. WINhealth provided individual health insurance products under the ACA before entering receivership with the Wyoming State Insurance Commissioner in 2015. WINhealth is currently in liquidation. As receiver for the WINhealth estate, Mr. Glause “is vested by operation of law with title to all of [WINhealth’s] property, contracts, and right of action . . . [and] may recover and take possession of” all assets. Wyo. Stat. Ann. § 26-28-112(b). As “a party authorized by statute,” Mr. Glause is, therefore, the real party in interest in this suit. RCFC 17(a)(1)(G).

2. Defendant is the United States. The United States Department of Health and Human Services (HHS) is the agency that administers the risk corridors program through the Centers for Medicare and Medicaid Services (CMS).

JURISDICTION

3. This Court has jurisdiction over this action under the Tucker Act, 28 U.S.C. § 1491, because the United States has not fulfilled its payment obligations under the money-mandating statute that established the risk corridors program.

4. This Court also has jurisdiction under the Tucker Act because the United States has breached its responsibilities under an implied-in-fact contract between WINhealth and the United States.

STATEMENT OF FACTS

5. Before entering receivership, WINhealth was a Wyoming-based health maintenance organization providing health insurance to thousands of people in Wyoming. It was also a significant employer in the City of Cheyenne, Wyoming.

6. Congress enacted the ACA in 2010, dramatically changing the

responsibilities of health insurers, private citizens, businesses, and the United States in the health insurance marketplace.

7. The ACA imposed on private citizens the responsibility to acquire and maintain health insurance. To ensure citizen access to insurance, the ACA prohibited insurers from denying coverage to new applicants based on pre-existing medical conditions.

8. The ACA attempted to bolster insurer competition and consumer options in several ways. One of the greatest changes the ACA made in the healthcare field was the creation of health insurance marketplaces, also known as exchanges or health exchanges. Congress intended these exchanges to streamline delivery of individual health insurance plans to consumers. On these exchanges, Congress hoped insurers would sell “qualified health plans”—plans that satisfied minimum standards including providing certain essential health benefits and a sufficient contracted network of physicians. 42 U.S.C. § 18021.

9. Insurers make money when they pay out less in insurance claims than they collect for all policies sold in any given time period. Premiums decrease with lower risk and increase with higher risk. Because the price of insurance premiums is tied to the risk of payment on insurance claims, insurers are wary of insuring unknown risks. Selling qualified health plans directly to consumers through the exchanges represented a large unknown risk. Congress, through the ACA, intended to decrease this risk by ensuring that participating insurers would not lose too much money even if they miscalculated the risk of entry, thus stabilizing the risk inherent to the relatively unknown individual marketplace.

10. To this end, Congress created three programs, colloquially known as the “Three R’s”: reinsurance, risk adjustment, and risk corridors. This action involves the risk corridors program established under Section 1342 of the ACA and codified at 42 U.S.C. § 18062.

11. Congress authorized the risk corridors program for 2014, 2015, and 2016. *Id.* § 18062. The program’s purpose was to offset the losses of insurers who performed particularly poorly in the exchanges due to the unknown risks posed by the sale of qualified health plans on the Health Exchanges. On the flip side, insurers who performed particularly well would help fund the program. *Id.*

12. Congress stated that if:

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

(B) a participating plan’s allowable costs for any plan year [were] 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.

Id. § 18062(b)(1) (emphasis added). The risk corridors program defined “target amount” as the amount “equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan.” *Id.* § 18062(c)(2). It also defined “allowable costs” as the amount “equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan.” *Id.* § 18062(c)(1)(A).

13. A risk corridors program was not a novel idea, but rather was “based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act,” also known as “Medicare Part D.” *Id.* § 18062(a). Under Medicare Part D’s risk corridor, the United States makes annual risk corridor payments to, and receives payments from, plan sponsors depending on how the plan sponsor’s benefit program performs. *Id.* § 1395w-115(e). The United States does not require payment from plan sponsors before distributing risk corridor payments and the program is not revenue neutral.

14. The United States, through HHS and CMS, promulgated rules to administer the ACA risk corridors program. The final rules required insurers issuing qualified health plans to meet certain requirements HHS set and assured insurers that they “**will** receive payment from HHS” under the risk corridor. 45 C.F.R. § 153.510(b) (emphasis added).

15. While promulgating another final rule in spring 2013, HHS disavowed any push toward budget neutrality in the risk corridors program, declaring that “[t]he 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.” Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15473 (Mar. 11, 2013) (emphasis added). Thus, the United States reassured insurers that they would receive payments under the risk corridors program even if the program’s liabilities exceeded its receipts.

16. The United States, through CMS, also assured insurers that it would make

risk corridor payments to insurers at the same time that insurers owing to the program paid into it. Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010, 77 Fed. Reg. 17,144, 17,219 (Mar. 23, 2012).

17. Through these assurances, the United States enticed insurers to take on the unknown risks the individual and small group markets represented.

18. WINhealth reasonably relied on the United States's promise to make timely and unconditional risk corridor payments. Based on that promise, WINhealth offered qualified health plans on a health exchange.

19. WINhealth designed several qualified health plans to offer individuals and small groups on the exchange. WINhealth submitted these plans to the authorities regulating the Wyoming health exchange on September 9, 2013, and October 21, 2014. These authorities certified the qualifying health plans on September 23, 2013, and October 29, 2014. Certification meant that eligible insureds qualified for federal subsidies and that WINhealth qualified for the risk corridor program. WINhealth offered its qualified health plans on the Wyoming exchange for 2014 and 2015.

20. After WINhealth began offering qualified health plans on the exchange, the United States changed its position regarding risk corridor payments. In mid-March 2014, the HHS published a final rule with the notice of benefit and payment information for 2015. In the rule's preamble, HHS forecasted 2014 risk corridor payments would be "budget neutral" and stated an intention to implement the program "in a budget neutral manner." HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,787, 13,829 (Mar. 11, 2014).

21. HHS did not, however, address whether it would implement risk corridors “in a budget neutral manner” even if payments due out of the program exceeded those received. *See id.*

22. Shortly thereafter, CMS again stated publicly that it would pay all amounts due out of the risk corridors program “[r]egardless of the balance of payments and receipts” into the program. At the same time, it also attempted to walk back the United States’s promise to make full risk corridor payments every year. CMS stated that, if the program’s liabilities to insurers exceeded its receipts, each insurer owed a payment would receive only its pro rata share of the amount CMS collected. CMS also suggested that it would prioritize the following year’s payments into the risk corridors program to cover its remaining liabilities from the prior year. *See CMS, Risk Corridors and Budget Neutrality* (Apr. 11, 2014).¹

23. CMS’s new “budget neutral” position reversed the United States’s earlier position that the risk corridors program would pay its obligations in full irrespective of payments into it.

24. In fall 2014, the U.S. Government Accountability Office issued a report on the risk corridor program. The report concluded that the 2014 CMS Program Management fund provided HHS with the authority and appropriations necessary to make full risk corridor payments. GAO, *HHS—Risk Corridors Program*, B-325630 (Sept. 30, 2014).²

¹ Available at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf>.

² Available at <http://gao.gov/assets/670/666299.pdf>.

25. Later that year, Congress enacted the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130 (2014), which restricted CMS from using appropriated funds to make risk corridor payments.

26. Nonetheless, CMS reassured state insurance commissioners in mid-2015 that “HHS recognizes that **the Affordable Care Act requires the Secretary to make full payments to issuers.**” Letter from Kevin J. Counihan, Chief Executive Officer, Health Insurance Marketplace, Dir., CCIIO, CMS, to State Insurance Commissioners (July 21, 2015) (emphasis added).³ CMS also noted that “these payments should be taken into account before decisions are made on final rates.” *Id.*

27. The risk corridors program ultimately collected less money than HHS and CMS expected and accrued significant liabilities.

28. By early October 2015, CMS stated that the risk corridors program would be budget neutral and would not make full payments for 2014. Although insurers submitted \$2.87 billion in claims under the program, CMS only collected \$362 million to fund them.

29. Because of the risk corridor’s receivable deficit, CMS stated it would only pay qualifying insurers 12.6% of the amount owed to them under the program.

30. CMS continued to assert that it would pay the full amounts due under the program, even without a clear path to doing so. Despite CMS’s failure to pay in full, it reaffirmed in July 2015 that the ACA required it to pay the full amount of its risk corridor liabilities. In the meantime, the United States’s failure to satisfy its obligations caused

³ Available at <https://www.cms.gov/cciio/resources/letters/downloads/doi-commissioner-letter-7-20-15.pdf>.

WINhealth immense hardship, along with many other insurers who participated in the exchanges and who relied on the United States's promise of risk corridor payments.

31. WINhealth entered receivership for financial insolvency in late 2015, partially because of the United States's failure to honor its obligation to pay WINhealth the amount owed it under the risk corridors program.

32. Early the next year, Wyoming's First Judicial District Court ordered WINhealth into liquidation. The liquidation order triggered Wyoming's statutory protections that, in part, ensure policyholders and providers receive a portion of the benefit of their insurance contracts.

33. WINhealth's liquidation forced the Wyoming Life and Health Insurance Guaranty Association, the body that pays insolvent insurers' policyholder claims in Wyoming, to assess private insurers millions to cover losses that otherwise would have been paid through the risk corridors program. Furthermore, as receiver, Mr. Glause has the duty to maximize the value of the WINhealth estate. *See Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) ("[A] receiver['s] . . . only object is to maximize the value of the corporation[] for the benefit of [its] investors . . .").

34. Congress has not amended or repealed the ACA or the risk corridor program.

35. At all times before the liquidation, WINhealth satisfied its statutory, regulatory, and contractual duties to remain eligible under the risk corridor program.

36. WINhealth's participation in the exchanges in 2014 entitled it to \$5,066,639.98 in risk corridor payments. CMS paid \$621,207 of this amount, leaving an

unpaid balance of \$4,445,432.98 still owing to WINhealth.

37. WINhealth's participation in the exchanges in 2015 entitle it to \$13,649,867.00 in risk corridor payments for 2015. CMS has paid none of this amount.

38. The United States' underpayment of its risk corridor obligations to WINhealth leaves a total unpaid balance of \$18,095,299.98.

CLAIMS FOR RELIEF
COUNT ONE

(Violations of Section 1342, Statutory Mandates and Authority)

39. This section incorporates all allegations and assertions contained in paragraphs 1 through 38 as if fully set forth herein.

40. Section 1342 of the ACA, codified at 42 U.S.C. § 18062, and 45 C.F.R. § 153.510 require the United States to pay insurers participating in the risk corridors program when they incur certain losses.

41. WINhealth satisfied all eligibility requirements to participate in the risk corridors program. WINhealth sold certified qualified health plans on the Wyoming exchange in 2014 and 2015.

42. As a result of WINhealth's participation in the Wyoming exchange in 2014 and 2015, it suffered compensable losses in the amount of \$18,716,506.98. After partial payment, the United States still owes it approximately \$18,095,299.98.

43. The United States continues to change its stance about when, or if, it will ever pay the amount due to WINhealth. Its most recent position is that it will not pay out additional funds until it receives payments sufficient to cover its obligations. WINhealth

has no reasonable basis to believe this will ever occur; indeed, the chance of the United States receiving payments into the risk corridors program that fully cover its obligations is virtually zero.

44. The United States is obligated to pay WINhealth because 42 U.S.C. § 18062 is a money-mandating source of law. WINhealth is entitled to full payment from the Judgment Fund. WINhealth is also entitled to full payment from any other available funds or under any other applicable legal principles. Full payment to WINhealth would constitute judgment in its favor and against the United States in the amount of approximately \$18,095,299.98.

COUNT TWO

(Breach of Implied-in-Fact Contract)

45. This section incorporates all allegations and assertions contained in paragraphs 1 through 44 as if fully set forth herein.

46. WINhealth and CMS entered into an implied-in-fact contract requiring CMS to make risk corridor payments to WINhealth in the amount due under § 1342 and CMS's rules and regulations. WINhealth participated in the Health Exchange, sold Qualified Health Plans, and agreed to pay into the risk corridors program in return for, among other things, the promise of payments from the risk corridors program should it qualify to receive them.

47. WINhealth satisfied all statutory, regulatory, and contractual duties required to receive risk corridor payments.

48. By failing to pay the full amount owed to WINhealth under the risk corridors

program, the United States breached its contractual duties to WINhealth.

49. The United States's breach of the implied-in-fact contract left WINhealth with defined and specific money damages.

50. The United States anticipatorily breached its contractual obligations to WINhealth by announcing it will not pay the amounts due under the risk corridors program unless it receives payments into the program sufficient to cover its liabilities. Because the United States will never receive payments into the program fully covering its liabilities, which the United States knew when it made these statements, the United States's statement repudiates the contract.

51. WINhealth's receivership estate is entitled to full payment of its outstanding risk corridor receivable from the Judgment Fund. The estate is also entitled to full payment from any other available funds or under any other legal principles. The amount of the receivable is approximately \$18,095,299.98.

PRAYER FOR RELIEF

Wyoming Insurance Commissioner Tom Glause as the WINhealth receiver respectfully asks this Court to enter judgment in his favor and against the United States in the amount of \$18,095,299.98. Further, the Commissioner respectfully requests that this Court:

- A. Award WINhealth's receivership estate monetary relief equal to amount the United States still owes WINhealth under the 2014 and 2015 risk corridors at the time this Court enters its order;
- B. Award WINhealth's receivership estate monetary damages in the amount equal to what the United States continues to owe under its implied-in-fact contract with WINhealth at the time this Court enters its order;
- C. Award WINhealth's receivership estate additional damages and monetary relief to the extent it is available under applicable law;
- D. To the extent available, award WINhealth's receivership estate pre-judgment and post-judgment interest;
- E. To the extent available, award WINhealth's receivership estate costs and attorneys' fees; and
- F. Award WINhealth's receivership estate any additional relief that this Court deems necessary and proper.

DATED this 25th day of August 2017.

Respectfully submitted,

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