

Receivership Court – the Ultimate R

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2020 Bringing Receivership Challenges Into Focus

Panel

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Three Examples Supporting the Receivership Court as the Ultimate R

- I. Arguments before the United States Supreme Court regarding the Risk Corridor cases
- II. The Court's Decision in Conway v. United States regarding a Reinsurance Claim
- III. Setoff Order from the Meritus Receivership Court

ARGUMENTS BEFORE THE
UNITED STATES SUPREME COURT
REGARDING THE RISK CORRIDOR
CASES

Cases: No. 18-1023, 18-1028 and 18-1038

Maine Community Health Options

Moda Health Plan, Inc.,

Land of Lincoln Mutual Health Insurance Company

Hearing: Tuesday, December 10, 2019

Summary of Media Reports of the Hearing

Six Justices appeared to support insurers based on media interpretation of questions:

Chief Justice Roberts

Justice Ginsburg

Justice Breyer

Justice Sotomayor

Justice Kagan

Justice Kavanaugh

One Justice, Justice Alito, appeared to support the government based on media interpretation of questions.

Two Justices, Justice Thomas and Justice Gorsuch, did not ask any questions.

Caveat: Very risky to predict final positions based on questions from the Justices

Justice Alito's questions were considered to be in support of the government:

Incentive program, not a contract

No funding and no right to sue

Questions from the other Justices were considered by the media to be in support of the insurers:

Breach of Contract – reliance on government’s promise to pay

Roberts and Kavanaugh: Did Congress seduce insurers into offering low-premium policies and then renege on a promise to help bear costs?

Lack of Mutuality

Kagan: “Insurers shall pay” is obligatory but government’s “shall pay out” is not obligatory? What kind of statute is that?

Legislative History

Ginsburg: other legislation was introduced repealing the obligation to pay and that legislation failed.

Missing Language

Kavanaugh: Congress could have added “subject to appropriations” and failed to do so

Credibility – Does Congress ever have to keep a promise?

Breyer: Compare the current position to Congress’ promise to pay the military and veterans. Is that obligatory?

THE COURT'S DECISION IN
Conway v. United States
REGARDING A REINSURANCE
CLAIM

Conway v. United States, U.S. Court of Federal Claims, Case No. 18-1623, October 3, 2019.

Background:

Colorado Co-Op Liquidator sent HHS a claims determination letter, disallowing submitted claims and requesting return of unauthorized offsets.

HHS did not object in the allotted time.

Liquidation Court affirmed the Liquidator's claim determination.

Conway v. United States, U.S. Court of Federal Claims, Case No. 18-1623, October 3, 2019.

Issue:

Whether the United States could rely on the federal rule of offsets, including the Netting Rule or whether Colorado's offset rules under the Colorado Liquidation Act would prevail.

Court Ruling:

The federal Netting Rule does not preempt Colorado's insurance liquidation priority scheme.

Conway v. United States, U.S. Court of Federal Claims, Case No. 18-1623,
October 3, 2019.

Rationale:

Federal statutes do not require or authorize HHS to issue a rule offsetting amounts due and owing among different ACA programs.

Federal interests do not require a uniform federal rule.

SETOFF ORDER FROM
THE MERITUS
RECEIVERSHIP COURT

Liquidation Order for Meritus Mutual and Meritus Health Partners (8-10-16)

Liquidation Plan – POC procedure and claims bar deadline (3-8-17)

United States POC, including (approximately)

MHP: \$50 million

Meritus Mutual: \$755,000 and loan/note of \$93 million

Receivership Court adjudicated and ruled on the claims and then setoff amounts by payments CMS owed MHP and Meritus Mutual:

	Net Owed to MHP	Net Owed to Meritus Mutual
Net Risk Corridor owed from CMS	\$4.8 million	\$12 million
Net Reinsurance owed from CMS	\$7.2 million	\$3.3 million

MHP and Meritus Mutual are participating in Risk Corridor Class Action.

Complaint Related to Reinsurance filed in US Court of Claims.

FEDERAL RELEASE

- The Federal Priority in Claims Act (31 U.S.C. Section 3713)
- United States has first priority for claims in insolvency cases that are not covered by Title 11 of the Federal Bankruptcy Code
- The McCarren-Ferguson Act (15 U.S.C. Section 101 et. Seq.)
- United States Department of Treasury v. Fabe, 508 U.S. 491 (1993)

- Priority
- No Bar Date
- Personal Liability
- DOJ Contact- *Sharon C. Williams, Esq., U.S. Department of Justice
1100 L St., N.W., Room 7004, Washington, D.C. 20005
(202) 353-0530 Sharon.Williams@usdoj.gov*
- Update to NAIC Handbook

- Contact the DOJ at the start of the receivership
- Ask for the checklist and follow it
- Provide as much information as possible
- Identify potential federal claims
- Be persistent

Language from a recent federal release for a ACA co-op:

...until the insurance insolvency proceeding is closed the United States has the right to offset any amounts owed and not yet paid by the United States to the company against the ACA Claim pursuant to 45 CFR 156.1215, as in effect on December 31, 2015.

Recent DOJ objection

In a Co-Op liquidation, the DOJ filed an objection stating that interest and penalties continue to accrue after the date of liquidation based upon the federal Netting Rule (45 C.F.R. 156.1215(b)) and 31 U.S.C 3717(a)(1), which requires interest on outstanding debts to the United States Government.

In other words, rights are not fixed on the date of liquidation.

CoOpportunity Health Iowa/Nebraska CoOp

- 1st CoOp to fail
- Vastly exceeded enrollment projections
- Lost \$162M in 2014
- Owed \$200M for 2014 Reinsurance and Risk Corridors
- Liquidation Order Prohibits Set-Off without further order of the Court

CMS/DOJ

- Initially allows 2014 \$60M Reinsurance Payment
- Then applies “Administrative Hold” to all other payments due CH
- Uses 3R money due CH to unilaterally set-off amounts CH owes
 - ❖ Start-Up Loan
 - ❖ Risk Adjustment

COOPORTUNITY 2015 RISK ADJUSTMENT

- Rehabilitation Order 12/23/14 – 1st CoOp Receivership
- Multiple discussions w/CMS in late December/early January re liquidation timing
- Month-end timing necessary (due to CMS inability to handle Enrollment/APTC/CSR data on partial-month basis)
- February 28, 2014 set as liquidation date
- Risk-scores of enrollees not carried over from 2014

COOPORTUNITY 2015 RISK ADJUSTMENT - continued

- Two months coverage in 2015 meant 10 months of coverage with other carriers and very low risk-scores for CoOpportunity enrollees
- Request to not include CoOpportunity 2015 data in Risk Adjustment calculations denied
- Risk Adjustment assessment of \$22 million approximately 50% of 2015 January/February premium

COOPORTUNITY/HHS LEDGER

Amounts Owed to CoOpportunity by HHS

		\$
2014	Transitional Reinsurance (Netted/Kept by HHS)	11,600,000
2015	Transitional Reinsurance (Netted/Kept by HHS)	5,200,000
2014	Risk Corridors Netted/Kept by HHS (13.2%)	16,400,000
2014	Risk Corridors balance owed	113,600,000
2015	Risk Corridors	27,000,000
2014	CSR Reconciliation Netted/Kept by HHS	<u>300,000</u>
		174,000,000

COOPORTUNITY/HHS LEDGER

Amounts Owed to HHS by CoOpportunity

	\$
2012 CMS Start-Up Loan	14,700,000
2014-15 APTC/CSR Overpayments	1,600,000
2014 Risk Adjustment	10,000,000
2015* Risk Adjustment	22,600,000
2014-15 Federal Gov't Excise Tax HIF	2,600,000
2015 Federal Reinsurance Fee	33,000
2015 CSR Reconciliation	350,000
2014-15 PCORI Fee/Excise Tax	<u>175,000</u>
	52,058,000

\$33,500,000 Already Netted/Kept by CMS

*2015 Risk Adjustment over 2x 2014 for just Jan/Feb 2015

(Solvency loans structured as surplus notes)

HEALTHYCT SET-OFF

- ❖ Connecticut Liquidation Act gives Liquidator power and authority to
 - set- off mutual debts or mutual credits between insurer and another and the balance only allowed or paid
- ❖ Connecticut common law recognizes where one party to mutual debts is insolvent, set off may be effectuated even though one or more of the obligations is not due and payable

HEALTHYCT SET-OFF TIMELINE

- January 1, 2017 Liquidation Order takes effect
- February 3, 2017 Liquidator effects set-off of mutual debts between HCT and HHS
- February 14, 2017 Letters to HHS, CMS and DOJ notified them of set-off
- March 3, 2017 Motion to Liquidation Court to approve set-off of mutual debts of HHS and HCT
- March 6, 2017 Letters to HHS, CMS and DOJ re Motion to Approve with Brief in Support of Motion

HEALTHYCT SET-OFF TIMELINE - continued

- No response to correspondence and Motion and no appearance by United States in Liquidation Court
- May 17, 2017 Order by Liquidation Court approves Liquidator's Set-Off
- July 17, 2017 2016 Transitional Reinsurance due but withheld by HHS
- July 31, 2017 HHS files Proof of Claim on bar date

MUTUAL DEBTS

	Before Set Off	After Set Off
Transitional Reinsurance	\$6,273,632	\$6,273,632
Risk Corridors	\$38,784,362.71	\$28,844,985.72
Risk Adjustment	(\$7,256,549)	--
Advanced Premium Tax Credit	(\$577,336)	--
Cost-Sharing Reduction	(\$937,764)	--
Affordable Care Act Fees	(\$1,167,728)	--

*Amounts payable to the United States are listed in (parenthesis) and do not include Start-Up and Solvency Loans, structured as surplus note payable only after all other creditors are paid.

SET-OFF CALCULATION

- ❖ Prior to effectuating Set-Off, HealthyCT owed \$9,939,377 in the aggregate for RA, APTC and CSR
- ❖ HHS/CMS owed \$45,057,995 in the aggregate for Transitional Reinsurance and Risk Corridors
- ❖ As a result of set-off, net payable by HHS/CMS to HCT of \$35,118,618
- ❖ Set-Off amounts covered 2014, 2015 and 2016 with 2014-15 fixed. Inputs for calculating amounts for 2016 were fixed as of year-end 2016 (with amounts calculated for 2016 subject to adjustment)

Questions???