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Health Republic's Curious Liquidation: Part 6

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Law360, New York (November 18, 2016, 5:34 PM EST) -- For those just joining us, these "Curious Liquidation" articles concern the receivership for New York's only Affordable Care Act Consumer Operated and Oriented Plan (CO-OP) — Health Republic Insurance Company of New York (Health Republic).[1]

Part 6 reports on an Oct. 11, 2016 conference requested by the liquidator's outside counsel to obtain approval for a claims settlement process. The court ultimately approved the liquidator's "Claims Adjudication Procedure," but during the back and forth over the procedure, the following emerged:

(1) counsel let slip that the liquidator plans to sue the federal government;

(2) the court found fault with how the liquidator proposed to hire a claims auditor (and directed that the liquidator's requests for proposals (RFPs) be reposted); and

(3) the court directed that the liquidator prepare a balance sheet for Health Republic.

Before we get to this interesting stuff, let's look at the procedure the court approved to address Health Republic's 650,000 open claims.

Procedure

In short, the liquidator will use Health Republic's "existing processes for adjudicating policy claims," including Health Republic's explanation of benefits (EOBs).[2] The policyholder will receive an EOB, via either email or regular mail.[3] The EOB will show an "allowable amount" for services rendered that will also serve as a Notice of Determination."[4] The notice will advise the "Claimant" of the amount recommended for "allowance" or will show a zero allowance "and the reason therefor." These notices will "look substantially like the EOBs that the members and providers have received in the past."[5] The proposed order has a sample EOB attached.[6] The EOBs will be sent out on a "rolling basis."[7]

If the policyholder (or the provider) disputes the allowance, the objecting party has 60 days to submit an appeal using a portal on Health Republic's website or mailing an objection to a P.O. Box located in Dublin, Ohio belonging to The Garden City Group, the third-party administrator that also operates the Health Republic website.[8] The notice and all future correspondence from the liquidator relating to the EOB/claim will go to the email address or the physical address for the policyholder as that address appears in Health Republic's books and records.[9] Policyholders may update their email or physical addresses only via the portal.[10]

The liquidator then has 60 days to grant the appeal and issue a new notice or deny the appeal and set out the grounds for the denial.[11] If the liquidator denies the appeal, the policyholder (or provider) has 30 days to file an objection.[12] The liquidator, "in her sole discretion," may

compel claimants to attend a mediation with the "liquidator and her agents."[13] Any unresolved claims that survive mediation will be referred to "a referee or healthcare qualified claim examiner appointed by separate order" of the court.[14] The "health care qualified claims examiners" will review all claims involving a disputed determination of "medical necessity."[15] Within 30 days of the referee's or examiner's ruling, a hearing will be scheduled to make the final determination with respect to an unresolved claim.[16]

With respect to how these referees or examiners will be selected, the court proposed that the liquidator post a "notice of solicitation almost like an RFP."[17] The selection criteria for the referees and examiners will be addressed in a future application.[18]

Finally, pursuant to N.Y. Insurance L. 7433, the liquidator will periodically submit to the court a list of the claims that have been resolved.[19] This list will be filed under seal with the court, but the policyholder or provider will be notified by email or letter of the determination and "will be able to securely review the disposition of their Policy Claim" on the Health Republic website.[20]

Policyholder v. Provider

Northwell Health, formerly North Shore-LIJ Health System, filed an objection to the proposed Procedure.[21] Northwell claims to be owed more than $21 million consisting of $5 million in claims for in-network services and $17 million for out-of-network services.[22] Northwell's counsel pointed out the procedure failed to make clear that out-of-network as well as in-network providers would receive EOBs.[23]

The issue with respect to the in-network versus out-of-network providers was resolved by redefining a claimant to include, in addition to the member/policyholder, both an in-network and an out-of-network provider.[24] In addition, the liquidator will "flag" on the EOB those instances where it's unclear whether an approved claim should be paid to the policyholder or the provider.[25]

But another issue was left unresolved, at least for now — to whom should an allowed claim, once approved, be paid if the policyholder and the service provider dispute ownership?[26] Northwell was concerned about policy provisions that do not require an assignment of benefits to the service provider.[27] The court determined that if policy terms require that payment be made to the policyholder, even though the policyholder has not paid for the services rendered, that provision may " have to be over-ridden by the court."[28] The court, therefore, called for a memorandum on the power of the court to override certain policy provisions.[29]

Subject to these changes, the court approved the procedure "in accordance with [the] so ordered [Oct. 11th] transcript." You can find both the order and the transcript on the Health Republic website.

RFPs for a Claims Auditor

It appears that the first step in the procedure involves an audit of all 650,000 claims to "ensure that no duplicate claims are paid and no claims that are improper because they don't fall within the insurance coverage or other applicable [Health Republic] guidelines would be allowed."[30] Counsel advised the court that "we are finalizing an agreement with the third-party administrator to perform this audit," which counsel estimated would take "four to five months to complete."[31]

Counsel did not identify the audit firm, but promised to post the liquidator's employment contract, once executed, on the Health Republic website along with the engagement agreements and contracts with other vendors or third-party administrators that are now available on the site.[32] At this point the court asked how the liquidator had selected the unidentified auditor. "[H]ow ... has the ... potential third-party audit administrator been identified? * * * [W]as there a vetting process or [was] there a ... search process for the third-party administrator?"[33]

Counsel stated that "proposals were sent to parties that the [New York Liquidation Bureau] and the liquidator are familiar with in terms of doing these sort[s] of projects ... ."[34] The RFPS were not posted on the Health Republic or the Bureau web site, but instead "went to a group of folks that regularly do this sort of work for ... [the] DFS and they got some proposals and [they were] negotiating with one in order to get that one finalized."[35]

The court was concerned with the "limited openness of the process of selection. ** * In other words, if you say we went to the regular cast of characters, [that's] a little problematic. I don't know who was excluded based on how you chose to send it out." The court directed that RFPs for the claims audit be reposted and left up for at least 20 days.[36] On November 9, the liquidator posted on the Health Republic website, under "Key Documents," a New York Liquidation Bureau Request for Proposal: Health Insurance Claims Auditor (RFP).

According to the RFP, the New York Liquidation Bureau "is seeking an experienced health insurance claims auditing firm to conduct a comprehensive 100% audit of approximately 650,000 unpaid medical claims for provider and member." The auditor must be prepared to "validate approximately 30 unique benefit plans for deductibles, copays, coverages and audit all claims based on these benefit plan." [37] You can find a copy of the RFP on the Health Republic website under "Key Documents." Responses to the RFP are due on Nov. 30, 2016.[38]

Balance Sheet

To the best of my knowledge, neither policyholders nor service providers have seen a Health Republic balance sheet since Health Republic filed its Second Quarter 2015 financial statement prepared as of June 30, 2015. The lack of a balance sheet makes it difficult to determine whether the money being spent on advisors, outside counsel and third-party administrators warrants the expense or allows claimants at least a ball-park idea of the potential value of their approved claims.

At the conclusion of the October 11 hearing, the court asked if anyone present had anything else to raise or add. I asked that the court consider directing the liquidator to prepare a "statutory balance sheet."[39] Among other things, I pointed out that the liquidator was building a very elaborate (and expensive) procedure for approving claims, but none of the creditors had any idea of how much money is available to pay their claims. I also asked about the role of the federal government in Health Republic's liquidation.[40]

During the exchange that followed, counsel told the court that the liquidator was "working on [a balance sheet] now" and that counsel would report to the court at the next session, but that "we don't have a sense of the assets."[41] But then counsel went on to add that a determination of Health Republic's assets "involves outbound litigation to recover reimbursements from the federal government."[42]

The court pointed out that potential recoveries could be placed in their "own category" and that the balance sheet would provide a "snapshot" of the estate's assets and liabilities and not necessarily a "firm number."[43] Counsel later stated that "vast majority [of Health Republic's] asset[s] are going to come from litigation against parties including the federal government * * * basically the federal government reimbursement application ... ."[44] We will see what the balance sheet reveals when it's posted, but the prospect of a suit by the liquidator against the federal government (and/or others) takes us to a new topic.

Suing the Federal Government

Other receivers for ACA CO-OPs, as well as a few surviving CO-OPs, have sued the federal government on different theories. These suits fall into three categories, but all of them have something to do with three ACA programs that were intended to protect against adverse selection and stabilize premiums in the individual and small group markets. These programs are often referred to as the "3Rs" — the reinsurance, risk corridor and risk adjustment programs.[45]

The reinsurance program, intended to operate for three years, pays insurers a pro rata portion

of the cost of treating especially costly members. This program operates like traditional excess of loss reinsurance and kicks in when a patient's costs reach a given plateau.

The risk adjustment program was designed to discourage insurers from "cherry picking" the healthiest enrollees. Applying health and human services regulations, a risk adjustment score would be given each health insurer. Insurers with the highest risk scores would receive moneys from insurers with the lowest risk scores.

The risk corridor program, also intended to operate for three years only, provided federal support for insurers that sustained heavy losses (and also required very profitable insurers to return some of their gains to the federal government). Congress, however, led by Senator Marco Rubio, refused to appropriate funds to make the full risk corridor payments and the U.S. Department of Health and Human Services paid out only 12.6 cents on the dollar for risk corridor payments, which contributed to the failure of many CO-OPs, including Health Republic.[46]

With respect to suits against the federal government, some surviving CO-OPs have commenced actions to recover payments that were required under the risk adjustment program. CO-OPs in New Mexico and Massachusetts, for example, have sued to recover (or avoid giving to other small-group health insurers) some of their profits. See New Mexico Health Connections v. United States Department of Health and Human Services, U.S. District Court for the District of New Mexico, 16-cv-00878, filed July 29, 2016, and Minuteman Health Inc. v. U.S. Department of Health and Human Services, U.S. District Court for the District of Massachusetts, 16-cv-11570, filed July 19, 2016. Both of these actions fault HHS regulations pursuant to which these CO-OPs were required to give large percentages of their total premium to other insurers whose insureds appeared to be less healthy (or required more money to treat).

On another theory, CO-OPs have sued the federal government for failing to reimburse them under the risk corridor program. See Health Republic Insurance Company (Oregon) v. United States of America, U.S. Court of Federal Claims, 1:16-cv-00259, filed Feb. 24, 2016. The Oregon suit seeks to collect moneys that would have come from the federal government under the risk corridor program

Finally, in May 2016, the Iowa Commissioner of Insurance, Nick Gerhart, commenced an action that is akin to a hybrid of the actions described above. Gerhart in his capacity as liquidator of CoOportunity Health Inc. v. U.S. Department of Health and Human Services, United States District Court for the Northern District of Iowa, No. 16-cv-00151 (CoOportunity Complaint). In his suit, Commissioner Gerhart seeks a declaration that the HHS's holding, netting, reducing or setting off certain payments due the Iowa co-op was arbitrary and exceeded HHS authority. The Gerhart suit also seeks a declaration that the federal government's claims relating to the CO-OPs start-up and other loans are not entitled to any federal "super-priority" in the Iowa liquidation, and that an administrative hold on certain payments due the Iowa co-op should be lifted.[47] HHS/CMS has moved to dismiss the complaint on a number of grounds, including the assertion that federal, not Iowa, law governs issues concerning rights of offset and netting in Iowa liquidation proceeding.

The Iowa liquidator starts off from a significantly different place because Iowa and Nebraska (where the CO-OP also wrote business) have guaranty associations that are paying policyholders. As of the date of the Gerhart complaint, those associations had paid a total of more than $114 million in policyholder claims.

At this point, it's unclear under what theories the New York liquidator will pursue the federal government and what position the federal government has been taking or will take with respect to the risk corridor and risk adjustment programs and the federal government's loans to Health Republic. Presumably, the balance sheet will refer to these potential claims against the federal government and place some value on them.

An Open Estate

This court's direction that the liquidator post Health Republic's third-party contracts and the

estate's expenses has shed more light on the status of the Health Republic liquidation than has either the DFS or the Bureau.[48] At this point, however, Health Republic's liquidation moves forward with almost no input from its 206,000 former policyholders or the dozens of major hospitals and practice groups that provided health services for these former policyholders.

These circumstances, and the questions raised above, call out for committees of policyholders and service providers in Health Republic's liquidation. The Court's direction that third-party administrator contracts be posted along with the expenses that are being paid from the estate's dwindling assets is a great step forward, but it's unclear how much money was spent from October 2015, when the Health Republic board stepped down, until the liquidation order was entered in May 2016. The current paid expense summary on the Health Republic website reveals that the liquidator has spent more than $3.9 million since the liquidation began in May of this year.[49]

Meanwhile, at the Fall meeting of the National Association of Insurance Commissioners (NAIC) in Miami (December 9-13, 2016), a CO-OP Solvency & Receivership Subgroup of the Health Insurance and Managed Care Committee will meet to address CO-OP receiverships in many states. Unfortunately, the meeting will be "Regulator Only" because, according to the NAIC, those discussions may concern specific companies and individuals and will include "collaborative financial and market conduct examinations and analysis."[50] To close the doors on these discussions about the liquidation of not-for-profit insurers capitalized only with tax dollars from the federal government looks wrong. A breakout session for regulators and a public session for the tax-paying public would be a much better idea.

In the absence of creditors' committees, your author has moved for leave to appear as a friend of the court in the Health Republic liquidation proceedings. Frankly, however, I would much rather be watching committees of policyholders and health providers reviewing the estate's expenses, examining the contracts entered into with third-party administrators, demanding a timeline and asking questions about how much money remains in the estate and how much of that money will be spent before policyholders see even a partial payment.

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[1] For those readers just joining us, Part 1 addressed how Health Republic opened in January 2014 and was shut down about 18 months later. Part 1 also set out how the then-acting DFS Superintendent petitioned in April 2016 to liquidate Health Republic and also summarized the petition to liquidate proceedings.

Part 2 explained why Health Republic's liquidation cries out for committees of policyholders and service providers, i.e., creditors' committees, to participate in the liquidation proceeding.

Part 3 reported on a July 2016 status conference requested by outside counsel representing Department of Financial Services Superintendent Maria T. Vullo in her capacity as Health Republic's liquidator. Counsel asked for the conference to advise the court overseeing the liquidation, Justice Carol Edmead, sitting in Supreme Court, New York County, Part 35, about a proposed claims procedure.

During the July conference, Justice Edmead directed that the superintendent's counsel post contracts entered into with Health Republic's third-party administrators, vendors and outside counsel. The court also directed that counsel post all of the expenses incurred by these third parties.

Part 4 sets out more reasons why committees of policyholders and service providers are desperately needed to weigh in during Health Republic's liquidation, particularly given the amount of money now being spent on vendors, outside counsel, accountants and third-party

administrators, without, as of yet, explicit court approval.

Part 5 focused on the third-party vendor contracts themselves, as well as the summary of the estate's expenses posted on the Health Republic website. At that point, the summary showed about $1.6 million in expenses paid from May 11, 2016, the date of entry of the liquidation order, through July 31, 2016. We also discussed in Part 5 the absence of any balance sheet for Health Republic.

[2] Transcript of hearing on Order to Show Cause, Oct. 11, 2016, p. 22 (Oct. 11 Trans.).

[3] Counsel advised that claimants would be able to use the Health Republic website to "look up their own situation on the website if they are computer-savvy." Oct. 11 Trans., p. 29

[4] Procedure ¶ 3 (e)

[5] Oct. 11 Trans., p. 26-28

[6] Oct. 11 Trans., p. 27

[7] Procedure ¶ 3 (f)

[8] Procedure ¶ 3 (g)

[9] Counsel advised that claimants would be able to use the Health Republic website to "look up their own situation on the website if they are computer-savvy." Oct. 11 Trans., p. 29

[10] Procedure ¶ 3 (h)

[11] Procedure ¶ 3 (i)

[12] Procedure ¶ 3 (j)

[13] Procedure ¶ 3 (k)

[14] Procedure ¶ 3 (l)

[15] Procedure ¶ 3 (l)

[16] Procedure ¶ 3 (l) (m); Oct. 11 Trans., p. 33-34

[17] Oct. 11 Trans., pp. 31-32

[18] Id.

[19] Oct. 11 Trans., p. 34; Procedure ¶ 3 (n) (o)

[20] Procedure ¶ 3 (n)

[21] www.healthrepublicny.org; see docket items 32, 33, and 34.

[22] Carmela Dunford Affidavit, dated Oct. 4, 2016, ¶ 8, 9. Northwell had sued Health Republic in January to recover these moneys, see North Shore Long Island Jewish Health System Inc. v. Health Republic of New York, Nassau County Index No. 607272/2015, but that suit was stayed pursuant to Health Republic's Liquidation Order.

[23] Oct. 11. Trans., p. 8

[24] Id.

[25] Oct. 11. Trans., pp. 8-19, 37

[26] Oct. 11 Trans., pp. 9-12

[27] Oct. 11 Trans., pp. 37-38

[28] Oct. 11. Trans., p. 39.

[29] Oct. 11 Trans., pp. 40-41.

[30] Oct. 11 Trans., p. 13

[31] Oct. 11 Trans., p. 22

[32] Oct. 11 Trans., p. 22

[33] Oct. 11 Trans., p. 23

[34] Oct. 11 Trans., p. 24

[35] Oct. 11 Trans., p. 24

[36] Oct. 11 Trans., pp. 25-26.

[37] RFP, pp. 1-2

[38] RFP, p. 4

[39] Oct. 11 Trans., p. 42

[40] Id.

[41] Oct. 11 Trans., p. 43

[42] Id.

[43] Id.

[44] Oct. 11 Trans., p. 44.

[45] For a concise description of the 3Rs, see American Academy of Actuaries, Fact Sheet: ACA Risk-Sharing Mechanisms, The 3Rs Explained, at www.actuary.org.

[46] For more on the 3Rs, budget neutrality, and the HHS regulations, see B. La Couture and A. Booth, The ACA's Risk Spreading Mechanisms: A Primer on Reinsurance, Risk Corridors and Risk Adjustment, https//www.americanactionforum.org/research/the-acas-risk-spreading.

[47] Complaint, pp. 27-28

[48] The focus of these articles has been on Health Republic's liquidation, not why it failed in the first place. Your author, however, asked the superintendent's spokesperson when a report on the investigation into Health Republic's failure would be released. On November 3 received this email response: "[T]he internal investigation by DFS is ongoing and I do not know whether there will be a report issued, public or otherwise."

[49] Expenses incurred by the estate through August 31 stand at $2.7 million including $727,272 paid to POMCO Inc., for "claims processing" and $595,421 paid to Alvarez & Marsal for "consulting services." Expenses for the estate through Sept. 30, 2016, total $3,912,965.

[50] NAIC Fall 2016 Meeting Schedule, http://www.naic.org /meetings1612sortable_agenda.htm.