

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	:	SUIT NO.: 651,069 SECTION: 22
VERSUS	:	19 TH JUDICIAL DISTRICT COURT
TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA	:	PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

RECEIVER'S STATUS REPORT REGARDING RISK CORRIDOR EXPECTATIONS

NOW INTO COURT, through undersigned counsel, comes James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), through his duly appointed Receiver, Billy Bostick ("Plaintiff" or the "Receiver"). In accordance with this Honorable Court's Order dated May 27, 2020, the Receiver files this Status Report regarding the anticipated timing and amounts of the Risk Corridor payments that Plaintiff may receive from the United States (the "Government") in the class action entitled *Health Republic Ins. Co. v. United States of America* ("Health Republic"), Court of Federal Claims case no. 1:15-cv-00259, as a result of the opinion of the United States Supreme Court in *Maine Community Health Options v. United States* ("Maine Community"), 140 S.Ct. 1308 (4/27/2020).

Background

The instant case arises out of the failure of Louisiana Health Cooperative, Inc. ("LAHC"), a Consumer Operated and Oriented Plan ("CO-OP") created under the Patient Protection and Affordable Care Act of 2010 ("ACA"). LAHC was created to provide Louisiana citizens with a government-subsidized health care alternative to be marketed through the ACA insurance exchanges. Unfortunately, LAHC failed miserably after less than two years of operation, owing over one hundred million dollars¹ to the Government, health care providers, agents and general creditors by the time it closed its doors at the end of 2015.

¹ More precise figures are detailed below.

The Receiver filed this suit in August 2016 and has amended it twice to date. The suit originally named many defendants believed to have contributed to LAHC's demise: Beam Partners, LLC ("Beam Partners"), which developed and initially managed LAHC; Milliman, Inc. ("Milliman") and Buck Consultants, LLC n/k/a Buck Global, LLC ("Buck"), the actuaries that set LAHC's premium rates; CGI Technologies and Solutions, Inc. ("CGI") and Group Resources Incorporated ("GRI"), the third-party administrators who, *inter alia*, were supposed to handle and process claims and enrollment for LAHC; a dozen or so former directors and officers of LAHC (the "D&O Defendants"); and the insurers for each of those. The D&O Defendants and their primary insurer settled out pursuant to a "*Gasquet* release" several years ago; the D&O Defendants remain nominal parties solely for the purpose of the Receiver's reserved claims against their excess insurers. Beam Partners and CGI have also settled out of the case and are no longer parties.

Just before the remaining parties were about to start taking depositions, this matter was stayed in March 2018 by the first circuit, pending a determination as to whether any portion of the case was arbitrable and whether the Receiver's claims against Buck had to be tried in New York. The Louisiana Supreme Court ultimately ruled on April 27, 2020 that the Receiver is not bound by any arbitration provision in any relevant contract. *Donelon v. Shilling*, 2019-00514 (La. 4/27/20), 2020 WL 2079362 (So.3d cite is not yet available). The stay was effectively lifted at that time.

By coincidence, on that very same day, the United States Supreme Court decided *Maine Community Health Options v. United States* ("*Maine Community*"), 140 S.Ct. 1308 (4/27/2020). There, the Supreme Court held that the United States Government owes Risk Corridor payments under 42 U.S.C. § 18062 to a group of health insurers similarly situated to LAHC. That ruling is expected eventually to benefit LAHC's Receiver, which is a class member in a class action entitled *Health Republic Insurance Company v. The United States of America* ("*Health Republic*"), pending in the United States Court of Federal Claims, Civil Action No. 16-00259-MMS. *Health Republic* seeks Risk Corridor payments from the Government on the same grounds asserted by the plaintiffs in *Maine Community*.²

Shortly after the ruling by the Louisiana Supreme Court in the instant matter, this Court held a status conference to discuss future handling and timing of pretrial deadlines. This Court

² *Maine Community* and the concept of Risk Corridors are discussed in more detail below.

then issued an Order dated May 27, 2020 that, among other things, required the Receiver to file the instant Status Report.

Risk Corridors

The ACA extended healthcare coverage to many who did not have or could not afford it before. *Maine Community, supra*, 140 S.Ct. at 1315. To encourage insurers to enter into this new market of taxpayer-subsidized health insurance, the ACA created several programs to reduce insurers' risk, one of which was the Risk Corridors program. *Id.* At 1315-16. The basic idea of this program was that if an insurer had significant underwriting losses (more than 103% of a target amount) in any of its first three years of operation, the government would make a Risk Corridor payment to the insurer to help defray the loss. On the other hand, if an insurer had low underwriting losses (less than 97% of the target amount) during any of the first three years, that insurer would have to pay some of its profit to the Government in order to defray the losses of the insurers experiencing high loss ratios. In essence, the Risk Corridors program was a mechanism whereby all participating insurers, like LAHC, would share profits and losses according to the dictates of the ACA. *Id.*

The profitable insurers paid their Risk Corridor payments to the Government. Congress, however, blocked appropriations needed to provide statutorily required payments to the unprofitable insurers. *Id.* During its three years of existence, the Risk Corridors program netted out with a deficit of approximately \$12 Billion that Congress simply refused to appropriate. *Id.* at 1317-18. This resulted in litigation by four of the larger insurers against the Government in *Maine Community* and in a class action against the Government by many other insurers, like LAHC, in *Health Republic*.

On April 27, 2020, the United States Supreme Court ruled in *Maine Community* that the Government could not renege on the obligations it expressly undertook in setting up the Risk Corridors program. While this decision is certainly expected, in due course, to benefit LAHC's Receiver in *Health Republic*, the exact amounts and timing of such benefit remain to be seen. And as detailed below, even if the Receiver ultimately recovers every penny in Risk Corridor payments that it has claimed from the Government, LAHC will still have tens of millions of dollars of losses for which the defendants must answer.

Amounts Expected, and Anticipated Timing

The relevant statute, 42 U.S.C. § 18062 (Section 1342 of the Affordable Care Act) sets forth specific formulae to determine what amounts the profitable insurers would have to pay the Government during each of the three years of the Risk Corridors program,³ and conversely, what amounts the Government was supposed to pay to the unprofitable insurers during each of those three years.⁴ The *Maine Community* Court held that the Government must make payments in accordance with the statute. The Supreme Court did not, however, make the calculations itself, nor did it state any specific dollar amount awardable to any particular plaintiff; it simply remanded to the lower courts for “further proceedings consistent with this opinion.” 140 S.Ct. 1331. Hence, there is as yet no ruling on how much the plaintiffs in *Maine Community* will or should actually receive, much less how much any plaintiff in any similar litigation (such as *Health Republic*) will or should ultimately receive. And we certainly do not know in what time frame those unresolved issues are going to be determined with regard to LAHC.

We do know how much the government has thus far stated as being owed to LAHC’s Receiver for Risk Corridor payments, namely \$9,956,581.61 for the year 2014 and \$53,374,565.50 for the year 2015, for a total of \$63,331,147.11. The exact manner of calculation of these figures by the Government is not entirely clear.⁵ But assuming that the Government agrees to actually pay this amount to the Receiver, or that the *Health Republic* Court ultimately awards this figure in a final judgment, the Receiver will eventually recover this amount, minus attorneys’ fees and costs allocated to LAHC, from the federal Judgment Fund. Of course, we do not know when or if such

³ [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(a)(2).

⁴ [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. 42 U.S.C. 18062(a)(1).

⁵ The calculation set forth *supra* n. 4 could not be calculated with precision by LAHC or the Receiver, because LAHC’s staff did not know the exact “target amount” as used in the statutory language. The “target amount” was *estimated* by the plans but was then modified by CMS through a “true up” process, the details of which are not entirely clear. LAHC sent CMS the claim file for the years 2014 and then again in 2015. LAHC also supplied Medical Loss Ratios (MLR’s) for the same periods including allowable items and excluding certain disallowed items. CMS then performed its calculations, after “truing up” the “target amount,” and reported to the Receiver \$63,331,147.11 as LAHC’s risk corridor receivable for the two years.

agreement or ruling may come to pass. Those are issues over which the Receiver, as a mere class participant in *Health Republic*, has little if any control.⁶

Complicating the matter further is that LAHC owes the Government a significant sum of money, some of which at least may be offset against the Risk Corridor amount owed by the Government to LAHC. LAHC took an approximately \$13 Million startup loan from the Centers for Medicare & Medicaid Services (“CMS”) on September 27, 2012, to help create the CO-OP, and a \$52.6 Million CMS “solvency loan” so that LAHC could meet solvency requirements as a Qualified Health Plan. At present, including interest and penalties, LAHC’s Receiver owes the Government approximately \$18.3 Million on the startup loan, Risk Adjustment Program, CSR Program, Reinsurance Program and miscellaneous CMS fees,⁷ and LAHC has booked a contingent liability to the Government of approximately \$64.9 Million on the solvency loan. There will have to be negotiations and discussions as to whether these loan obligations may be offset against the Risk Corridor payment owed to LAHC’s Receiver, and if so in what amounts, before the Receiver will see a dime of actual money from its Risk Corridor claim.⁸ Additionally, the amount of attorneys’ fees and pro-rata costs regarding any Risk Corridor recovery which are potentially owed by the Receiver have not yet been determined.

In sum, the Receiver expects but is not guaranteed to receive \$63,331,147.11 (minus attorneys’ fees and costs) in Risk Corridor payments at some unknown time in the future, some or all of which may be set-off against loan principal, interest, penalties and other amounts owed by the Receiver. The Receiver has little if any control over if, when, or how much of those funds, or any part of them, will be actually received.

⁶ Just prior to filing this Status Report, undersigned counsel conferred with national class counsel in the *Health Republic* case for an update regarding the status of that proceeding. At present, the Government has been ordered and is expected to file a formal status report with the Court on June 29, 2020. To date, no Judgment has been issued in the *Health Republic* class action. If and when a Judgment is issued in the *Health Republic* case, at that point, it is anticipated that the various issues regarding the exact amount of the Risk Corridor payment owed to each plaintiff, whether any setoff may be appropriate for any particular plaintiff, the amount of attorneys’ fees owed, etc. may be addressed. As discussed herein, whether, when, and how much the Government may eventually pay the Receiver are unknown at the present time.

⁷ Further breakout of these figures is provided below.

⁸ The Receiver takes the position that the solvency loan was specifically granted in order for LAHC to meet minimum capital requirements under Louisiana insurance laws, and therefore, that the solvency loan may be repaid only out of LAHC’s surplus earnings. Since there have been no surplus earnings, the Receiver contends that no payments are due on the solvency loan, at least not as of yet. Therefore, the Receiver contends that the Government cannot offset these “not yet due” amounts against Risk Corridor payments owed to LAHC. So far, the Government has neither expressly accepted nor expressly rejected this position.

Damages Claimed in the Instant Case

Although the defendants in this action erroneously believe that a Risk Corridor recovery will somehow eliminate their exposure, that belief is unfounded. Even if the Receiver ultimately collects every dime it claims in Risk Corridor payments in *Health Republic*, LAHC will still have tens of millions of dollars in losses for which the defendants here must answer.

The Receiver's total loss, as of end of 2019, caused by the tortious and contract-breaching acts and omissions of the defendants, is calculated and estimated as follows:

Long Term Notes Payable Start up loan	\$13,032,260.57
Interest Payable Start up loan	721,413.20
Early Termination Penalty Start up loan	1,317,656.00
Transitional Reinsurance Payable	159,199.33
Accrued ACA Fees	41,400.78
Accrued Liability CSR	1,324,016.47
Accrued Risk Adjustment Payable	1,443,768.94
Other Accounts Payable CMS	289,536.98
Long Term Notes Payable Solvency loan	52,614,100.00
Interest Payable Solvency loan	7,056,887.07
Early Termination Penalty Solvency loan	5,261,410.00
Provider/Member premium refund claims	17,297,527.31 ⁹
Accrued Broker Commissions Payable	3,876,666.41
Accrued LA Premium Tax Liability	70,786.41
Accrued Vendor POC's	88,744.85
Estimated Administrative Costs	1,092,687.77
LESS Cash in Bank Accounts	<u>(11,794,052.03)</u>
	\$93,894,010.06

Even if we subtract from these damages the entirety of the Receiver's Risk Corridor claim, the defendants are still responsible for approximately \$30,562,862.95 (\$93,894,010.06 minus \$63,331,147.11), plus additional interest running on LAHC's liabilities and attorneys' fees and costs.


Conclusion

Even if LAHC ultimately collects all of the Risk Corridor payments owed to it by the Government, LAHC has sustained more than approximately \$30 million of compensable damages caused by defendants' grossly negligent conduct. This is not the first case where defendants challenge the extent and amount of a plaintiff's recoverable damages. Like in any other case, issues surrounding such damage issues should be explored through discovery and appropriate pre-trial motion practice if indicated. Defendants cite no cases or authority to support their position that because they may have an argument that the Receiver's ultimate damages may be reduced by the potential recovery of Risk Corridor payments, that discovery and pre-trial practice should be

⁹ This figure was originally about \$23 Million at the time LAHC was placed in receivership. The Receiver has been able to pay about \$8.0 Million of the amount owed for these claims.

suspended or delayed in any way. The Receiver's efforts to hold defendants responsible for their tortious conduct have already been frustrated by the more than two-year delay caused by the first circuit's stay order. The Receiver respectfully requests that Your Honor allow the parties to proceed with discovery and pre-trial practice in an orderly and efficient manner by issuing a new CMS without further delay.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Walters', written over the text 'Respectfully submitted,'.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via e-mail to all counsel of record as follows, this 15th day of June, 2020, in Baton Rouge, Louisiana.

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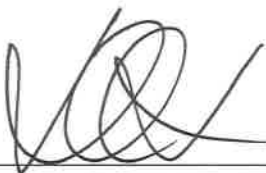
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