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Land Of Lincoln Latest Co-Op Casualty As ACA Funds Stall

By **Jessica Corso**

Law360, New York (July 18, 2016, 6:55 PM ET) -- Illinois' Land of Lincoln Health will be shuttered following a recent announcement that it can't make good on a $32 million payment to the federal government, but health care experts say that it is Congress' blocking of billions of dollars in promised payments to marketplace participants that has led to a wave of Affordable Care Act-created co-ops crashing nationwide.

A couple of weeks ago, the Illinois Department of Insurance tried to shield Land of Lincoln Mutual Health Insurance Co. from a payment that it warned would wreck a company that just last year reported a $90 million net operating loss, saying in a letter to the Centers for Medicare and Medicaid Services that it believed the state had the power to do so.

CMS refused to yield, however, apparently telling Illinois last week that it didn't have the authority to block the payment, which was due to the government under a program known as risk adjustment. That program was created under the ACA to shore up state marketplaces by spreading the wealth among exchange participants.

But it's CMS' inability to pay into another ACA-instituted program that helped crash Land of Lincoln and 15 other co-ops across the nation, experts say.

In 2014, a Republican-led Congress blocked payments into a program known as risk corridor that was meant to keep the exchanges and the newly created co-ops afloat. The measure was passed almost as soon as the exchanges had gotten off the ground with the promise of government support.

Falling Like Dominoes

Sixteen of the 23 health care co-operatives have folded since they were created by The Affordable Care Act

"The timing of it all has been a bit of a bait and switch for health plans," explained Ursula Taylor, a litigator who often represents health care clients for Chicago-based Butler Rubin Saltarelli & Boyd LLP.

Taylor pointed to an amendment to the 2015 budget that made so-called risk corridor payments budget-neutral, meaning that the funding wouldn't be appropriated and that CMS would have to find the money itself. That amendment was also written into the 2016 budget. Just last Thursday, a Senate Appropriations subcommittee passed its 2017 health spending plan with a provision that the risk corridor payments remain budget-neutral.

Republicans have called the payments a bailout. The subcommittee's news release on the 2017 plan claims that preventing CMS from drawing money from general appropriations saved taxpayers $2.5 billion last year.

Eric Klein of Sheppard Mullin Richter & Hampton LLP noted that figure is drawn from claims for risk corridor payments made by marketplace participants in 2014 and expected to be paid out in 2015. But CMS was only able to pay out $326 million, by Klein’s figures, which represents 12.6 percent of insurers' claims.

"If you're expecting to operate a business and you’re prefacing it on the federal government paying its risk corridor payments, then you get the nice letter that says, 'Sorry, we're only paying 12.6 percent,' you've got a big shortfall," Klein said.

Many insurers have sued to regain that money, including Land of Lincoln, which says in a U.S. Court of Federal Claims filing that it is owed $73 million in risk corridor payments from 2014 and 2015.

Land of Lincoln CEO Dennis O'Sullivan told Law360 that the lawsuit was still moving forward as of Thursday, despite the impending shutdown of the business.

Both Taylor and Klein pointed out that the lawsuits could be one way around the budget-neutrality issue, saying that CMS could draw from the government's judgment fund to settle lawsuits or fund an adverse judgment.

Jason Dubner of Butler Rubin said that the government was "all but inviting the insurers to file these lawsuits" by both admitting that the payments are owed and because CMS currently has access to the judgment fund.

As Taylor pointed out, however, that may not remain the case after Rep. Ron DeSantis, R-Fla., introduced an amendment to the House Financial Services and General Government Appropriations Act that would prevent the government from using the judgment fund to make the risk corridor payments.

Although it appears that the amendment didn't make it into a final version of the bill, conservative policy institute Freedom Partners praised DeSantis’ effort and also labeled the risk corridor program a bailout. The proposal could be brought forth in later years, as the government is fighting the suits and one lawsuit could take years to wind its way through the courts.

"The administration has shown that it is willing to go to extremes to artificially prop up its failing health care law," Freedom Partners Senior Policy Adviser Nathan Nascimento said in a June statement. "Using billions in taxpayer money to pay out Obamacare settlements and bail out insurance companies is the last thing this administration should be doing."

The House GOP has also sued to keep the program budget neutral and won a favorable judgment in May, when U.S. District Judge Rosemary M. Collyer found that the ACA doesn't earmark funds for cost-sharing subsidies.

That decision is currently being appealed to the D.C. Circuit.

In the meantime, 16 of the 23 ACA-created co-ops have folded while awaiting payment. It's not just the tens of thousands of policyholders that are left stranded, according to Klein.

"It is expected there will be dislocation and doctors and hospitals won't get paid because of this," he said. "It's not a pretty picture but it’s a direct result of the [budget] amendment that occurred."

--Additional reporting by Jeff Overley, Diana Novak Jones and Dani Kass. Editing by Katherine Rautenberg and Patricia K. Cole.