

Humana Bundles Up; Files Suit to Recover Hundreds of Millions in Risk Corridor Payments From Uncle Sam

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On November 2, Humana filed a lawsuit in the United States Court of Federal Claims to recover approximately \$600 million allegedly owed by the United States government. *See Humana Inc. v. U.S.*, case number 1:17-cv-01664. The Humana case follows a string of similar lawsuits over the past year alleging that the government violated Section 1342 of the Patient Protection and Affordable Care Act (the “Affordable Care Act” or “ACA”) and breached an “implied-in-fact” contract by failing to make risk corridor payments for 2014, 2015, and 2016. Humana seeks damages and other relief, including an award of interest on unpaid payments, litigation expenses, and attorney’s fees.

The ACA created a system of virtual marketplaces where individuals and small groups could purchase qualified health plans (QHPs) from participating insurance companies (“Exchanges”). To mitigate the risk of financial loss posed by the uncertainty in costs during the first three years, the government used premium stabilization programs, including a temporary risk corridor program. The

temporary risk corridor program allowed the government to collect money from insurers if the health insurance premiums they collected exceed claims costs by a certain amount, and to redistribute those dollars to insurers that experienced losses.

Unfortunately, many of the largest insurers incurred significant losses from participation in the Exchanges in the first three years, as the cost of medical care for beneficiaries who purchased through the Exchanges exceeded the health insurance premiums those beneficiaries paid into the system. For example, the 2014 and 2015 total risk corridor payments owed to plans affiliated with the Blue Cross and Blue Shield Association exceeded \$3.6 billion. To further complicate the matter, Congress failed to appropriate sufficient ACA funds to cover anticipated QHP losses.

In the absence of congressional appropriation to make risk corridor payments, Humana and others are seeking payment through the government's Judgment Fund ("Fund"). The Fund can be used in cases where payment is "not otherwise provided for" by Congress, and has historically been used to pay court judgments and compromise settlements of actual or imminent lawsuits against the government.

In 2016, the U.S. Department of Health and Human Services stated that it was open to settlement discussions to resolve risk corridor claims. In August 2017, a federal judge in one of the pending risk corridor lawsuits ruled that the government [owed Molina Healthcare \\$52 million in risk-corridor funds](#). In February, Moda Health [received a \\$214 million award](#). Those cases, along with several others, are now on appeal and could proceed to the U.S. Supreme Court. Given the lack of congressional appropriation for risk corridor payments, insurers that do not take proactive steps to recoup their risk corridor funds risk being left out in the cold.

We continue to monitor the status of the Humana and other risk corridor cases, and will supplement this article with additional details as they become available. If you are interested in determining whether your company is owed a risk corridor payment, or further discussing your company's standing to pursue a risk corridor claim under the ACA, please contact a member of the Carlton Fields team listed below.

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