

Feds Eye Settling Insurers' ACA Suits To Stabilize Markets

By **Jeff Overley**

Law360, New York (September 12, 2016, 11:06 PM ET) -- The Obama administration is opening the door to settling numerous lawsuits with health insurers seeking billions of dollars in unpaid Affordable Care Act obligations, which would give the administration a path around Republicans' block on the market-stabilization spending.

The administration made the offer late Friday in a letter regarding the so-called risk corridor program, a three-year initiative that transfers cash from highly profitable insurers to money-losing insurers. Thus far, there haven't been enough profits to offset losses, and recent Republican-backed legislative provisions have barred the use of public funds to fill the gap. The provisions have triggered lawsuits from insurers who say the ACA guarantees risk-corridor payments — something the administration has not disputed.

Friday's letter said the U.S. Department of Justice is still "vigorously defending" against the lawsuits. But it added that the administration is "open to discussing resolution" and "willing to begin such discussions at any time."

Several experts on Monday were struck by the move, calling it a rare example of the federal government throwing in the towel early in litigation — and likely an intentional effort to get risk-corridor payments distributed sooner rather than later, helping to stabilize ACA markets.

"It's highly unusual, and we think we know why," said Ursula A. Taylor, a partner at Butler Rubin Saltarelli & Boyd LLP. "This is a different ball of wax than your typical litigation. The DOJ wants to pay. This is legacy Obama legislation, [and] risk corridors is a fundamental part of the necessary stabilization in the early years."

The letter was issued by the Centers for Medicare & Medicaid Services. An agency spokesman on Monday declined to comment on the settlement negotiations.

Separately on Monday, President Barack Obama reportedly met with insurance company leaders, including Humana Inc. CEO Bruce Broussard and Cigna Corp. CEO David Cordani, to discuss ways to strengthen the ACA and boost enrollment.

The Republican-backed legislative provisions on risk corridors have been tucked into spending bills over the past two years and will soon come up for renewal. Supporters say the provisions prevent taxpayer-funded bailouts of private insurers, while critics call them transparent efforts to sabotage the ACA.

On Monday, conservative observers quickly attacked the potential settlements, describing them as an end-run around Congress' power of the purse. As one example, the conservative-leaning National Review published a column headlined, "Another Illegal Obamacare Bailout Appears to Be on the Way."

Roughly a half-dozen lawsuits over the risk-corridor shortfall have been filed by various insurers, including Health Republic Insurance Co., Highmark Inc. and Blue Cross and Blue Shield of North Carolina. It's not clear precisely how much money could be owed, but payouts fell short by \$2.5 billion in the program's first year alone.

Any settlement money would likely come from the government's so-called Judgment Fund, a permanent and open-ended account for paying government obligations that are not otherwise covered by congressional appropriations.

Timothy Jost, an ACA expert at the Washington and Lee University School of Law, said Monday that regulators have fairly broad leeway to tap the Judgment Fund for settlement costs.

"There are some conditions that need to be met ... but basically agencies decide whether to settle," Jost said.

Although the administration has been pushing back against the lawsuits, it does not dispute that the insurers are owed money. Instead, it contends that their suits are premature and must await the last risk-corridor payment cycle in 2017.

Many observers have been skeptical of that defense, saying it would defy common sense to think that payments meant to provide early stability for the ACA could be postponed for years while insurers are abandoning ACA marketplaces or collapsing altogether.

"We don't think it's a strong case objectively to defend," Butler Rubin partner Jason S. Dubner said.

It is true that the administration could dispute its obligation to fund risk corridors. But some experts doubt that such arguments would fly, noting that the ACA says the government "shall pay" insurers under the risk corridor program.

"They don't deny liability here, and I don't think they can," Jost said. "This is clearly an obligation of the federal government if you read the statute."

If the government doubts its case, then it may see no reason to drag out cases and thereby delay payments that could benefit the ACA.

"There's nothing wrong with settling a lawsuit that you believe you should lose," University of Michigan Law School professor Nicholas Bagley said on Monday.

Risk-corridor payments were underfunded by almost 90 percent for 2014. In Friday's letter, CMS announced that all collections meant for 2015 payments would be redirected toward covering the unpaid amounts for 2014.

The settlement overture raises a number of new questions, including what terms CMS is prepared to offer, how long negotiations might take and whether additional lawsuits will be filed by insurers looking

to secure themselves a seat at the table.

“If the way to obtain those funds is to file a lawsuit ... it in a sense encourages other companies to file lawsuits in order to enter into a settlement process,” Freeborn & Peters LLP partner David M. Kaufman said.

The cases include Health Republic Insurance Co. v. U.S., case number 1:16-cv-00259; First Priority Life Insurance Co. Inc. et al. v. U.S., case number 1:16-cv-00587; and Blue Cross and Blue Shield of North Carolina v. U.S., case number 1:16-cv-00651, in the U.S. Court of Federal Claims.

--Editing by Philip Shea and Jill Coffey.

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