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Health Republic's Curious Liquidation: Part 3

Law360, New York (August 29, 2016, 2:45 PM ET) -- Health Republic Insurance of New York Inc., New York's only Affordable Care Act, nonprofit health insurer,[1] is now being liquidated under New York Insurance Law Article 74. We continue to follow the liquidation proceedings and urge the superintendent of the U.S. Department of Financial Services, Maria T. Vullo, in her role as Health Republic's liquidator, to establish committees of policyholders and service providers to participate in those proceedings.



James Veach

Background

In Part 1 of this series, I set out how the Freelancers Union created Health Republic and obtained capital for the company through federal loans provided by the ACA's Consumer Operated and Oriented Plan Program. I explained how the federal government and New York state, where Health Republic was incorporated and operated, were both responsible for overseeing the company's operations, but that New York was charged with approving Health Republic's rates and overseeing the company's solvency. Health Republic only wrote business from Jan. 1, 2014, through October 2015.[2] Part 1 set out to discuss the eventual April 2016 commencement of Health Republic's liquidation proceedings.

In Part 2, I discussed why committees of policyholders and service providers would help expedite Health Republic's liquidation and avoid unnecessary expense and delay. I set out several areas where these committees would make real and immediate contributions to the liquidation process now being overseen by Supreme Court Justice Carol Edmead, sitting in the New York Supreme Court (Part 35).

Part 3 sets out to report on a recent status conference with Justice Edmead, the purpose of which was to get the court's input with respect to a proposed claims adjudication protocol for Health Republic's policyholders. The court commented on the proposed procedures and suggested several changes, which outside counsel for the superintendent, Weil Gotshal & Manges LLP, will include in an order to show cause.

But more significantly, the court directed that outside counsel and certain third-party administrators hired by the superintendent to administer the Health Republic estate post online their contracts and the administrative costs incurred to date in order for policyholders and service providers to understand how Health Republic's limited assets are being spent.[3]

Tomorrow, in Part 4, I will provide additional reasons why, in light of Justice Edmead's directions at a July 28 status conference, policyholder and service providers committees are needed to monitor administrative costs and push for a prompt estate closing. These committees could also seek answers to questions about Health Republic's failure, how claims will ultimately be resolved, and why so many outside consultants and administrators are needed to process Health Republic's remaining claims.

Resolving Health Republic's Policyholder / Service Provider Claims

To recap, you may recall that then-acting Superintendent Vullo's petition[4] to liquidate Health Republic resulted in a May 25, 2016, hearing that brought about five dozen confused Health Republic policyholders, as well as counsel for several hospitals and other service providers, to Part 35. The court directed that a transcript of the liquidation petition proceedings be prepared, in both English and Spanish, and posted. You can find a copy of the May 25 transcript on Health Republic's website. (HR Site; May Trans.).[5]

Ordinarily, representatives from the New York Liquidation Bureau would appear with the attorney general at a hearing on a petition to liquidate a New York-domiciled insurer. The bureau's representatives would then address any claims-related questions that might arise. In Health Republic's case, however, no one from the bureau appeared on May 25.

Article 74 requires that all persons with claims against a liquidated New York insurer submit their claims "within four months from the date of entry of [the liquidation] order," or, if the superintendent "certifies" that more time is needed, "such longer time as the court shall prescribe."[6] As you might suspect, this four-month requirement is rarely observed.[7]

In Health Republic's case, the petition itself sought an extension and the court's liquidation order, which is also posted on both the HR site and the bureau's website, defers the deadline to submit claims "until further Order of the Court."[8]

Although papers submitted in support of the petition to liquidate alluded to a claims submission procedure and that topic was broached during the hearing,[9] the procedures themselves weren't explored. Those Health Republic policyholders who attended the May hearing were advised that a claims procedure would be addressed at some future time. Justice Edmead, however, directed that Weil prepare a "synopsis" of the petition hearing and post that on Health Republic's website as well.[10] The HR site now contains, under the heading "Condensed Remarks," a short description of how Health Republic claims might be processed.

The remarks refer to Health Republic's chief restructuring officer and Health Republic's management team, Alvarez & Marsal, as "hav(ing) been evaluating the processes Health Republic already has in place to collect, review, and adjudicate ... hundreds of thousands of ... claims against Health Republic."[11] According to the remarks, an audit of these claims will be undertaken. Based on that audit, explanations of benefits or EOBs will be issued "for each Policy Claim to both the applicable provider and the member ... "[12] The liquidator will then file a motion with the court approving procedures for "adjudicating" the claims.[13]

In mid-July, Weil wrote to Justice Edmead requesting a conference "for the purpose of apprising the Court" of the liquidator's proposed procedures to collect and distribute Health Republic's assets and "adjudicate" claims. On July 28, counsel appeared before Justice Edmead to "update" the court. (At the conclusion of the status conference, the court again directed that a transcript of the conference be posted, and a week and a half later a transcript appeared on the HR site.

Unlike the May hearing on the petition to liquidate, Part 35 was almost empty for the July status conference. One service provider sent an attorney and one attorney representing two policyholders appeared, but no policyholders or other creditors attended.

Weil first advised the court that the liquidator proposed to move by order to show cause for an order approving a claims procedure. The order to show cause would be accompanied by a "plain English notice" describing the proposed claim adjudication procedures.[14] Weil again reported that "hundreds of thousands of claims" had been submitted, most of which were claims under Health Republic policies.

Weil stated that prior to Health Republic's liquidation, policyholder claims had been handled by a third-party administrator — POMCO.[15] When a Health Republic policyholder was treated by a provider in network, the provider submitted a claim to POMCO. When a policyholder went out of network, the policyholder submitted her/his claim to POMCO. Under the terms of the Health Republic policies, all policyholder claims had to be submitted on or before March 31, 2016.[16]

Weil told the court that the proposed adjudication process would only address policyholder

claims because "it is highly unlikely that HR will have sufficient assets to pay any claims against it other than claims for administrative expenses" and "some percentage of each allowed policy claim." [17] Therefore, according to counsel, "it would be a waste of estate resources" to establish claim procedures for any entities other than policyholders. [18]

Before seeking the court's "preliminary observations" on the claims process, Weil reported that the liquidator was "finalizing agreements with the third-party administrator to audit the current policy claims inventory for the purpose of initially eliminating duplicative claims and assessing the accuracy of some of the proposed claims determinations," a process counsel estimated would take "3 to 4 months." [19]

Based on this audit, two documents would be prepared and distributed: (1) an explanation of benefits (EOB) would be sent to policyholders; and (2) an explanation of payments (EOP) would be sent to service providers. Health Republic members/policyholders and Health Republic service providers would also receive "a piece of paper explaining what the view is of their particular submission." The EOB and the EOP would also "serve as a notice of the determination of the amount of the provide[r's] or member's claim against Health Republic." [20]

Due Process

At this point, the court asked: "Where is the due process?" [21] This led to a lengthy discussion of how the claims adjudication process would operate to assure that policyholders had an opportunity to respond to claim determinations in the EOBs.

According to counsel, the EOB would set out all amounts previously paid to both members and providers. The court then asked about the nature of the explanation provided on the EOB. Court: "How will someone understand before one puts in an appeal why or what [is] not covered?" Counsel assured the court that codes and a chart explaining the determination would be included in the EOB. [22]

Weil proposed a 60/60/30-day procedure in which the policyholder would have 60 days to submit "something" in response to the EOB. The liquidator would then have 60 days to respond and the policyholder would have 30 days to reply. [23] Much colloquy ensued concerning the policyholder's time to object, mediation of disputed claims (both binding and nonbinding), resolution of disputed claims by a referee, and procedures allowing policyholders to come to court.

Many of these issues were left unresolved at the conference, including: (1) the extent to which a policyholder who failed to submit a timely response to the EOB might have recourse to the court to enlarge her/his time to submit a claim; (2) how disputed claims would be referred to a referee or a "health care qualified claims examiner"; (3) how the referees or claims examiners would be selected; and (4) when and how claimants could opt out of the claims process. [24]

The court directed that the claims adjudication procedures be set out in order to show cause and that any presentation to policyholders be illustrated with a "graphic" in order for claimants to "visualize" the claims process. Finally, the court raised the extent to which claims would be sealed and how the court could track the volume of claims submitted and approved/rejected. [25]

At one point, counsel remarked that no claims would be paid until "the claims are all resolved." [26] The court estimated that completing the claims settlement process would take 18-24 months. [27]

Transparency

Early in the conference, and in the context of counsel's discussing administrative expenses, the court asked about the estate's administrative costs.

Court: How is the administrative cost[] determined? It should have been set by now. The administrative costs? How are they captured?

Counsel: The administrative costs are the costs of attorneys and advisors to Health Republic's estate.

Court: Already in place.

Counsel: There are arrangements in place for the professionals and advisors.

Court: Are those contracts somewhere transparent?

Counsel: They can be.

Court: That I would like. I would like that. And I would like the administrative costs and the related agreements to those administrative costs posted so people — interested parties — can see, since you say the likelihood of reaching beyond the policy claims in conjunction with the administrative costs would leave very little, if anything, left.

I think everything that's being covered or spent should be transparent. So the administrative costs, and to whom those costs are going, I would like that transparent. I would like that posted. If it is a contract, if it is — however it is.

* * *

Court: I want that transparency posted on the site.

I want the identity — I want administrative costs posted that I can link into it and see who is getting what. Who is it and what are they getting.

* * *

So that those who may be left out will understand where the money went. And if there is an issue with respect to exorbitant administrative costs someone will bring it to the court's attention if they feel that's what's going on.[28]

The court noted that the liquidator must submit "periodic reports" for court approval pursuant to NYIL § 7422.[29] Justice Edmead, however, went beyond this general obligation, which does not provide for monthly, quarterly or annual reports, and addressed Health Republic's current and ongoing administrative expenses. These costs, presumably, would include all payments that have been made to (or incurred by) third-party administrators and outside counsel now acting for the superintendent as liquidator and all payments made to (or incurred by) third-party administrators and outside counsel from October 2015, when Health Republic's board consented to the entry of an order of liquidation, to date.

Thus far, no contracts or administrative expenses have been posted on the HR site or the bureau's site, but the court's interest in seeing to it that the policyholders (and service providers) understand the costs associated with Health Republic's liquidation supports our recommendation that the superintendent, or the court on its own initiative, recognize committees of policyholders and service providers to function as creditors' committees. These committees would aid greatly in keeping an eye on the Health Republic estate's expenses and determine early on whether those expenses are warranted.

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- [1] Most discussions of the Affordable Care Act's nonprofit health insurers use the term "nonprofit," although Health Republic was incorporated in New York state as a not-for-profit corporation under Section 402 of New York's Not-for-Profit Corporation Law.
- [2] For a thorough treatment of Health Republic's rise and fall, see M. Waldholz, *The short and chaotic life of an Obamacare darling*, Crain's New York Business (April 17, 2016).
- [3] Justice Edmead directed that a transcript of the July status conference also be posted and an English and Spanish version can be found on the HR Site.
- [4] Technically, a Superintendent seeking to initiate a liquidation proceeding under Article 74 must be represented by the attorney general and, in this case, an assistant attorney general did present the petition and then withdrew. NYIL § 7417.
- [5] You can also find a copy of the May transcript on a website maintained by the New York Liquidation Bureau.
- [6] NYIL 7432(b).
- [7] NEW APPLEMAN NEW YORK INSURANCE LAW, Ch. 45, Rehabilitation, Liquidation, and Insolvency, 45.09[1] (2016).
- [8] Order of Liquidation, ¶ 18.
- [9] May Trans. at 17-19.
- [10] May Trans. at 19.
- [11] Remarks at 2-3.
- [12] Remarks at 3.
- [13] Id.
- [14] July Trans. at 3.
- [15] POMCO ceased processing claims in November 2015 and stepped down as administrator sometime thereafter.
- [16] July Trans. at 4. According to the Remarks, most policyholder claims were submitted before coverage ceased on Nov. 30, 2015. Nevertheless, Health Republic's policies allowed for claims to be submitted up to March 31, 2106.
- [17] July Trans. at 6-7.
- [18] July Trans. at 7. According to counsel, Health Republic's liquidator will at some point provide for a "claims look-up tool" so that members and providers may confirm receipt of their claims.") These "look-up tools," which are not yet available, will then be updated to reflect the "outcome of the claims adjudication process."
- [19] July Trans at 11.
- [20] July Trans. at 13.
- [21] July Trans. at 13.
- [22] July Trans. at 16-17, 23-24.
- [23] July Trans. at 34.

[24] July Trans. at 10, 28, 32, 36, 39-42.

[25] July Trans. at 45-48.

[26] July Trans. at 26.

[27] July Trans. at 50.

[28] July Trans. at 7-8.

[29] July Trans. at 8.

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