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Health Republic's Curious Liquidation: Part 1

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Health Republic Insurance of New York, New York's only Affordable Care Act nonprofit health insurer, has finally been placed in liquidation. Health Republic's liquidation definitely could use a policyholders' committee and a health providers' committee to sort out how this failed insurer will be wound up, particularly given the liquidation's chaotic and belated commencement.

Health Republic's failure took up a substantial part of the New York Senate Insurance Committee's June 8 confirmation hearing for then-Acting Department of Financial Services Superintendent of Insurance Maria T. Vullo[1] and certainly got a lot of attention when it failed. For those familiar with Health Republic's demise, skip to: "Health Republic's Liquidation." For those who are not familiar with the Health Republic story, a little background is in order.

Nonprofit Obamacare Co-Ops

The 2010 Affordable Care Act included a Consumer Operated and Oriented Plan Program to create nonprofit insurance companies or Co-Ops. Congress intended for these Co-Ops to compete against larger (and increasingly fewer) for-profit health insurers like Anthem, UnitedHealthcare and Aetna.

Under the ACA, the federal government's Department of Health and Human Services and its Centers for Medicare & Medicaid Services were to provide capital for the Co-Op program.[2] Congress, however, did not preempt state regulatory oversight over the Co-Ops themselves.[3] As a result, even though federal tax dollars funded the Co-Ops, state insurance regulators remained responsible for Co-Ops operating in their states. In New York's case, that meant that NY's DFS had to approve Health Republic's rates and policy forms and assure that the Health Republic stayed solvent.[4]

Twenty-three Affordable Care Act Co-Ops were ultimately established in 26 states. For a comprehensive, albeit arguably partisan, review of the Co-Op program and the poor job done by the federal government overseeing the Co-Op program, see Failure of the Affordable Care Act Health Insurance Co-Ops, Majority Staff Report of the Permanent Subcommittee on Investigations for the Committee on Homeland Security and Governmental Affairs (March 10, 2016) (Portman report).[5]

Freelancers' Union Applies to the Co-Op Program

In February 2012, the CMS approved the Freelancers Union's application to participate in the Co-Op program. The Freelancers Union is a nonprofit, New York-based organization that advocates for and makes health insurance available to its more than 300,000 members, most of whom work as consultants, independent contractors, temps and part-timers and more than half of whom live in New York State.

When CMS approved Freelancers' application to participate in the Co-Op program, CMS also

approved two loans: (1) a $23.7 million startup loan and (2) a $151 million solvency loan. The solvency loan covered capital reserves and other solvency requirements imposed by the DFS.

In July 2013, the DFS licensed Freelancers to write health service indemnity coverage. In October 2014, Freelancers had changed the name of its Co-Op to Health Republic of New York. The DFS approved Health Republic's proposed rates, rates that were far lower than any of its competitors.

In September 2014, the CMS approved an additional $90 million loan to Health Republic in order to satisfy reserve requirements set by the DFS. This brought the total solvency funding to about $241 million. (Health Republic later sought an *additional* $70 million loan, but by then HHS had exhausted its Co-Op loan authority and Congress had refused to provide further funding.)[6]

The DFS required that Health Republic, now a licensed NY health insurer, submit annual and quarterly financial statements to the superintendent. Health Republic was also subject to examination by the DFS at any time. Health Republic opened offices located at 30 Broad Street in Manhattan, literally around the corner from DFS' offices.

Health Republic's Short, Unhappy Life

Health Republic began writing on Jan. 1, 2014. Within hours, 30,000 people signed up, including five new enrollees who were admitted to Memorial Sloan Kettering Cancer Center for expensive treatment. For a comprehensive take on how and why Health Republic failed, see M. Waldholz, The short and chaotic life of an Obamacare darling, Crain's New York Business.[7]

The Crain's article describes many missteps, including management's decision to set rates below those recommended by its actuaries at Milliman Inc. and the then superintendent approving those too-low rates, then refusing to allow the new Health Republic CEO to increase Health Republic's rates.

The Crain's article also addresses what Waldholz characterizes as the DFS's failure to monitor Health Republic. Although Health Republic lost more than $77 million in its first year of operation, the DFS waited until early 2015 to demand monthly, as opposed to quarterly or annual, financial statements and allowed Health Republic to continue to issue policies until Oct. 31, 2015. By that time, Health Republic had lost $544 million in 2015 alone.

In January, joint New York State Senate Committees on Health and Insurance conducted a hearing in Albany concerning Health Republic's collapse.[8] During the hearing, Insurance Committee Chairman James L. Seward asked, but was not answered, why the acting superintendent of insurance had not already petitioned to place Health Republic in receivership.

Liquidating a Failed NY Insurer

New York-domiciled insurers that fail are placed in liquidation under New York Insurance Law Article 74.[9] Since 1909, the New York Liquidation Bureau (NYLB), a non-New York state agency that operates outside the DFS (and its Division of Insurance), has overseen the rehabilitation or liquidation of troubled/failed New York insurers.[10] Under Article 74, New York insurance company liquidation proceedings are subject to the exclusive jurisdiction of a New York Supreme Court Justice.[11]

Article 74 calls for the superintendent, in her/his role as liquidator to prepare a plan to liquidate the insurer.[12] Within 180 days after the order of liquidation has been entered, the superintendent should apply to the court with a proposal to disburse the failed insurer's assets.[13]

Claimants, be they policyholders, general creditors or others, are to submit their claims against the estate within four months of the entry of the liquidation order pursuant to a claims procedure devised by the superintendent, although this four-month claim submission deadline is often

extended.[14] Claims are then divided into nine classes and, under the court's supervision, every claim in each class is paid in full before the members of the next class receive any payment.[15]

Health Republic's Liquidation

The receivership process for Health Republic is off to a slow start.

About half of the original 23 ACA Co-Ops had failed by early 2016.[16] Nevertheless, New York was one of the last states with a troubled Co-Op to place its Co-Op under supervision or in rehabilitation or liquidation.

State insurance regulators in Iowa, Nebraska, Louisiana, Nevada, Kentucky, West Virginia, Tennessee, Colorado and Oregon obtained orders of supervision, rehabilitation or liquidation for failed Co-Ops in late 2014, throughout 2015, or by the latest January 2016. [17]

The DFS directed that Health Republic cease writing new policies on Sept. 25, 2015, but did not cancel Health Republic's existing policies. Nevertheless, based on a subsequent DFS and CMS review of the company's finances, the DFS and CMS announced on Oct. 30, 2015 that it would be "in the best interest of consumers to end all Health Republic policies ... on Nov. 30, 2015."[18]

Even though Health Republic had at that point lost more than half a billion dollars and would receive no additional HHS funding and even though Health Republic's board had consented in October 2015 to have the company placed in liquidation, the DFS waited until April 22, 2016 to petition for an order liquidating Health Republic and placing it under court supervision.

In almost all instances, the NYLB works in conjunction with state guaranty insurance funds that pay, up to a statutory limit, approved policyholder claims. Although New York has several different guaranty funds for policies written by insolvent insurers writing property-casualty, life, workers' compensation and automobile insurance, New York does not have a guaranty fund for a failed health insurer, including an ACA Co-Op. While policyholders in Co-Ops in Colorado, South Carolina and Iowa have access to guaranty funds, Health Republic's policyholders have no guaranty fund capable of paying some or all of their allowed unpaid medical claims.

The Liquidation Begins

In New York, the liquidation process usually begins with an application from the New York attorney general for an order to show cause (OTSC) why the insurer should not be placed in liquidation. In the case of a domestic insurer, notice of the OTSC must be given to the insurer's president with constructive notice usually provided to its policyholders through publication in newspapers or by other means as required by the court issuing the OTSC.[19]

The Health Republic OTSC required service on only one person: Ronald J. Vance Jr. Vance, however, is not Health Republic's president. Vance is the Chief Restructuring Officer of Health Republic and an employee of Alvarez & Marsal, a financial advisory firm that is assisting with Health Republic's runoff.[20]

Although the OTSC did not direct that notice be mailed to Health Republic's policyholders and health providers, on May 10 about five dozen Health Care members/policyholders, as well as a few health providers represented by counsel, crowded into Justice Carol Edmead's courtroom on the fourth floor of 60 Centre Street.

The court quickly discovered that many Health Republic policyholders attending the hearing spoke only Spanish. The court directed that a Spanish interpreter translate the proceedings. After an assistant attorney general completed his presentation urging that a liquidation order be entered, the court determined that no objections to the liquidation itself had been filed and granted that part of the application.[21]

Interestingly, counsel that had been representing Health Republic after the DFS directed that Health Republic cease writing business or paying claims, but before the liquidation, Weil Gotshal & Manges LLP, then addressed the court as counsel for Acting Superintendent Vullo.

Although no party opposed the liquidation itself, an objection had been filed concerning the scope of an injunction within the proposed liquidation order. This provision would enjoin not only the commencement or prosecution of any action against Health Republic, the NYLB or the acting superintendent in her role as liquidator, but would also bar any action on her claim against the DFS and would thus enjoin the pro se objector's previously commenced suit against the DFS.

The court denied the motion to modify the injunction, but you can find on another website a copy of the papers objecting to the scope of the injunction. This website is maintained by the Garden City Group, which describes itself on its website as an organization that handles "complex class action settlements, bankruptcy reorganizations, mass tort administrations and legal notice programs like no one else."

No NYLB Involvement

Ordinarily, the NYLB marshals a failed insurer's assets, collects all records, establishes a claims procedure, processes policyholder claims, collects reinsurance and otherwise winds up the company. Although Acting Superintendent Vullo has designated two persons at the NYLB and one former NYLB employee who now works at the DFS, as her agents with respect to Health Republic, at this point it, appears that the NYLB's role with respect to NY's failed Co-Op is confined to posting court orders on its website.

With respect to their claims, Health Republic's policyholders are, at this point, being directed to the website maintained by the Garden City Group. This website advises that Health Republic's policyholders should "submit their claims for out-of-network services by March 31, 2016 in accordance with the procedures and deadlines set forth in their insurance policies" and that they will receive an "Explanation of Benefits statement ... as soon as available."

Brokers and vendors, however, are told not to bother filing claims in that "it is highly unlikely that Health Republic will have sufficient funds to pay any claims," other than administrative expenses, i.e., the expenses presumably already incurred and being incurred by vendors such as Alvarez & Marsal, the Garden City Group and Weil Gotshal.

Health Republic's last quarterly financial statement covered the period ending on June 30, 2015. At this point, it remains unclear how much of Health Republic assets remains or when the liquidator will establish an Article 74 claims procedure.

Nothing has been posted on the NYLB or the Garden City websites with respect to Health Republic's assets and liabilities. Under these circumstances, committees of policyholders and health providers would assist greatly in opening up and expediting Health Republic's liquidation. This will be examined more closely in the second part of the article.

[1] Acting Superintendent Maria T. Vullo's testimony during her June 8, 2016 confirmation hearing. The NY State Senate confirmed Gov. Andrew Cuomo's appointment of Vullo on June 15, 2016.

[2] The Affordable Care Act also provided certain "risk sharing" mechanisms to shift funding among the Co-Ops and provide certain excess reinsurance in order to help these new insurers deal with policyholders, many of whom were previously uninsured. See generally, Durkin & Taylor, Emerging Disputes Over Risk Sharing Under The ACA.

[3] Under the McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011 et seq. (2016), Congress left the business and regulation of insurance to the states unless a federal statute "specifically relates to the business of insurance." See United States v. Fabe, 508 U.S. 491, 493, 498 (1993).

[4] See generally, Obamacare's Co-Ops: The "Charter Schools" of Health Care, 17 Quinnipiac Health Law Journal 105 (2013-2014).

[5] Sen. Portman left Congress in 2005 to serve as the United States Trade Representative and then served as the Director of the Office of Management and Budget under President George W. Bush.

[6] Portman Report, p. 43, n. 257.

[7] Crain's commissioned this article, supported in part by a CUNY Journalism School Grant. Waldholz is a Pulitzer-winning former editor and journalist at the Wall Street Journal and Bloomberg News.

[8] You can view a video of the hearing here.

[9] See generally, NEW APPLEMAN NEW YORK INSURANCE LAW (2d. Ed.) Vol. 3, Ch. 45 (2015) (APPLEMAN).

[10] Dinallo v. DiNapoli, 9 N.Y.3d 94, 103 (2007) ("The Bureau is not part of the Insurance Department's budget, operates without the benefit of state funds, maintains its own errors and omissions coverage and is represented by its own private counsel, not the Attorney General, as is normally the case when a state agency is sued.") For a comprehensive critique of the Bureau and how it might be improved and restructured, see P. Bickford, New York's Liquidation Bureau: a Critical Analysis, Parts I and II, Insurance Advocate, No. 10 (May 18, 2009) at 18 and No 11 (June 1, 2009) at 24.

[11] Knickerbocker Agency Inc. v. Holz, 4 N.Y.2d 245, 252 (1958 quoting Motlow v. Southern Holding & Securities Corp., 95 F.2d 721, 725-26 (8th Cir. 1938) ("[I]t is essential that the title, custody, and control of the [insolvent insurer's] assets be entrusted to a single management under the supervision of one court.")

[12] In re Lawyers Title & Guar. Co., 254 App. Div. 491, 495, 5 N.Y.S.2d 484, 487 (lst Dept. 1938), reh'g denied, 255 A.D. 1032, 9. N.Y.S. 2d 126 (lst Dept. 1938) ("The Superintendent may not be compelled to surrender his trust created by statute. * * * He may ask the help of the Court in solving the problems which arise from time to time but all propositions for the liquidation of the corporation must be approved by him." * * * There is nothing to prevent the Superintendent himself from negotiating with parties interested for the formulation of an appropriate plan of liquidation, and, when he has decided upon such plan, it may be submitted for the approval or disapproval of the court.")

[13] NYIL § 7405 (f)(1).

[14] NYIL § 7432(b).

[15] NYIL § 7434.

[16] C. Borrelli, What The Demise of Insurance Co-Ops Says About the ACA, www.law360.com/articles.748140.What-the-demise. (January 22, 2016).

[17] Portman Report, pp. 10-15.

[18] NYDFS, NYSOH, CMS Announce Additional Actions Regarding Health Republic Insurance of New York. The New York Department of Health then oversaw an emergency effort to enroll Health Republic policyholders with15 other NY health insurers.

[19] NYIL §7418 (a)(1).

[20] Crain's Article at 11/19 ("The insurer's office in downtown Manhattan shut down in November and its assets, if any, are being managed by the restructuring firm Alvarez & Marsal, which didn't return calls for comment.")

[21] The Court also directed that a copy of a transcript of the May 10 proceeding, including a Spanish translation, be posted on the NYLB website.

Health Republic's Curious Liquidation: Part 2

(June 22, 2016, 11:18 AM EDT)

The U.S. Bankruptcy Code provides for committees in both liquidation (Chapter 7) and reorganization (Chapter 11) proceedings.[1] In a Chapter 7 liquidation proceeding, the court *may* appoint a creditors' committee consisting of not more than 11 or fewer than three creditors, but the committee's members are usually not reimbursed for their time or expenses.[2]

In a Chapter 11 reorganization, the trustee *must* appoint a committee of unsecured creditors.[3] A Chapter 11 creditors' committee may consist of representatives from entities that hold the seven largest claims against the debtor. Creditors' committees are usually formed within a few weeks of the commencement of the case.

The bankruptcy court may also appoint other committees, including multiple creditors committees or committees consisting of equity security holders. These committees may retain attorneys, accountants or other professionals to advise the committees, and the court may reimburse members of the committees subject to limitations in the Code.[4]

Under the McCarran-Ferguson Act, 15 U.S.C.A. § 1012(b), state insurance company insolvencies are conducted under the law of the state in which the insurance company is domiciled. These state laws are derived from model laws drafted by the National Association of Insurance Commissioners (NAIC). These model laws and state statutes do not specifically address the use of committees in insurance company insolvencies.[5] Nevertheless, committees have been effectively used in insurer receiverships in New York.

In the liquidation of Midland Insurance Co., which began in 1986 and continues today, Justice Michael Stallman, at the urging of the then-liquidator's outside counsel, brought together Midland's major policyholders and Midland's larger reinsurers to explore how to resolve asbestos-related claims and to structure a framework in which the liquidator could collect reinsurance for those claims.

In June 2006, four of Midland's major reinsurers and twelve of its Fortune 500 policyholders crafted a Case Management Order (CMO) that allowed Justice Stallman to address issues that stood in the way of collecting Midland's reinsurance, including what law should be applied to determine coverage questions and how reinsurers might participate in the liquidator's claims determinations.

The CMOs produced by these committees and so-ordered by Justice Stallman allowed the policyholders to move to resolve a choice of law dispute that eventually resulted in a Court of Appeals determination upholding Justice Stallman's ruling.[6]

Years before Midland, Supreme Court Justice Walter Schackman concluded that a cedants'/creditors' committee would help the liquidator of Constellation Reinsurance Co. evaluate proposals to bring Constellation, a failed professional reinsurance company, out of liquidation.[7] Pursuant to that order, the creditors' (actually cedants') committee passed information back and forth between Constellation's cedants and the liquidator.[8]

The committee's membership fluctuated and at various times included representatives from reinsurance intermediaries, attorneys for cedant companies and nonlawyers from the cedants themselves. Neither of the committee members nor the committee's co-counsel were paid from Constellation's assets and the committee also paid for the cost of copies, postage and Federal Express.

In 1991, Zurich Reinsurance Co. of New York offered to buy Constellation pursuant to a 100 percent quota share contract. The committee gathered comments and obtained several changes to the proposal. At a hearing that approved the Zurich proposal and took Constellation out of liquidation, Justice Schackman noted that the committee's counsel and the committee itself had been "very helpful."

Policyholders' and creditors' committees have also played useful roles in insolvency proceedings in Pennsylvania (Mutual Fire)[9] and Missouri[10] (Transit Casualty). Although receivers in some jurisdictions have successfully prevented the formation of creditors' or policyholders' committees, or at least the formation of formally recognized committees whose members would be reimbursed by the estate for professional fees or other expenses, even those courts have left the door open to "unofficial or informal" committees of policyholders.[11]

Health Republic is not a typical insurance company receivership and cries out for committees of policyholders and medical providers to promote the transparency needed to understand how New York intends to step up and address the loss of taxpayer monies and the unpaid or unreimbursed losses sustained by more than 200,000 Health Republic policyholders and health providers.

The Need for Transparency and Committee Involvement

Health Republic policyholders include many energetic and alert writers, assistants and part-time employees who can add value and shine light on the liquidation. Health Republic health providers are, in many cases, represented by in-house or outside counsel, as well as trade associations, but thus far have been only observers in the Health Republic liquidation. The health providers (and their counsel) should bring their resources and considerable talents to the Health Republic liquidation.

Here are a few of the areas that the committees could explore:

> ***1. Timeline.*** The New York Senate Insurance Committee and others have asked about the delay in liquidating Health Republic, but regardless of the explanation, how long will the Health Republic liquidation take? Committees are needed to press for a timetable and an end-game for the liquidation.
>
> ***2. Proofs of Claim.*** Policyholders have been promised an "explanation of benefits" with respect to their unreimbursed claims, but nothing has been announced with respect to filing proofs of claim. "Deadlines are set for filing proofs of claim in order to encourage all claimants to file promptly, making possible an early partial distribution of the insurer's assets."[12]
>
> Committees should have input with respect to the filing of proofs of claim. Committees should also participate in the drafting of any case management orders.
>
> ***3. Assets and Liabilities.*** Nothing has been posted on the NYLB or Health Republic websites with respect to Health Republic's assets and liabilities. The New York State Senate has passed a measure that would create a special "Health Republic Insurance of New York

Fund" that would collect monies from certain fines, tobacco settlements, lotteries and other fees and authorize the superintendent of the DFS to distribute that money pursuant to "terms to be set forth in a future chapter of the law," but the bill provides that these monies may only be distributed after distribution of all assets in connection with a [Health Republic] liquidation proceeding.[13] This measure passed in the Senate, but no similar action has been taken in the Assembly.

Committees could ask about measures like these and give both health providers and policyholders a voice with respect to how the lack of a guaranty fund for Health Republic will be addressed, both in the liquidation court and in the New York Legislature. And committees certainly should be heard with respect to the posting of reports on Health Republic's remaining assets.

4. Administrative Expenses. At this point, it is unknown how much in Health Republic assets has been spent from October 2015 to date on outside vendors and counsel working, presumably, at the direction of the DFS.

At the May 10 liquidation hearing, counsel for the then-acting superintendent stated that there exists a reinsurance arrangement, pharmacy rebates and "certain amounts that Health Republic is entitled to receive from federal programs" that may be collected.[14] Counsel also promised that "financial statements" would be prepared "during the liquidation" to "apprise the court of the liquidator's progress," but no dates were offered as to when these reports will be made available. Committees could monitor and comment on these reports.

5. Recoupment. Actions have been commenced in other states to recover monies from the federal government on behalf of failed Co-oPs. Complaint, Health Republic Insurance Company [of Oregon] v. United States of America, No. 16-259 C (Ct. Fed. Cl. Feb. 24, 2016). This action seeks to recover monies allegedly promised by the federal government under the reinsurance and risk-sharing provisions of the Affordable Care Act. Health Republic (Oregon) shut down in October 2015, but continued paying claims and has not yet been liquidated. Another Oregon Co-Op, Oregon's Health Co-Op, survived the reduced amount of federal risk-sharing monies and continues in operation.[15]

In Iowa, Commissioner Nick Gerhart took over CoOpportunity Health Inc., an Iowa Co-Op, in December 2014 and placed the company in liquidation in February 2015. Unlike New York, the Iowa liquidation order provided a claims procedure and the federal government has already filed a proof of claim against the CoOportunity estate. Commissioner Gerhart seeks a declaration that the federal government is not entitled to priority claim status in the government's efforts to recoup solvency loans that Gerhart claims are subordinated to policyholder claims. Gerhart v. U.S. Department of Health and Human Services, No. 16-cv-00151 (S. D. Iowa May 3, 2016).

Committees of Health Republic policyholders and health providers should be given standing to address how claims on behalf of and against the Health Republic estate will be handled and to explore whether New York's acting superintendent will commence similar actions.

As one attorney with experience working for and with the liquidators of insolvent insurers put it while advocating for policyholder committees: "The desirability of creditors' committees is manifest. After all, it is the creditors who paid good money for bad insurance. They are the only ones who are hurt by the insolvency." [16] In Health Republic's case, the need is even *more* manifest.

Health Republic has no guaranty funds to pay policyholders or providers. Nor are there any private investors; all of Health Republic's capital came from federal taxpayers. And most of Health Republic's policyholders and health providers are New York residents. For that reason, the Health Republic liquidation poses a fraction of the difficulties posed by the failures of large 50-state

multiline insurers like Midland or Union Indemnity.

Policyholders shouldn't be shunted to a third-party website and provided almost no information on their claims other than being told that an explanation of benefits may be headed their way one of these days. The Health Republic liquidation should be conducted in the open so that additional monies will not be wasted by outside vendors whose work remains unevaluated and largely unknown.

While advocates for committees in U.S. insurer liquidations have argued that only creditors can push for such committees, in this case Superintendent Vullo should take the lead. Health Republic's policyholders and health providers should not be kept in the dark with only a website and a few FAQs to guide them. Health Republic should be wound up quickly and with as much policyholder and health provider participation as possible.

And if the federal government intends to seek a priority claim status in the Health Republic Liquidation, let's find that out sooner rather than later. Committees would bring light and energy into the Health Republic liquidation, which was adjourned on May 10 without date, and help avoid having New Yorkers suffer a second Health Republic debacle, this one during its liquidation. [17]

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[1] 11 U.S.C.A. § §705, 1102.

[2] 11 U.S.C.A Section 705.03[3].

[3] 11 U.S.C.A. § 1102.

[4] See generally COLLIER BANKRUPTCY MANUAL (co-chief editors Alan N. Resnick and Henry J. Sommer), chs. 705, 1102, 1103 (2008).

[5] See D. Hartz, Creditor Committees, Constituencies, and Constitutions, The Insurance Receiver, Vol. 9, No. 4 (Winter 2000).

[6] In re Liquidation of Midland Insurance Company, 16 N.Y. 3d 536, 542 (2011) ("Consequently, during the spring of 2006, the parties negotiated and agreed upon a proposed case management order * * * The CMO set forth a procedure to resolve the legal disputes between the parties . . . ."); see also, Veach and Milrad, Threshold Choice-of-Law Analysis Required for Each Midland Policy, Mound, Cotton, Wollan & Greengrass Newsletter, Vol. 18, Issue # 3 (2011); see also, T. McCarthy, Creditors' Committees in U.S. Insolvencies – the Wave of the Future (Only if Creditors Demand it!) at 18, Insurance Receiver, Vol. 9, No. 3 (2000) (McCarthy, Creditors' Committees).

[7] In re Liquidation of Constellation, Index No. 43178/1986 at 7 (1990).

[8] J. Veach, Creditors' Committees: The Constellation Story, Insurance Receiver, Vol. 10, No. 1 (Spring 2001) at 18-21.

[9] Foster v. The Mutual Fire, Marine and Inland Insurance Company (appeal of the cedent's committee), 544 PA 387, 404 (1996) (Supreme Court agreed with committee's argument that fee petitions should not be filed under seal).

[10] McCarthy, Creditors' Committee at 18 discussing ad hoc committee of guaranty associations established during the Transit Casualty Insurance Company liquidation, as well as a proposed creditors' committee.

[11] In Re Liquidation of Integrity Ins. Co, 231 N.J. Super 152, 161, 555 A.2d 50 (Ch. Div. 1988).

[12] APPLEMAN § 45.09[4] at 45-52.

[13] NY LEGIS 54 (2016) Sess. Law News of N.Y. Ch. 54 (S. 6406-C, Part LL amending NY State Finance Law § 99 (McKinney's).

[14] May 10th Liquidation Hearing Trans. at 18.

[15] N. Budnick, Health insurer beats odds with luck, caution.

[16] McCarthy, Creditors' Committees at 18.

[17] For an outrageous example of all that can go wrong in an insolvency proceeding in which outside vendors played a huge role, but no policyholders' or creditors' committees participated, see B. Coffin and others, The Complete ELNY Saga: 21 Years of Mismanagement, Corruption, Broken Promises, and Shattered Lives, HealthPro; P. Bickford, The Elephant in the Courtroom, AIRROC MATTERS, Summer 2012 at 6.

Health Republic's Curious Liquidation: Part 3

(August 29, 2016, 2:45 PM EDT)

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.

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.

[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.

Health Republic's Curious Liquidation: Part 4

(August 30, 2016, 2:49 PM EDT)

In Health Republic's Curious Liquidation: Part 1, I traced Health Republic's birth as a New York state-authorized not-for-profit company funded under the Affordable Care Act's Consumer Operated and Oriented Plan Program and its subsequent liquidation.

In Part 2, I set out several areas where committees of policyholders and service providers would aid in Health Republic's liquidation, just as creditors' committees in bankruptcy courts add value and expedite those proceedings.

Yesterday, in Part 3, I reported on a July 28 status conference during which Justice Carol Edmead, in her role as the court overseeing Health Republic's liquidation, directed that the liquidator's contracts with outside counsel and third-party administrators, as well as the liquidator's administrative expenses incurred to date, be posted online in order for policyholders and service providers to see how Health Republic's assets are being spent.

Here, in Part 4, I provide more reasons why Health Republic's estate would benefit greatly from committees of policyholders and service providers that would bring their perspectives to the liquidation process.

More Reasons Why the Health Republic Liquidation Needs Committees

As I mentioned in Part 2, committees of creditors, equity holders and other interested parties are standard features in bankruptcy court.[1] Congress provided for these committees because they add value and give creditors and shareholders a voice in the proceedings. Creditors' committees also help bankruptcy courts understand and address issues that might otherwise be obscured or overlooked or addressed much later than would otherwise be the case.

We identified in Part 2 instances in which courts overseeing New York insurer liquidations, as well as courts overseeing liquidation proceedings in other states, have reached out to or recognized committees of reinsurers or cedants or others. But we also pointed out that creditors' committees in insurance company insolvencies are the exception rather than the rule. Health Republic itself, however, is also an exception to many rules with respect to insurer insolvencies and warrants full policyholder and service provider participation through committees recognized by the court.

Consider the following circumstances that distinguish Health Republic from most insurance company insolvencies.

First, all of Health Republic's capital came from the federal government. In most insurer insolvencies, shareholders have skin in the game and follow the proceedings and the treatment of the company's assets. The Freelancers Union has not participated in Health Republic's liquidation because, reputational risk aside, it had very little skin in the game and has none now. Federal taxpayers may or may not have standing to jump into the Heath Republic liquidation, but there are no shareholders watching the Health Republic proceedings.

Second, Health Republic has caught the attention of New York legislators, who have asked why it took so long to liquidate the company (and, to my knowledge, have never received an answer). I discussed in Part 2 how legislators have proposed a fund to reimburse the service providers whose claims will never be paid. Health Republic's failure came up several times during Superintendent Vullo's televised confirmation hearings a few months ago. Health Republic's failure and subsequent liquidation is of considerable public interest and, as a result, its liquidation should be fully explored in open court.

Individual policyholders and even individual service providers should not be expected to follow along on their own. Committees would allow for policyholders and service providers to pool their experience and knowledge and help the court — and each other — understand where Health Republic's liquidation is headed.[2]

Third, the New York Liquidation Bureau, with few exceptions, has handled almost every insurance company insolvency in New York since 1909.[3] But in the case of Health Republic, outside counsel for the superintendent, counsel that represented Health Republic before the liquidation proceeding began, a financial advisory firm and a third-party administrator that still operates Health Republic's website are apparently all working together to fashion a liquidation plan and a claims procedure for Health Republic. The bureau's role, thus far, appears to be confined to posting Health Republic's liquidation order and a copy of transcript of the May hearing on its website.

The bureau has handled far more complicated insolvencies than Health Republic, e.g., the liquidations of Midland Insurance Company, Frontier Insurance Company, Ideal Mutual Insurance Company, Union Indemnity Insurance Company, and the ancillary liquidation proceedings for Lumbermens Mutual Casualty Insurance Company, The Home Insurance Company, and Reliance Insurance Company. These insolvencies all involve insurers that wrote many lines of business in all, or almost all, 50 states, Washington D.C., and Canada. These insurers all have complicated reinsurance programs and their liquidators must deal with guaranty funds in all, or almost all, 50 states. Health Republic, on the other hand, wrote one line of business for about twenty months. Its reinsurance program is limited to a couple of surplus treaties and, unfortunately, there are no guaranty funds involved.[4]

The superintendent has the authority to appoint "special deputy superintendents, and employ such counsel, clerks, and assistants as [she] deems necessary."[5] In this proceeding, Superintendent Vullo appointed four special deputies, three of whom are employed by the bureau and one of whom is the former head of the bureau who now also serves as the executive deputy superintendent of the U.S. Department of Financial Services and thereby oversees the division of insurance.[6] Despite this, the design of the claims procedures has been delegated to outside counsel, a financial advisory firm and a third-party administrator, the fees for none of which have been approved by the court.

Despite all these agents and outside advisers, the superintendent has not yet included Health Republic's policyholders and largest creditors in the liquidation process. At the July status conference, the court asked whether the explanations of benefits (EOBs) for policyholders would provide enough meaningful information for policyholders to know whether to appeal. What better way to get an answer than to refer that issue, and other related claims adjudication questions, to a policyholders committee for input? And, along the way, that committee could explore why Health Republic needs so many cooks in this kitchen.

Fourth, claims procedures are being drafted for service providers, such as New York University Hospital Centers, North Shore University Hospital and St. Catherine of Siena Medical Center, even though hospitals, practice groups and doctors are being told that they will receive nothing. It appears that a lot of time and effort may be going into explanations of payments (EOPs) for providers that will never see a nickel. Has anyone consulted with service providers on this issue? A committee of service providers could add real and immediate value to the liquidation proceedings

on matters such as these.

Fifth, Health Republic's last financial statement was its 2015 second quarter financial statement, which showed assets of $152 million and liabilities of $530 million.[7] The bureau is required to publish a balance sheet of sorts concerning the Health Republic estate, but that nonstatutory balance sheet is not due until May 2017![8] To date the court has not been presented with any information with respect to Health Republic's current assets and liabilities. As a result, policyholders lack even a ballpark idea of how much money is available to pay a portion of their claims.

If a simple balance sheet were made available now, the court would be in a much better position to evaluate the proposed claims procedures. And if it turns out that, hypothetically, Health Republic has $500 million in liabilities, but only $50 million in assets, then many policyholders may not bother to submit claims. A policyholders committee could step in and ask that this search for false precision cease until policyholders have at least a rough idea of how much money remains in the estate.

All of these circumstances cry out for committees of policyholders and providers to help the superintendent and the court close the Health Republic estate as quickly and economically as possible. Nevertheless, Justice Edmead, despite the lack of policyholder and service provider participation, has already focused on one very important issue: how much money has already been spent during the months after Health Republic's board consented in October 2015 to liquidation? Rather than wait for "periodic reports" months or years from now, the court has demanded that contracts be posted and moneys accounted for now, and recent past insurer insolvencies support these demands.[9]

Time's A-Wastin'

In 2008, the then-superintendent, acting in his role as liquidator, presented Justice Eileen Bransten with an "Initial Report on the Status of the Liquidation of Union Indemnity Insurance Company of New York." Union Indemnity had been placed in liquidation in 1985. The initial 2008 report sought approval to pay administrative expenses already incurred by the liquidator and to allow for a pro rata share of policyholder claims. (At that point, the Union Indemnity estate had been open for 23 years.)

The court declined to approve the initial report and noted that "Union's assets total $106,419,398 and the administrative expenses are $83,704,661," thus calling for "approximately 80% of the estate ... going toward satisfaction of administrative expenses, which leaves the policyholders ... with a very small proportionate share."[10] One objector to the initial report, a reinsurer, called for an audit of the estate and the appointment of a creditors' committee.

The liquidator had admitted in his "initial" report that the Union Indemnity estate had been poorly administered and even alluded to "criminal conduct," but the liquidator assured the court that significant reforms at the bureau had been implemented. The court ordered that the liquidator prepare another report and "demonstrate that [Union Indemnity's] administrative expenses [were] not attributable to poor management, criminality, or audit failure."[11] But given the liquidator's representations about its "mandate for reform," the court chose not to "interfere with the liquidator's discretion to manage the estate by requiring a creditor's committee ... *at this time* (emphasis added)."[12]

Part of the reforms referred it in the initial report included 2008 legislation amending NYIL 7405(g) and adding provisions for annual "audits" of the estates under the bureau's management.[13] The effectiveness and value of these "audits" has been questioned,[14] but the concern here is not verifying that moneys were spent, but determining whether money should be spent in the first place. And it should be noted that "audited" statements prepared pursuant to NYIL 7405(g) won't appear until August 2017.

Unlike Union Indemnity, where expenses were presented decades into the liquidation proceeding, the Health Republic liquidation has just begun. Justice Edmead is on the right track in insisting that administrative expenses and the terms of the third-party engagements be presented now, and not after the estate's assets have been dissipated.

The court is also correct in requiring that expenses and contracts be placed online, where policyholders and providers can see them. A policyholders committee and a service providers committee, however, would assist mightily in evaluating these expenses and commenting on the proposed claims adjudication procedures.

Health Republic's creditors, including over 200,000 policyholders and its dozens of service providers, are a relatively sophisticated lot. The superintendent could solicit applications for committees through the HR site, the bureau website and a press release. A representative policyholders committees might include policyholders with large claims, policyholders with out-of-network issues, and policyholders from different parts of the state. The service provider committee might include representatives from the larger hospitals, a couple of practice groups and an individual doctor.

Clearly, it would be easier for the liquidator to proceed at the current pace and behind closed doors with sporadic appearances before the court to seek approval for procedures and, eventually, approval of expenses that have already been incurred, but by that time the money will have been spent. The issue here is not auditing files to determine if money in matches money out; the issue here concerns the expeditious winding up of the Health Republic estate (and not wasting more taxpayer money).

[1] K. Klee and J. Shaffer, Creditors' Committees under Chapter 11 of the Bankruptcy Code, 44 S.C. L. Rev. 995, 999 (1993). The authors, of course, acknowledge the distinction between near-mandatory creditors' committees under Chapter 11 and the limited responsibilities of a creditors' committee under Chapter 7. Those responsibilities (rights) under Chapter 7 include making recommendations to the Chapter 7 Trustee and submitting to the court recommendations concerning the administration of the estate. Note 17.

[2] During both the May hearing and the July status conference, Justice Edmead gave counsel for the service providers an opportunity to address the court, an opportunity that counsel passed up. That was unfortunate because the service providers probably have a lot to say about how policyholder claims should be processed and how much money is being spent processing the claims.

[3] In 1994, Superintendent Ed Muhl, one of the rare superintendents of insurance who had executive insurance experience before being appointed superintendent, appointed a special agent, who himself had substantial insurance regulatory experience, to oversee the liquidation of United Community Insurance Company located in Schenectady, New York. For an account of United Community liquidation see P. Bickford, The Insurance Receivership Process in New York at 4-5.

[4] The bureau may not have experienced many health insurer failures recently, but did close two health maintenance organizations (HMOs) in 2015: Essence Healthcare of New York Inc. and CIGNA Healthcare of New York Inc.

Neither of these HMOs had any open claims and the only creditors were the HMOs' owners. Note,

however, that: (1) a deputy bureau chief in the DFS health bureau submitted affidavits in support of the liquidations of both of the HMOs, which was not the case for Health Republic; and (2) the CIGNA estate, even though it was open for less than a year and had no claims, incurred $134,165 in administrative and direct costs. Report on the Status and Request to Close the Liquidation Proceedings of CIGNA Healthcare of New York, Inc., dated Sept. 28, 2015, a copy of which may be bound on the Bureau's website.

[5] NYIL 7409 (c). The fees paid these special deputy superintendents and counsel "shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer." Orders of liquidation and orders approving expenses and closing these estates may be found on the bureau's website.

[6] You can find the June 17, 2016, certificate of appointment on the Health Republic website under "Docket."

[7] For example, Health Republic's second quarter financial statement has this liability entry: "Uncollected Premiums and Agent's Balances in the Course of Collection - $240 million." Uncollected premiums? A committee could explore what this entry means.

[8] NYIL 7405(g).

[9] July Trans at 7-8.

[10] In Re Matter of the Liquidation of Union Indemnity Insurance Company of New York, Index. No., 41292/85, slip op. at 26 (filed February 6, 2009).

[11] Id., Slip Op. at 27

[12] Id. For an example of an estate that would have profited from a policyholders committee, see generally, P. Bickford, Opinion: Ongoing ELNY Debacle Exposes Serious Problems, Insurance Advocate at 22-24 (February 18, 2013.

[13] Bickford, Part V at 19-24.

[14] Id.

Health Republic's Curious Liquidation: Part 5

(October 7, 2016, 8:29 PM EDT)

For those readers just joining us, Part 1 addressed how Health Republic Insurance of New York Inc., New York's only not-for-profit health insurer formed under the Affordable Care Act, opened in January 2014 and was shut down in the Fall of 2015. Part 2 explained why Health Republic's liquidation cries out for committees of policyholders and service providers to participate in Health Republic's recently commenced liquidation proceedings.

Part 3 reported on a July 2016 status conference requested by outside counsel representing Maria T. Vullo, superintendent of the New York Department of Financial Services, in her capacity as Health Republic's liquidator. Counsel asked for the conference to advise the court overseeing the liquidation about a proposed claims procedure for Health Republic's 206,000 former policyholders. During the July conference, Justice Carol Edmead, who oversees the liquidation pursuant to NYIL Article 74, directed that counsel post contracts entered into with Health Republic's third-party administrators, vendors and counsel and also post all expenses incurred by these third parties.

Part 4 set 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 and third-party administrators.

Court Directs that Contracts and Expenses be Posted

During the July conference, the court directed that Health Republic's "administrative costs and related agreements" be posted online in order that "interested parties ... can see * * * the [estate's] administrative costs, and to whom those costs are going ..."[1]

The court also directed that the liquidator's counsel return to court with a revised claims procedure for policyholders, one that would address how policyholder disputes over claims would be handled.[2]

On September 20, counsel filed a revised, proposed order to show cause with respect to claims procedures for policyholders. The proposed order to show cause is now returnable at 10:00 a.m. in Supreme Court, New York County, Part 35 (Room 438) on Tuesday, Oct. 11, 2016.

At about the same time that counsel filed the revised order to show cause, a one-page summary of $1.6 million in expenses paid by the estate for the ten-week period from May 11, 2016, through July 31, 2015, appeared on a website operated by the Garden City Group (GCG), one of Health Republic's third-party service providers.[3] The paid expenses summary may be found on the site under the heading: "Key Documents." The website also included under the heading key documents copies of five contracts/engagement letters with vendors, third-party administrators and counsel.

After unsuccessfully seeking additional information about the contracts and paid expenses from

the DFS, I wrote to Justice Edmead and set out the questions and concerns that committees of policyholders and service providers would probably raise if such committees were recognized.[4] What follows is a synopsis of those questions, some of which may be addressed on the October 11 return date of the proposed order to show cause.

Third-Party Contracts

Since I wrote to the court, two more agreements have been posted. You can now find on the Health Republic website seven engagement agreements or contracts. Five of the seven agreements/contracts were entered into before Health Republic was liquidated on May 10, 2016.

Here are the firms or companies for which contracts have been posted:

a. Alvarez & Marsal, engaged to "assist with" an examination of Health Republic and to "wind down ... its operations" (one contract executed on Nov. 24, 2015 and another on Sept. 27, 2016);

b. GCG, hired to provide notices, collect information on claimants and their addresses, run a website and provide related administrative services (executed on Nov. 24, 2015);

c. EisnerAmper, engaged to audit Health Republic's statutory financial statements and schedules of federal government loans (executed on May 11, 2016);

d. POMCO Inc., hired to review and audit policyholder claims, essentially the same functions that POMCO performed pursuant to a 2013 contract entered into with Health Republic before Health Republic began issuing policies (no date of execution provided);

e. Weil Gotshal & Manges, retained to provide legal advice to the superintendent in her role as Health Republic's liquidator (executed on Nov. 19, 2014) ; and

f. Rackspace, hired to provide data-base "hosting services" for Health Republic (executed in Dec. 24, 2013, a week before Health Republic issued its first policies).[5]

You can read these contracts and review the paid expenses summary yourself on the Health Republic website (maintained by GCG), but here are a few questions that committees of policyholders and service providers might raise.

Questions About the Contracts

1. A&M Agreement/Fees. Three persons signed the November 2015 A&M agreement, which runs for 16 single-spaced pages with a couple of appendices: Barbara Davis, Health Republic's board chair; Cheryl Aini, the DFS director of administration; and Ronald Vance, a managing director at A&M. Pursuant to the A&M Agreement, Mr. Vance became (and until late September apparently remained as) Health Republic's Chief Restructuring Officer or "CRO." [6]

The November 2015 A&M Agreement states that, pursuant to an October 2015 Health Republic board resolution, the board had consented to "having [Mr. Vance and other A&M personnel] operate under the supervision of the Department," but describes Vance as Health Republic's "Chief Restructuring Officer (the 'CRO')." [7] The September 2016 A&M agreement that Vance and DFS special deputy superintendent Scott Fischer just signed appears to demote Vance to a "consultant" role, but his hourly fee remains at $675.[8]

The November 2015 A&M Agreement provided that for the month of November 2015, A&M's total hourly fees billed would not exceed $395,000 "without the express written agreement of the Department." Under the November 2015 agreement, subsequent monthly billings would not exceed $750,000 unless the department agreed in writing. A&M also agreed to

provide "weekly bills to the Department for review."[9] The September agreement appears to have eliminated these caps on billing.

In the November 2015 A&M Agreement, Health Republic, which was at that point subject to the superintendent's supervision, agreed to pay promptly a retainer of $395,000.[10] The September 2016 agreement reduced the retainer to $150,000.[11]

As discussed below, the paid expenses summary does not cover the period from the date of the board's consenting to liquidation until the Health Republic liquidation order was entered on May 11, 2016. Where is the accounting for the fees paid to A&M from October 2015 through mid-May 2016? With respect to the November 2015 A&M Agreement, it appears that Vance engaged Weil on Nov. 19, 2014, even though the November A&M Agreement was executed on Nov. 24, 2019.

Under what contract or authority did Vance engage Weil before A&M entered into its agreement? Is there another A&M agreement that predates the November agreement? More importantly, if the board stepped aside in October 2015, and it appears that it did, who was hiring third-party administrators, engaging counsel and spending Health Republic's money from October 27, 2015 to May 10, 2016?

2. Weil Engagement/Fees. Five days before Vance executed the November 2015 A&M Agreement in his capacity as a managing director of Alvarez & Marsal Healthcare Industry Group LLC, Vance was the addressee on a "Restructuring Engagement" letter with Weil (Weil Engagement).[12] Vance hired Weil to "advis[e] and represent[] [Health Republic] in preparation for, and in connection with, the administration and prosecution of a potential proceeding involving [Health Republic] under Article 74 of the New York Insurance Law ... and such other matters, if any, as may be listed on Schedule 1."[13]

Health Republic agreed to Weil's regular hourly rates of up to $1,215 an hour.[14] Health Republic also agreed to pay promptly all monthly billings and also agreed to pay a $250,000 "initial fee advance."[15] The Weil agreement contains an advance conflict waiver. Within the advance conflict waiver provision, the agreement states that: "[Health Republic] hereby consents to the engagement of Weil in connection with an Article 74 Proceeding by (i) the Superintendent of Financial Services of the State of New York in his capacity as rehabilitator or liquidator of the Company, and (ii) the New York Liquidation Bureau."[16]

The paid expenses summary does not identify any fees paid to Weil from the date of entry of the liquidation order, May 11, 2016, through July 31, 2016. During the July 28 status conference, the court did not limit the period for an accounting of Health Republic expenses. When will Weil's fees be posted and what period will the fees cover?

The Weil engagement letters calls for a $250,000 retainer.[17] Has that been paid? Will Weil's billings, when posted, describe the services rendered so that these services can be matched with the service provider and the provider's hourly rates?

3. GCG Agreement/Fees. On Feb. 1, 2016, more than three months after Health Republic's board consented to the entry of an order of liquidation, Vance, acting for Health Republic, entered into an agreement with the GCG to "perform certain noticing, claims processing, and other administrative services" for Health Republic.[18] This work would be done in connection with Health Republic's anticipated liquidation.[19] The services to be provided by GCG were set out in an attached pricing summary and included: printing and sending notices, "importing claimant data," posting legal notices, scanning and storing records, creating a claimant name and address database, supplying "Interactive Voice Responses" and customer services representatives.[20]

GCG now maintains a website for Health Republic that includes FAQs, summaries of the claims process for policyholders, service providers, and general creditors, a court docket,

and copies of documents filed in the liquidation proceeding. GCG also operates a phone bank and provides recorded messages for policyholders who call with questions.

The paid expenses summary shows that GCG was paid $304,580 in June for mailing court orders and operating a phone center, but the summary also shows GCG paid nothing in May and July.[21] Are the GCG's bills still under review? How much was GCG paid from October 2015 until May 10, 2016, and who approved those payments? Most importantly, when will GCG's billing be made available with a description of services showing hourly rates and specific services rendered?

4. EisnerAmper (E&A) Agreement. The "scope of services" set out in the E&A agreement describes an audit of Health Republic's financial statements "as of December 31, 2015 ... ." [22] On information and belief, Health Republic's last financial statement was its Second Quarter 2015 statement as of June 30, 2015. The E&A agreement presumably would cover the second half of 2015, but would not address the period from Jan. 1, 2016 through May 10, 2016. Will there be a further audit for this period?

The E&A agreement contains a $295,000 estimate for the fees required to complete E&A's statutory audit.[23] The paid expenses summary states that E&A was paid $150,000 in June and $145,000 in July for a total of $295,000, which is precisely the estimated statutory statement audit cost.[24] If so, is the "statutory" audit complete? When will it be produced? [25]

It also appears that E&A's assignment does not include the review or audit of policyholder claims. In other words, can it be confirmed that the $295,000 paid to E&A is not for the "audit" of pending policyholder claims that counsel referred to during the July 18th status conference?[26]

During the status conference on July 18, counsel stated that the liquidator was "finalizing agreements" with a third-party administrator to audit Health Republic's claims inventory and that this claims audit would take three to four months.[27] Who is performing this audit? Is the auditor POMCO?

5. POMCO Agreement. The original POMCO agreement, entered into on Feb. 1, 2013, established POMCO as Health Republic's "agent for the payment of claims." In that capacity, POMCO administered and, on information and belief, adjusted health claims for Health Republic during its short life.[28] The amended POMCO agreement has POMCO providing "Run-Out Services" as defined in the amended "Attachment A – Fees and Run-out Services." These services cover all aspects of claim handling, including "[c]laim adjudication against benefits."[29] Presumably that entails preparation of the explanations of benefits (EOBs) that counsel referred to during the July status conference.

The amended POMCO agreement calls for the payment of $4 million "contemporaneous" with the execution of the POMCO agreement.[30] The Health Republic website now displays an "execution copy" of the POMCO Agreement, but without an execution page. Will an execution page be posted? Was POMCO, in fact, paid $4 million on the date the POMCO agreement was executed?

The POMCO agreement calls for a $400,000 retainer. [31] Was that paid? The POMCO agreement also calls for the payment of $181,818 per month for providing "Claims Centric Adjudication Services," including, but not limited to, providing "Eligible Person EOBs." Has the $400,000 retainer been drawn down to pay the monthly billings or is the estate paying $181,818 per month and the retainer remaining at $400,000?

Paid Claims Summary

The one-page paid expenses summary shows that the New York Liquidation Bureau was paid

$166,665 in June and July, but without any description of services rendered. Who at the bureau worked on the Health Republic matter in June and July and what did they do? On information and belief, a portion of the charges levied by the bureau pays for a pro rata share of the bureau's rent, directors and officers liability coverage, and employee benefits, including retirement benefits. Will those charges be isolated and broken out?

The paid expenses summary shows the following additional entities paid during the 10 weeks from May 11, 2015 through July 31, 2015: DAZ, MegaPath, BDO Seidman, Finsbury, Dentons and Transperfect. No contracts were posted with respect to these entities. Were the monies set out in the paid expenses summary paid pursuant to invoices without any contractual commitments?

Finsbury's website describes Finsbury, which has offices in London, Beijing, Moscow, Brussels, Hong Kong, Singapore, Dubai and Abu Dhabi and clients such as Starbucks, Charles Schwab, Nielsen, Shell Oil and The Royal Bank of Scotland, as a "global leader in strategic communications" and a "trusted adviser to boards, senior executives and legal counsel of many of the world's most successful companies, institutions and organizations." What services is Finsbury providing to Health Republic, a failed not-for-profit New York health insurer capitalized solely with loans from the federal government?

Missing Balance Sheet.

Policyholders and service providers have not been provided with a balance sheet of Health Republic's assets and liabilities. Health Republic's last quarterly statement revealed that as of June 30, 2015, Health Republic had assets of $530 million and total liabilities of $444 million, but, to my knowledge, these figures have not been updated in any published report. Nor have the EisnerAmper audit results discussed above been released.

It is also unclear where Health Republic stands with respect to the Health and Human Services'(HHS) risk adjustment program, as well as where matters stand with respect to the federal government's loans to Health Republic. If the federal government is Health Republic's largest creditor, what priority of payment will the federal government assert? Has the superintendent discussed with HHS the nature of any federal government claims?

A simple, but complete, balance sheet would help Health Republic's policyholders understand whether they should bother to pursue their claims. Regardless of how consumer-friendly the claims process may turn out to be, a balance sheet would allow policyholders to determine how much of their ultimately approved claims will be paid. 50 cents on the dollar? Five cents on the dollar?

Where are we going; how long will it take; how much will it cost?

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 New York Liquidation Bureau. 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.

Counsel now seeks the court's approval of a claims settlement procedure without, to my knowledge, obtaining comments or suggestions from either Health Republic's policyholders or service providers and without advising the court with respect to how much money is available to pay any ultimately approved policyholder claims.

These circumstances, and the questions raised above, call out for committees of policyholders and service providers in Health Republic's liquidation. These committees would help the court fashion procedures that will allow Health Republic to be wound up quickly and economically.

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 to date. The snapshot provided for the 10-week period after the entry of the liquidation order reveals that more than $1.6 million was spent and that's without Weil's fees. At that rate, more than $8 million will be spent during the first year of Health Republic's liquidation.

When will policyholders (and service providers who hold an assignment of policyholder claims) be paid? Is there a target date for a partial payment?[32] Has the liquidator a target date by which to close the estate? And what role, if any, will federal regulators at the Department of Health and Human Services have to play in these proceedings? These are the types of issues and questions that committees of policyholders and service providers could and should address during Health Republic's liquidation proceedings.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] July Trans. at 6-7.

[2] July Trans. at 34-48.

[3] http://www.healthrepublicny.org/

[4] The letter appears as docket number 31 on the New York State Unified Court System site under New York Supreme Court Docket No. 450500/2016 (Vullo v. Health Republic Insurance of New York Corp.: https://iapps.courts.state.ny.us/nyscef/

Among other things, my letter to the court pointed out that the paid expense summary referred to companies that had been paid, but whose contracts or letters of engagement were not produced, including a firm named Rackspace. The Health Republic website now has posted a Rackspace contract and another contract with Alvarez & Marsal, a contract executed on Sept. 27, 2016.

[5] For a snapshot of Health Republic's short history within the context of the Affordable Care Act, see Crain's investigation into Health Republic's rise and fall, including the timeline on p. 7/19. M. Waldholz, The short and chaotic life of an Obamacare darling, Crain's New York, http://www.crainsnewyork.com/article/201604017/HEALTH_CARE/160419890/a-crains-insurance

With respect to the receivership process, note that by mid-September 2015, the DFS had directed Health Republic to stop issuing new policies. On Oct. 27, 2015, Health Republic's board of directors consented to the entry of an order of liquidation or rehabilitation. Three days later, then-acting Superintendent Albanese directed that all Health Republic policies be terminated effective Nov. 30, 2015. The Department of Health and other New York state agencies helped Health Republic's 206,000 policyholders find other health coverage.

[6] November 2015 A&M Agreement, p. 1

[7] November A & M Agreement, p. 3

[8] September 2016 A&M Agreement, pp. 1, 4. The September 2016 agreement purportedly operates "as of May 10, 2016." September 2016 A&M Agreement, p. 1.

[9] 2015 A&M Agreement, pp. 4-5. The 2015 A&M agreement also makes clear that for the period

from November 2 through the date of execution of the agreement, A&M was entitled to fees and expenses incurred during the negotiations that led up to the November 2015 A&M Agreement.

[10] Id. A&M may, under the agreement, invoice Health Republic to replenish the retainer agreement and would supply a copy of such invoice to the director of the administration bureau at the DFS. While neither the DFS nor any state agency is obligated to pay A&M for services rendered to Health Republic, "the Department [will] reasonably assist A&M in assuring that A&M's monthly statements are paid by the Company in a timely manner." A&M Agreement, p. 6.

[11] September 2016 A&M Agreement, p. 4.

[12] The letter came from Joseph Verdesca, Jr. at Weil, was addressed to Mr. Vance, and was executed on Health Republic's behalf by Christine Testaverde, Health Republic's General Counsel.

[13] Weil Engagement, p. 1 Schedule 1 is not attached to the engagement letter posted.

[14] Weil Engagement, p. 1 Health Republic also agreed to pay for "Computerized Legal Research," "Document Production" (defined as word processing that involves "over two continuous hours of work"), photocopies, and "Secretarial Overtime." Weil Engagement, p. 2.

[15] Weil Engagement, p. 2 Health Republic agreed to add to this retainer if necessary.

[16] Weil Engagement, p. 3

[17] Weil Agreement, p. 2.

[18] GCG Agreement, p. 1.

[19] GCG Agreement, p. 1.

[20] GCG Agreement, Exhibit A.

[21] Paid Claims Summary.

[22] E&A Agreement, p. 1.

[23] E&A Agreement, p. 8.

[24] Paid Expenses Summary.

[25] It appears that the E&A Agreement will not extend to E&A's "auditing" or, more accurately, preparing a summary of the Health Republic estate, pursuant to NYIL 7405(g). Under this provision, the Liquidator must submit to the DFS "an annual report of the preceding calendar or fiscal year's activity" for every New York-domiciled insurer subject to rehabilitation or liquidation. Because Health Republic was not placed in liquidation until mid-2016, that report will not be due until 2017.

[26] July Trans. at 10-11.

[27] July Trans. at 10-11.

[28] POMCO Agreement, p. 1.

[29] POMCO Agreement, p. 11.

[30] POMCO Agreement, p. 4.

[31] POMCO Agreement, p. 4.

[32] During the July conference counsel stated: "We are not going to make any distributions until the claims are all resolved." July Trans. at 26. Counsel also stated that it will take "18 to 24 months" before an initial distribution could be arranged. July Trans. at 49-50. There are no guaranty fund monies available to pay approved claims. Unless approved claims are paid on a partial basis, policyholders may not see any payments until three or more years after Health Republic stopped paying claims.

Health Republic's Curious Liquidation: Part 6

(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.

Health Republic's Curious Liquidation: Part 7

(February 15, 2017, 3:37 PM EST)

Parts 7 and 8 report on my application for leave to appear in the Health Republic of New York Inc. (Health Republic) liquidation proceedings, the arrival of another deputy superintendent to oversee the New York Liquidation Bureau, the fall meeting of the National Association of Insurance Commissioners in Miami, a contract entered into by the liquidator to hire an auditor to review claims "adjudicated" by a third-party claims administrator, and a Health Republic balance sheet.

Part 9 will address a joint letter from the chairs of the New York State Senate Insurance and Health Committees to Department of Financial Services (DFS) Superintendent Maria T. Vullo with respect to, among other things, the costs incurred thus far in Health Republic's liquidation, a quickly convened conference concerning an auditor contract that had been signed, but not court-approved, and a motion to permit, in certain circumstances, allowed claims to be paid directly to health providers such as Northwell.

First, the Bigger Picture

Part 7 should be read in context[1] and that would include where things stand in the country and the tristate region with respect to Affordable Care Act consumer operated and oriented plans (CO-OPs). Of the original 23 CO-OPs formed under the ACA, only five remain.[2] The Commissioner of Banking and Insurance of New Jersey has moved to liquidate that State's CO-OP, Health Republic of New Jersey.[3] Connecticut's CO-OP, Healthy CT, ceased underwriting last July[4] and is now in liquidation.[5]

The Connecticut and New Jersey CO-OPs landed more softly than did Health Republic, as they were first shut down and then began run-offs that allowed policyholders to find new coverage. By contrast, New York's Health Republic collapsed before its 2015 policies terminated. This forced New York's Departments of Health and Financial Services to scramble to find coverage for the final month of 2015.

New York delayed placing Health Republic in liquidation. On Oct. 27, 2015, Health Republic's board consented to the entry of an order of liquidation, but the then-acting superintendents of the DFS did not obtain an order of liquidation until May 11, 2016. Policyholder claims in the Connecticut and New Jersey liquidation proceedings will be paid by life and health guaranty associations.[6] New York has no guaranty association to pay Health Republic's unpaid policyholder claims. As a result, Health Republic's 206,000 policyholders can look only to the estate's assets for any recovery on their claims, and only after those claims are approved by the liquidator and the court overseeing Health Republic's liquidation, Justice Carol Edmead sitting in Supreme Court, New York County (Part 35) (Court).

It was in this context that I initially proposed that the superintendent allow for committees of policyholders and health providers to participate in the liquidation proceedings. This would allow

committees to monitor the estate's expenses and push to expedite the payment of claims, an important role played by creditors' committees in bankruptcy proceedings. When that proposal went nowhere, I moved to appear as a friend of the court overseeing the liquidation.

A "Friend of the Court," a "Fly in the Ointment"

An amicus curiae or "friend of the court" is a nonparty to a proceeding that "call[s] to the court's attention law or facts or circumstances in a matter ... that might otherwise escape its consideration."[7] Amicus curiae often appear in appellate proceedings that address matters of public interest. Every year, for example, the U.S. Supreme Court receives hundreds of applications for leave to submit amicus briefs on behalf of associations, groups, companies or individuals who want to bring to the justices' attention arguments or law that might otherwise not be raised.[8]

Less often, nonparties move for leave to appear in trial court proceedings, particularly in cases involving matters that may affect many persons who are not parties to the case,[9] as when the court has been asked to construe statutes or regulations that will affect the general public. In some cases, trial courts have even allowed nonparty friends of the court to cross-examine witnesses.[10]

In Part 6, I wrote that given the absence of any creditor committees in the Health Republic liquidation — and the absence of almost any counsel speaking only for Health Republic's policyholders — I would move for leave to appear as a friend of the court. I did move by order to show cause returnable on Nov. 21 and my brief and affirmation appear on the Health Republic website under the heading: "Court Docket."[11] In my papers and during argument, I stressed that I did not seek to intervene or appear as a party in the proceeding.[12] Counsel for the liquidator, however, "strenuously argue[d]" that it would be a "mistake" and "wholly unprecedented" to allow a friend of the court in a New York State insurance company liquidation proceeding.[13] Counsel maintained that conferring amicus status would, among other things, require that the liquidator share information regarding, for example, a possible suit by the liquidator against the federal government, and that my having access to this information might infringe on attorney client and work-product privileges.[14]

The court ultimately denied my application rather than "writ[e] a case of first impression ... that ... the Appellate Division will probably reverse ... because they don't want to open a .. flood gate."[15] The court, however, did enter an order that allows me to continue to write and bring to the court's attention "discrete issues" concerning Health Republic's liquidation.[16] Or, as the court put it during argument: "I don't have to give you any official title for you to continue to be the fly in the ointment, in a good way, ointment. All you have to do is just keep doing what you are doing. If you write to the Court and say ... [for example] I think you should ... speak to them and get them to consider [bringing] Federal cases, I will follow-up on it."[17]

Although disappointed, I'm in either good (or bad) company when it comes to applications to appear as an amicus in proceedings involving troubled Affordable Care Act CO-OPs. A Federal Court of Claims recently denied an amicus application filed by the United States House of Representatives in an action brought against the federal government by Health Republic Insurance (Oregon).[18] In another case, another Federal Court of Claims denied an application by plaintiffs in other cases against the federal government to participate as friends of the court.[19]

Although I was not seeking to advance any particular party's or person's position in the Health Republic liquidation, much less amend any pleadings, I take comfort in the court's kind words about my "dedicated work and thorough submissions"[20] and appreciate the court's allowing me to continue in my role as a fly in whatever ointment remains in Health Republic.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] For those readers just joining us, Part 1 addressed Health Republic's formation and how Health Republic began issuing policies in January 2014 and was then shut down about eighteen 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 liquidation 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 in order to monitor costs and the pace of the liquidation proceedings.

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 on Health Republic's website 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 set 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 claims expense 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.

Part 6 concerned an Oct. 11 appearance in the liquidation court that began with counsel's description of the liquidator's claim adjudication procedures, but resulted in the court's directing the liquidator to post on the Health Republic website a balance sheet and further directing that the liquidator post requests for proposals from an outside firm to review the claims in order to complete the first step in the adjudication process, in this case, the preparation of explanations of benefits (EOBs) for what was then 650,000 unresolved claims. A transcript of those proceedings and the previous proceedings, may also be found on the Health Republic website.

[2] See, e.g., CO-OP Catastrophe: Total Losses Near $1.9 Billion. https://energycommerce.house.gov/news-center/blog-posts/ CO-OP-catastrophe. Note: this blog takes a highly partisan view of the CO-OPs and promises that "House Republicans have a Better Way . . . ."

[3] L. Washburn, Nonprofit health insurer won't be coming back to N.J., http://www.northjersey.com/story/news/jea;th.2017/01/06/nonprofit-health-insurer-wont-coming back.

[4] Financially unstable" Connecticut Obamacare CO-OP now under state supervision, http://www.cnbc.com/2016/07/05/financially-unstable-connecticticut-obamacare-CO-OP-now-under-state-supervision.

[5] Affordable Care Act Insurer Ordered Into Liquidation, Mealey's Litigation Report: Insurance

[6] A. Becker, Insurance Department will seek to liquidate HealthyCT, Dec. 2, 2016, http://ctmirror.org/2016/12/02.insurance -department-will-seek-to-liquidate-healthyct/; L. Washburn, Nonprofit health insurer won't be coming back to N.J., http://www.northjersey.com/story/news/health/2017/01/06/nonprofit-health-insurer-wont-coming-back-nj/96243482/.

[7] Kruger v. Bloomberg, 1 Misc. 3d 192, 195, 768 N.Y.S. 2d 76, 80 (N.Y. Sup. Ct., New York County 2003) quoting Kemp v. Rubin, 187 Misc. 707, 708, 64 N.Y.S.2d 510 (N.Y. Sup. Ct., Queens County 1946).

[8] These additional briefs may or may not be read, but during the 2015-2016 term, amicus briefs were filed in 98% of the U.S. Supreme Court's cases. (That translates into almost 800 amicus briefs.) Franze and Anderson, Record Breaking Terms for Amicus Curiae in Supreme Court Reflects New Norm, The National Law Journal, August 19, 2015

[9] Empire State Ass'n of Assisted Living, Inc. v. Daines, 26 Misc. 2d 340, 342-3, 887 N.Y.S.2d 452, 455-6 (N.Y. Sup. Ct., Albany County 2009) (challenge to proposed regulations for nursing homes).

[10] Dawe v. Silberman, 185 Misc. 335, 337, 56 N.Y. 2d 902, 904 (Municipal Court, Queens County 1944). And "[w]here a person is uniquely qualified to give relevant testimony, the court, in the exercise of its discretion, may call the amicus curiae to give testimony." Kruger, 1 Misc. 3d at 196, citing Matter of George ("Joey" S.), 194 A.D.2d 328, 329, 598 N.Y.S. 2d 229, 230 (lst Dep't 1993).

[11] Health Republic Court Docket, Items 55, 56, and 57.

[12] Memorandum in Support of Motion, p. 8, Affirmation in Support of Motion, ¶ 5, p. 2.

[13] Nov. 21, 2016 Trans., pp. 24-25. The transcript appears on the Docket on the Health Republic websitewebsite, Item 64.

[14] Nov. 21, 2016 Trans., p. 39.

[15] Nov. 21, 2016 Trans., p. 34.

[16] Order entered on November 21, 2016, Health Republic Docket, Item 63.

[17] Nov. 21st Trans., p. 34.

[18] Health Republic Insurance Company (Iowa) v. United States, 2016 WL 6581229 (U.S. Ct. of Federal Claims, November 7, 2016) (U.S. House of Representatives denied leave to file a brief arguing that the United States should move to dismiss suits filed against the Health and Human Services/Centers for Medicare and Medicaid Services(HHS/CMS) for loss corridor payments on the ground of failure to state a cause of action).

[19] Land of Lincoln Mutual Health Insurance Company v. United States, 2016 WL 5900196 (U.S. Court of Federal Claims, Oct. 7, 2016) (Court rejected applications by Health Republic Insurance Company and Moda Health Plan, Inc. to appear in support of Land of Lincoln's loss corridor suit).

[20] Order, Health Republic Docket, Item 63.

Health Republic's Curious Liquidation: Part 8

(February 16, 2017, 11:44 AM EST)

Part 7 of this series discussed my motion, in lieu of the court's appointing creditors' committees, to appear in the Health Republic liquidation proceeding as a friend of the court.

Part 8 begins with the appearance of a new head of the New York Liquidation Bureau who stopped by to listen to argument on my friend of the court application.

Part 8 then turns to: (1) the appointment of an auditor for Health Republic policyholder claims already "adjudicated" by POMCO Inc.; (2) a balance sheet, "of sorts," for the Health Republic estate; and (3) the limp response of the National Association of Insurance Commissioners to the failure of 18 of the 23 not-for-profit health insurers established under the Affordable Care Act.

A New Deputy Superintendent; Auditing the "Adjudicator"

A few days before the Nov. 21, 2016, return date on my order to show cause, counsel for the liquidator asked me to adjourn my motion in order for a new deputy superintendent to familiarize himself with my motion. I declined[1] because every day's delay in the liquidation proceeding adds to the estate's expenses and ultimately reduces the funds available to pay policyholder claims. Counsel for the liquidator withdrew his request to adjourn the motion.

On the return date, the new deputy superintendent at the bureau, David Axinn, stopped by Part 35 to listen to the argument on my friend of the court motion, even though Axinn was not officially appointed until Nov. 28.[2] Axinn, a Columbia Law School graduate, served as an assistant solicitor general under New York Attorney General Eliot Spitzer. Axinn then served as special counsel to the New York Liquidation Bureau and worked on a request for bids for Midland Insurance Company, in liquidation, at a time when Eric Dinallo headed up the then-Department of Insurance (and also served as Midland's liquidator).[3]

After his tenure as special counsel, Axinn joined Millennium Partners/Millennium Management, a global investment firm that, according to its website, manages more than $30 billion in assets and operates from offices in the U.S., Europe and Asia. Axinn was Millennium's chief compliance counsel until he returned to the bureau in November.

As one of his first official acts at the bureau, Axinn wrote to the court on Dec. 12, 2016, to advise the court that the bureau had hired a claims auditor to "review all unpaid [Health Republic] Policy Claims for the period January 1, 2014 through November 30, 2015, that were previously examined and recommended for allowance or disallowance by Health Republic's claims administrator."[4]

To put this in context, in Part 6 we reported that the court had rejected an earlier attempt by the bureau/liquidator to hire an audit firm to review 650,000 unpaid Health Republic claims, weed out all duplicate claims and confirm that the claims were covered by Health Republic policies.[5] When first told of the liquidator's plans to hire this unidentified auditor, the court immediately directed the liquidator's outside counsel to prepare a request for proposal (RFP), post the RFP on the bureau's website for at least 20 days, and then tell the court what firm the Liquidator proposed to hire.[6]

Axinn's Dec. 12 letter, which appears on the Health Republic website,[7] announced that only one firm, Truven Health Analytics, had submitted a proposal to review Health Republic's unpaid claims, which Axinn described as now numbering 700,000 unpaid claims, an increase of 50,000 unpaid claims. IBM owns Truven, a big data health specialist that IBM purchased in February 2016 for $2.6 billion.[8] In an IBM announcement issued at the time of the purchase, IBM describes Truven as "a leading provider of cloud-based healthcare data, analytics and insights ... ."[9]

Axinn's letter announced that Truven would review all 700,000 claims for $102,000. According to Axinn, a contract with Truven was being drafted and data would be "migrated" to Truven before the end of the year in order for Truven's audit to begin in January 2017. This would allow the bureau to issue explanations of benefits/allowances (EOBs), which will serve as proofs of claim in the Health Republic liquidation.

I wrote to the court the following day[10] and pointed out that in his letter Deputy Superintendent Axinn gave no explanation for the dramatic increase in unpaid claims. I asked whether these additional 50,000 claims may have come from policyholders who, having not heard from the liquidator, had resubmitted their claims.

I also pointed out that Truven's proposed role might duplicate services provided by POMCO, Inc. The POMCO contract, also posted on the Health Republic website, stated that the superintendent hired POMCO to receive, capture, review, adjudicate, finalize, re-open (if necessary), and adjust Health Republic claims.[11] The POMCO contract also specifically provided for POMCO to review up to 12,000 transactions for claims received after March 2016.

The POMCO agreement was entered into in March 2016, before the superintendent moved to liquidate Health Republic, and called for a payment of $4 million for services that POMCO performed from Dec. 1, 2015, through and including Jan. 31, 2016, as further "consideration" for POMCO's entering into the March 2016 contract.[12] In addition, the 2016 contract provided for POMCO to be paid a flat fee of $181,818 per month starting in March 2016.[13] The 2016 POMCO contract terminated on Dec. 31, 2016.

The Health Republic claims expense summary now posted on the Health Republic website shows that the liquidator paid POMCO $181,818 in each of the months of May, June, July, August, September, October and November 2016. Notably, the current Alvarez and Marsal contract, also available on the Health Republic website, calls for A&M to "oversee []the vendors who handle claims and distributions ... .[14] The proposed contract with Truven raised the question of what Truven would be doing if the liquidator was already paying POMCO to "adjudicate" all Health Republic unpaid claims and was also paying A&M to oversee POMCO.

In addition, the Truven contract[15] refers, under the sub-heading "Volume," to Health Republic's "[u]p to 130,000 members," even though Health Republic had 206,000 policyholders. The data sources to be reviewed by Truven includes POMCO's "Adjudicated But Unpaid Medical Claims." The contract also states, under the heading "Truven Health Responsibilities," that Truven would "electronically re-adjudicate 100% of claims to identify potential adjudication errors."

Axinn executed the Truven contract on Dec. 20, 2016, without the court's approval. This begged many questions, some of which were addressed during a January 11, 2017 status conference convened on short notice by Justice Edmead, which will be discussed in Part 8.

A Balance Sheet, of Sorts

Part 6 also reported on a request during an Oct. 11, 2016, conference that the liquidator post a balance sheet for Health Republic.[16] Shortly before the Nov. 21 return date on my friend of the court application, a balance sheet appeared on the Health Republic website.[17] The balance sheet, which is unaudited and as of Sept. 30, 2016, shows Health Republic with "total assets" of $99 million and "total liabilities" of $466 million. Thus should give policyholders at least an inkling of the possible value of their approved claims. The balance sheet, however, is sprinkled with footnotes that raise many questions.

For example, the balance sheet shows $52 million in amounts recoverable from federal reinsurance. Is this true reinsurance that the federal government acknowledges? Has any of this reinsurance money been collected? Is the federal government offsetting these amounts against risk corridor or other funds arguably due Health Republic? The balance sheet also shows an "accrued retrospective receivable" of $432 million that is then backed out of the asset calculation. Does this represent potential payments due from the federal government?

With respect to liabilities, the balance sheet shows $216 million in policyholder claims and loss adjustment expenses, but another $191 million entry is denominated as a "risk adjustment payable." Does this refer to risk adjustment payments that Health Republic arguably owes other health insurers? An accompanying footnote 4 states that the risk adjustment payable is "subordinate to policyholder claims and related expenses," but footnote 4 is also assigned to the $23 million start-up loan from the federal government. And the $271 million dollar solvency loan from the federal government is denominated, see note 6, as a surplus note that may only be paid with the superintendent's permission. Does the U.S. Department of Health and Human Services agree with these characterizations?

Outside counsel for the liquidator told the court that the liquidator has been focused "like a laser beam" with respect to "bringing in money from the Federal Government."[18] The balance sheet shows what's at stake, but thus far what the superintendent intends to do about moneys owed by the federal government remains a mystery, and the bureau's representative at a January 2017 status conference would not share anything with the court other than to confirm that discussions with the federal government were underway. Perhaps those discussions should have been concluded before Jan, 20, 2017.

NAIC Fall Meeting

The National Association of Insurance Commissioners[19] holds three national meetings each year. For the past several years, the NAIC held its third national meeting in Washington, D.C., or across the Potomac at a convention center that's a short drive to the Capitol. Although all eyes were on Washington, D.C., the NAIC met in Miami for its third meeting. Approximately 1,600 regulators, agents/producers, vendors, lawyers and lobbyists attended.

The NAIC is a large organization and has a lot of territory to cover. As result, the NAIC assigns its work to dozens of committees, sub-groups, working groups and task forces. During the year, these committees and groups confer at regional meetings and via conference calls. When the committees, sub-groups and task forces meet at an annual meeting, their meetings are open to anyone who pays the price of admission to the national meeting, about $700. The NAIC has its own open meeting policies, but a few of the meetings and conference calls are designated as regulator-to-regulator sessions and closed to members of the public, including those who paid to attend the national meeting.

I attended the fall meeting in Miami to hear what the NAIC and those insurance commissioners with failed CO-OPs in their states were doing to address almost two dozen CO-OPs now in run-off or receivership. I began by inquiring before the meeting about the NAIC CO-OP solvency and receivership (B) subgroup (of the Health Insurance and Managed Care (B) Committee) (the CO-OP subgroup). The CO-OP subgroup includes all the commissioners or directors of states in which CO-OPs had been writing. I saw, however, that the CO-OP Subgroup's meeting in Miami had been

designated as "Regulator Only."

I called the subgroup support liaison person (every NAIC committee, group, task force or sub-group has an NAIC staff person assigned to it) and asked why the meeting was closed, only to learn that the meeting had been canceled. I wrote to the subgroup Chairs — Commissioner Nick Gerhart (Iowa)[20] and Katherine Wade (Connecticut) to point out that closing the meeting appeared to violate the NAIC's policy statement on open meetings. I also pointed out that anyone interested in the CO-OPs could easily find out a lot about them, including where they were located, how much business they had written, the size of the federal government's solvency and start up loans, and a lot more information that had emerged as a result of lawsuits against the United States commenced by state insurance superintendents in their roles as liquidators.

Finally, I noted that the failed CO-OPs were capitalized only with taxpayer moneys and, given the number of CO-OP policyholders with unpaid claims, the CO-OPs' fate was a matter of considerable public interest. I also pointed out that the failed CO-OPs did not appear on the agenda for a meeting of the Receivership and Insolvency [E] Task Force, which did meet in Miami. I received no response to my letter, but I was told that the CO-OP subgroup might meet via conference call in lieu of the Dec. 11 meeting. That conference call, however, would also be confidential and regulator-to-regulator only.

A couple of days later I left for the fall meeting where I spoke about Health Republic at a meeting of the International Association of Insurance Receivers. I also attended the receivership task force meeting where I discovered that the CO-OPs were not only missing from the task force's agenda (and not discussed at the task force meeting in Miami), but were also not included in the task force's proposed 2017 charges. I spoke at the task force meeting and asked that the CO-OPs be added to the 2017 charges. I subsequently wrote to the task force urging that the CO-OPs be added to the 2017 charges so that the NAIC would provide some public access to information on the CO-OPs' fates. Thus far, I have received no response to my letter.

The CO-OPs did come up in an informal Receivers Guaranty Fund Liaison Committee meeting sponsored by IAIR. The liaison committee is not an officially recognized NAIC committee, but includes several current and former insurance regulators and persons employed by or working with various state guaranty associations.

Among other things, the liaison committee discussed the CO-OPs in the context of how guaranty associations in those states that have health insurer guaranty associations would soon be dealing with both the failed CO-OPs and the recent failure of long-term care provider Penn Treaty Insurance Company.[21] Those attending the liaison committee meeting also discussed suits that have been brought against the federal government to recover loss corridor, loss adjustment and other moneys. The majority of those attending the liaison committee meeting believes that even if the CO-OPs prevail in their suits against the federal government, none of the failed CO-OPs would be revived for several reasons, including insufficient recoveries in the suits underway and the dispersal of the CO-OPs' staffs.

This is not to say that the NAIC has turned its back on the CO-OPs. More than likely, the CO-OPs were discussed in meetings of the Financial Analysis [E] Working Group, which consists of regulators who focus on troubled insurance companies. FAWG's meetings are confidential, for obvious reasons, but FAWG ordinarily stops focusing on insurers after they enter formal rehabilitation or liquidation proceedings.

For whatever reason, the NAIC has chosen not to take the lead with respect to the CO-OPs. Whether this is a missed opportunity to demonstrate that state regulators can work together to address a shared problem or just another example of red state v. blue state warfare over health care, those looking for a coordinated response to the CO-OP failures shouldn't waste their time with the NAIC.

Back to New York

I returned to New York to find Axinn's Dec. 12 letter, discussed above, waiting for me. The claims expense summary on the Health Republic website has now been updated. Since May 11, 2016, Health Republic's liquidator has spent $5,415,622, all without court approval. Meanwhile, Health Republic's unpaid claims now number 700,000, but not one claim has been identified as post-audit-"adjudicated," much less paid.

Health Republic's liquidator isn't saying where the federal government stands with respect to Health Republic's reinsurance and its start-up, and reserve loans. Two New York State senators, Senator James Seward, Chair of the Senate Insurance Committee, and Senator Kemp Hannon, Chair of the Senate Health Committee, have written to the superintendent asking about Health Republic's liquidation and expenses incurred.[22] The court has directed that the liquidator not sign any more contracts with third-party administrators or vendors without the court's approval and the court may be holding hearings on the estate's expenses. We'll turn to this, and more, in Part 9.

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[1] Nov. 18, 2016 letter to Justice Edmead, Health Republic Docket, Item 62.

[2] Health Republic Docket, Item 66.

[3] See NY Liquidation Bureau Seeking Private Buyer for Billion-Dollar Midland Insurance Company, NYLB Press Release, dated March 4, 2009. Mr. Dinallo had served as an Assistant Attorney General under then-Attorney General Spitzer. Scott Fischer, who headed up the NYLB when Health Republic first entered liquidation now serves as the Executive Deputy Superintendent of the Department of Financial Services and previously served as an Assistant Attorney General at the New York State Attorney General's Office.

[4] Letter from Deputy Superintendent Axinn to Justice Edmead, dated December 13, 2016, p. 1, Health Republic Docket, Item 67.

[5] Curious Liquidation: Part 6, p. 2.

[6] October 21, 2016 Trans., pp. 25-26; Part 6, pp. 2-3.

[7] Health Republic website, Court Docket, No. 67

[8] IBM Watson Health Announces Plans to Acquire Truven Health Analytics for $2.6B, Extending Its Leadership in Value-Based Care Solutions, https://www-03.ibm.com/press/us/en/pressrelease/49132.wss.

[9] Id.

[10] Health Republic Docket, Item 68.

[11] POMCO Contract, Attachment A – Fees and Run-Out Services. You may read the POMCO Contract online on the Health Republic website under the heading "Key Documents" and then "Vendors." Don't look under "Vendors" because that heading deals with those who sold products and services to Health Republic before it failed, i.e., estate creditors. Of course, POMCO falls into a couple of slots as a party to a contract entered into after the board stepped down, but before

Health Republic's liquidation order was entered.

[12] POMCO Agreement, Section Five – Compensation of POMCO.

[13] POMCO Agreement, Attachment A, pp. 11-12.

[14] Alvarez & Marsal Engagement Agreement dated November 24, 2015, Section 1, p. 3.

[15] Exhibit 1, Audit Services.

[16] Curious Liquidation, Part 6, pp. 3-4.

[17] The balance sheet may be found on the Health Republic website under Key Documents: Balance Sheets.

[18] Nov. 21, 2016 Trans., p. 39.

[19] For those not familiar with this organization, the NAIC is an association comprised of all the state insurance superintendent, commissioners, and directors in the United States (and Puerto Rico, Guam, and the U.S. Virgin Islands, as well as the District of Columbia). For more on the NAIC, its history and how it functions, see http://www.naic.org,

[20] Iowa's Insurance Commissioner, Nick Gerhart, who had taken the lead on issues relating to the CO-OPs, resigned days before the NAIC Fall meeting. T. Leys, Insurance Commissioner Gerhart stepping down, December 5, 2016, http://www.desmoinesregister.com/story/news/health/2016/12/05/insurance-commissioner-gerhart-stepping-down/95016750/

[21] J. Distefano, PA Braces for largest health insurers failure in U.S. history, http://www.philly.com/philly/business/20161016_Insurer_Takeover.html.

[22] Health Republic Docket, Item 70.

Health Republic's Curious Liquidation: Part 9

(April 13, 2017, 5:29 PM EDT)

Part 9 of Health Republic's curious liquidation[1] concerns a December 2016 letter from New York State senators James L. Seward and Kemp Hannon to Department of Financial Services Superintendent Maria T. Vullo asking about the pace and direction of Health Republic Insurance Company of New York's liquidation, the Superintendent's (belated) response, and this question: did the superintendent miss an opportunity to settle Health Republic's account with the Department of Health and Human Services before the Obama administration left office?

Albany's Take on Health Republic's Failure and a Timeline

In October 2015, Health Republic's board stepped down and agreed not to oppose a petition to liquidate the company. For the next half-year, Health Republic operated under the direction of the DFS and outside consultants, including Alvarez & Marsal.

The Roundtable

In January 2016, the New York State Senate Committee on Health and the New York State Senate Committee on Insurance convened a joint "Roundtable on the Demise of Health Republic."[2] Senators James L. Seward, Chair of the Insurance Committee, and Kemp Hannon, Chair of the Health Committee, led the Roundtable.

Senators Seward and Hannon, committee members, and several invited insurance company and health organization executives discussed why Health Republic failed and when Health Republic's policyholders would be reimbursed for their unpaid claims.[3] The governor had not yet appointed Vullo to succeed Benjamin Lawsky as head of the Department of Financial Services and did not appear.[4] Troy Oeschner, the head of the Health Bureau, represented the DFS. In conjunction with the roundtable, the press reported on an ongoing DFS investigation into Health Republic's failure.[5]

In April 2016, by-then-acting DFS Superintendent Vullo directed that Health Republic be liquidated. In May 2016, Justice Carol Edmead, sitting in Part 35, Supreme Court, New York County, began overseeing Health Republic's liquidation under New York Insurance Law Article 74. Parts 1-8 of Health Republic's Curious Liquidation traces Health Republic's liquidation over the past year.

The Confirmation Hearing

In June 2016, acting DFS Superintendent Vullo went to Albany for her confirmation hearing.[6] Among other things, senators Seward and Hannon wanted to know why Health Republic failed so quickly while operating under DFS supervision.[7] Many of the senators' questions concerned the DFS's prior approval of Health Republic's rates, particularly after many of the roundtable participants had remarked that they believed from the outset that Health Republic's rates were unrealistically low. Senator Seward, for example, observed that it seemed as if everyone familiar with Health Republic's rates and business model believed that Health Republic was either in trouble from the word go or would soon fail except those in charge of overseeing health insurance rates at the DFS.

In the back and forth during her confirmation hearing, nominee Vullo testified that the DFS had "a pending investigation to see what went wrong." The still-acting DFS superintendent reminded the insurance committee that she was not at the DFS when Health Republic failed, but that she had directed that Health Republic be liquidated and that Health Republic was now operating under court supervision.

Senator Hannon pointed out, as had Senator Seward, that many insurance company and health association executives at the roundtable believed that there were many warning signs that preceded Health Republic's collapse. Senator Hannon asked the acting superintendent how a failure akin to Health Republic's collapse could be avoided in the future. Vullo replied that any risk based capital deficiencies would be brought to her attention or to the attention of her first deputy. But Senator Hannon pushed back observing that the roundtable discussions had revealed, in his opinion, serious deficiencies in how Health Republic's rates, actuarial submissions and business model were reviewed and approved.

On June 15, 2016, Vullo was unanimously confirmed to head up the DFS.

The Senators' Letter and the Superintendent's Response

On Dec. 13, 2016, Senators Seward and Hannon wrote to Superintendent Vullo for "a status update" on Health Republic's liquidation. The senators acknowledged that the Court supervising Health Republic's liquidation had directed that certain information concerning the estate be posted online. While the senators found these online postings "helpful," the senators felt that it would also be "helpful ... for DFS as Liquidator to provide the Legislature with an update regarding what has transpired [in the liquidation] to date as well as what is to be expected in the coming months."[8]

In their letter, the senators asked Superintendent Vullo about an unaudited Health Republic balance sheet prepared as of Sept. 30, 2016 and discussed in Curious Liquidation, Part 6.[9] The senators remarked that the balance sheet showed Health Republic with assets just under $100 million, but with liabilities of more than $465 million. The senators asked if the balance sheet had been updated.

Turning to the estate's expenses, the senators pointed out that from May 11, 2016, through the end of September 2016, the New York Liquidation Bureau had spent almost $4 million in consulting, legal, other professional and administrative fees, as well as other expenses for the Health Republic estate, but that none of these fees or expenses had been court-approved. The senators, therefore, asked whether the superintendent, in her role as Health Republic's liquidator, could "estimate [what] the total costs of these outside vendors will be for the entire liquidation process, in order to ensure that what little assets remain are not unnecessarily spent."

Finally the senators returned to the question they raised at the January 2016 roundtable: Why did Health Republic fail?

> [I]t is our understanding, based on comments raised during the Senate Roundtable [in January 2016] and discussed in the press, that [the] DFS has an ongoing internal investigation as to why Health Republic failed in the first place.
>
> We would appreciate the current status of the investigation. We further expect that there will be a report provided on the results of the investigation. It is paramount that such a failure be avoided by other Health Insurers in the future.[10]

Part 10 of this article will follow tomorrow, discussing the superintendent's response to the senators.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] For those readers just joining us, Part 1 addressed Health Republic's formation and how Health Republic began issuing policies in January 2014 and was then shut down about eighteen months later. Part 1 also set out how then-acting DFS Superintendent Maria T. Vullo petitioned in April 2016 to liquidate Health Republic and also summarized the liquidation 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 Health Republic's liquidation in order to monitor the cost and pace of the liquidation.

Part 3 reported on a July 2016 status conference requested by outside counsel representing DFS Superintendent 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 (Court), about a proposed claims procedure.

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

Part 4 set 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, all without 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, Health Republic's claims expense 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.

Part 6 concerned an October 1, 2016 conference that began with outside counsel's description of the Liquidator's claims adjudication procedures, but resulted in the court's directing the liquidator to post on the Health Republic website a balance sheet. The court further directed the liquidator to post requests for proposals from an outside firm to review pending claims in order to complete the first step in the adjudication process, in this case, the preparation of explanations of benefits (EOBs) for what was at that time 650,000 unresolved claims. A transcript of these and all other court hearings or conferences may be found on the Health Republic website.

Part 7 concerned my motion to appear in the Health Republic liquidation proceedings as a "friend of the court."

Part 8 covered the appointment of an auditor (Truven-IBM) to review the work of a claims adjudicator (POMCO, Inc.). Part 8 also discussed an unaudited balance sheet posted on the Health Republic website and the National Association of Insurance Commissioners' (NAIC) non-response

to the failure of almost all of the Affordable Care Act not-for-profit insurers.

[2] A video of the Roundtable on Health Republic's demise may still be viewed on the website for the New York State Senate Insurance Committee. https://www.nysenate.gov/calendar/events/insurance/james-l-seward/january-06-2016/demise-health-republic-and-preparing-future.

[3] The New York Senate Health and Insurance Committees invited to the Roundtable representatives from New York State Conference on Blue Cross and Blue Shield Plans, the President and CEO of Health Now New York, the President of the Medical Society of the State of New York, the President of the New York Health Plan Association, the Executive Director of New York Department of Health, and an Acting Deputy Superintendent of Insurance and head of DFS's Health Bureau – Troy Oeschner.

[4] Governor Cuomo nominated Ms. Vullo to serve as head of the DFS a couple of weeks after the Roundtable. In October 2015, Interim DFS Superintendent Anthony Albanese told Governor Cuomo that he would leave his interim position, but stayed on at the DFS until the end of the year as acting-superintendent.

[5] http://www.pressconnects.com/story/news/local/2016/01/06/health-insurer-exhange/78379648/.

[6] A video tape of the confirmation hearing remains on the Insurance Committee website. https://www.nysenate.gov/calendar/meetings/insurance/june-08-2016/insurance-meeting.

[7] J. Lamantia, Lawsky's Replacement takes on Senate Republicans at confirmation hearing, Crain's New York, June 8, 2016. http://www.crainsnewyork.com/article/20160608/HEALTH_CARE/160609873/lawskys-replacement-a-brooklyn-lawyer-takes-on-senate-republicans-at-confirmation-hearing

[8] A copy of the senators' letter may be found on the Health Republic website under Court Docket, Item 70.

[9] The Sept. 30, 2016, balance sheet appears on the Health Republic website under Key Documents: Balance Sheet. The $432 million loss corridor payment due from the federal government is listed as an "Accrued retrospective receivable" and then (backed out} of the balance sheet.

[10] Dec. 13, 2016 letter from Senators Seward and Hannon, p. 2.

Health Republic's Curious Liquidation: Part 10

(April 14, 2017, 12:55 PM EDT)

Part 9 detailed a December 2016 letter from New York State senators James L. Seward and Kemp Hannon to Department of Financial Services Superintendent Maria T. Vullo, asking about the direction of Health Republic Insurance Company of New York's liquidation, the superintendent's belated response, and this question: did the superintendent miss an opportunity to settle Health Republic's account with the Department of Health and Human Services before the Obama administration left office?

About six weeks later, Superintendent Vullo responded to the senators' letter with, a letter, I suspect, written by someone at the bureau. [1]

The superintendent's Jan. 25 letter advises the senators that her "first priority as Liquidator has been to build a process for resolving policy-related claims ... ."[2] The letter then discusses Health Republic's short life and provides a thumbnail treatment of the Affordable Care Act's (ACA) "3Rs" programs, programs that were designed to stabilize the ACA CO-OPs over their first three years of operation.[3]

With respect to the federal government, the letter reports that "as a result of Congress's action [in December 2014], the [Centers for Medicare & Medicaid Services (CMS)] sent Health Republic a series of notices terminating its financing arrangement under the CO-OP program and reducing its expected statutory payments under the Risk Corridors program." The letter also states that in March 2016 — a month before the superintendent moved for an order liquidating Health Republic — an "'administrative hold' had been placed by [the Department of Health and Human Services] on all future payables to Health Republic ... ."[4] The letter then claims that "Congress's actions resulted in over $130 million in unpaid Risk Corridors obligations to Health Republic." We'll return to this figure below.

With respect to the estate's expenses, the letter states that "the first six to twelve months of a liquidation are generally the most intensive and much of the difficult work ... is front-loaded."[5] But the letter does not acknowledge that Health Republic operated under DFS supervision from at least October 2015, when Health Republic's board stepped down, until Justice Edmead granted the petition to liquidate the company on May 11, 2016.

In other words, we are not nine months down the road from Health Republic's failure, but more than a year and a half down the road after Health Republic's board consented to the entry of an order of liquidation. And, to my knowledge, no accounting has been offered for moneys spent from October 2015, when the board consented to liquidation, until the order of liquidation was entered on May 11, 2016.

The letter takes credit for establishing a "transparent process for Health Republic's liquidation." This process includes, according to the letter, setting up a Health Republic website and a call center, even though the Health Republic website and the call center, both of which are operated by a third-party administrator, The Garden City Group, were established well before Health Republic was placed in liquidation.[6]

The letter also states that "we have posted vendor agreements on Health Republic's website and provided a monthly tally of administrative expenses," as well as an unaudited balance sheet.[7] The letter omits that it was Justice Edmead who directed that the liquidator post all vendor contracts along with a summary of the estate's expenses[8] and that it was your author who first proposed, over strong objections for outside counsel representing the liquidator, that a balance sheet be provided for policyholders in order that Health Republic policyholders could get some idea of the estate's assets and liabilities.[9]

The letter then completely ignores the senators' request for a report on the DFS investigation into why Health Republic failed. Nor does the letter respond to the senators' request for an estimate of the total projected costs of all vendors, consultants, outside counsel and third-party administrators now being paid, thus far without court approval.

Superintendent Vullo Testifies Before the Legislative Budget Committee

Two weeks after the superintendent wrote to the senators, she returned to Albany to testify in joint budget hearings conducted by the chairs of the Senate Finance Committee and the Assembly Ways and Means Committee. Senators Hannon and Seward participated in those hearings.

In her written testimony, the superintendent repeated some of the information contained in her letter to the Senators. For example, she stated that Health Republic had paid all claims up to November 2015, that a claims auditor[10] had been hired to review the work done by a claims adjudicator, [11]and that explanations of benefits (EOBs) would be issued to Health Republic's former policyholders beginning in the second quarter of 2017.

Superintendent Vullo's written testimony then addressed Health Republic and confirmed that the federal government owes Health Republic $423 million in loss corridor payments and $51 in reinsurance recoverables, not just the $130 million referred to in her letter. Her written testimony also advised that the $474 million owed by the federal government may be subject to the government's claims of offsets (presumably offsets based on the government's start-up and solvency loans).[12]

Superintendent Vullo also stated in her written testimony that "payments to claimants cannot be made until the dueling claims with the federal government are resolved)(emphasis added)."[13] This is important because if no Health Republic policyholder can be paid until all claims against the government are resolved, then even if all 700,000 Health Republic policyholder claims are processed and all claim rejections or objections are dealt with, Health Republic's policyholders will have to wait until all of Health Republic's claims against the government are fully determined or completely settled before any Health Republic policyholder will see a cent.

The superintendent then addressed the legislators' questions. Senator Seward began by emphasizing that he remained focused on the prompt payment of all legitimate policyholder claims. Senator Seward alluded to a New York State "dry fund" contained within legislation proposed in 2016 that would pay for any shortfall with respect to moneys owed to policyholders.[14] Senator Seward asked about the approximately two dozen law suits brought by health insurers, including a couple of suits brought by failed (or no longer active) not-for-profit health insurers formed under the ACA against the federal government to recover moneys due them under the ACA's loss corridor program. Senator Seward wanted to know why Superintendent Vullo, in her capacity as Health Republic's liquidator, had not already sued the federal government to recover the loss corridor moneys due Health Republic, i.e., the $130 million alluded to in her letter or the $474 million mentioned in her written testimony.

The superintendent acknowledged that other actions against the federal government were underway[15] and that an ACA health insurer had recently won a favorable decision in the Federal

Court of Claims.[16] The superintendent then told the Finance Committee that she had determined that her claim against the federal government was not subject to a statute of limitations and that delaying her filing would reduce litigation costs.

In the exchange that followed, the superintendent referred to an unidentified class action that had been commenced and advised that the attorneys in that class action would be seeking a contingent fee, but that she wanted no part of a contingent fee arrangement.[17] This was a curious observation in that under Article 74, the superintendent, in her role as liquidator of a New York domiciled insurer, can't be compelled to participate in a class action.[18]

Senator Seward pressed for a commitment that an action against the government would be commenced on behalf of Health Republic. The superintendent testified that it was only a question of "when" and not "if" she would commence suit against the government, but that for now she was "sitting on the complaint."

Senator Hannon, chair of the Health Committee, tried to clarify how much money the superintendent would seek to recover under the loss corridors program. Superintendent Vullo confirmed that the government owes Health Republic $432 million under the loss corridor program, but quickly pointed out that the federal government would in all likelihood seek to offset all or some of any amounts due under the loss corridor program against the federal government's $23 million start-up loan and $241 million solvency loan to Health Republic.

Part 11 of this article will follow next.

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[1] letter from DFS Superintendent Maria T. Vullo to Senators Hannon and Seward, dated January 25, 2017. I attached a copy of the Superintendent's January 25th letter to my letter to the Court e-filed on March 31, 2017. My letter and the January 25th letter from the Superintendent are now posted on the Health Republic website under Court Docket Items 90, 91, 92, and 93.

[2] I summarized the claims adjudication procedure in Curious Liquidation, Part 6.

[3] Curious Liquidation, Part 6.

[4] Vullo letter, p. 2

[5] Vullo letter, p. 3

[6] Since May 11, 2016, the Garden City Group has been paid $702,000 to operate the website and call center. See Vendor Expenses summary posted on the Health Republic website under Key Documents: Paid In Expenses – 2016 and 2017.

[7] Vullo letter, p. 3.

[8] Justice Edmead: "I would like the administrative costs and the related agreements to those administrative costs posted so people . . . can see [these administrative costs], since you say the likelihood of reaching beyond the policy claims . . . would leave very little. * * * I think that everything that's being covered or spent should be transparent. * * * I want administrative costs posted [so] that I can link into it and see who is getting what." July 28, 2016 Trans., pp.7-8; see also Curious Liquidation, Part 5, pp. 1-2.

[9] Oct. 11, 2016 Trans., pp. 42-46. Transcripts of all Health Republic Court conferences and

hearings are posted on the Health Republic website maintained by the Garden City Group. See also, Curious Liquidation, Part 6, p. 3. Note that while the Superintendent in her answers to questions during the February budget hearings referred to an effort to update the DFS website, the Bureau's website contains a fraction of the information about other liquidated New York insurers that one can find on the Health Republic website operated by the Garden City Group.

[10] This presumably refers to Truven Health Analytics, Inc. recently purchased by IBM (Truven/IBM). A copy of Truven/IBM's contract with the Liquidator may be found on the Health Republic website along with other vendor contracts.

[11] This presumably refers to POMCO, Inc., which administered claims for Health Republic before it failed, during the six-month interregnum between the board's resignation and the beginning of the liquidation, and then during the liquidation proceeding itself. The POMCO, contract purportedly terminated on December 31, 2016, but the Bureau told Justice Edmead in January that the Liquidator contemplated yet another contract with POMCO in order for POMCO to work with Truven/IBM in connection with Truven's audit of POMCO's adjustment of Health Republic's 700,000 pending claims. January 11, 2007 trans., pp. 17-19, 24-26.

[12] Maria T. Vullo Written Testimony Delivered to the Legislative Fiscal Committees on the State Budget – Health, February 16, 2017 (Vullo Testimony), p. 3.

[13] Vullo Testimony, p. 15

[14] Curious Liquidation, Part 2, p. 13

[15] According to a recent filing in a loss corridor suit brought in a U.S. District Court, at least nineteen risk corridors cases have been filed in the Court of Federal Claims. See Health Republic Ins. Co. v. United States, No. 16-259C (Fed. Cl.); First Priority Life Ins. Co. v. United States, No. 16-587C (Fed. Cl.); Blue Cross and Blue Shield of North Carolina v. United States, No. 16-651C (Fed. Cl.); Moda Health Plan, Inc. v. United States, No. 16-649C (Fed. Cl.); Land of Lincoln Mutual Health Ins. Co. v. United States, No. 16-744C (Fed. Cl.), appeal docketed, No. 17-1224 (Fed. Cir. Nov. 16, 2016); Maine Cmty. Health Options v. United States, No. 16-967C (Fed. Cl.); New Mexico Health Connections v. United States, No. 16-1199C (Fed. Cl.); BCBSM, Inc. v. United States, No. 16-1253C (Fed. Cl.); Blue Cross of Idaho Health Service, Inc. v. United States, No. 16-1384C (Fed. Cl.); Minuteman Health Inc. v. United States, No. 16-1418C (Fed. Cl.); Montana Health CO-OP v. United States, No. 16-1427C (Fed. Cl.); Alliant Health Plans, Inc. v. United States, No. 16-1491C (Fed. Cl.); Blue Cross and Blue Shield of South Carolina v. United States, No. 16-1659C (Fed. Cl.); Neighborhood Health Plan, Inc. v. United States, No. 16-1659C (Fed. Cl.); Health Net, Inc. v. United States, No. 16-1722C (Fed. Cl.); HPHC Ins. Co., Inc. v United States, No. 17-87C; Medica Health Plans v. United States, No. 17-94C (Fed. Cl.); BCBS of Kansas City v. United States, No. 17-95C (Fed. Cl.); Molina Healthcare v. United States, No. 17-97C (Fed. Cl.). Notice of Supplemental Filing (February 2, 2017) in Gerhart v. U.S. Department of Health and Human Services, Case No. 4:16-CV-00151 (S.D. Iowa) (Gerhart v. U.S.) Since this filing, the Gerhart v. U.S. case itself was dismissed for lack of subject jurisdiction, Gerhart v. U.S., 2017 WL1019816 (Fed. Cl. March 16, 2017), but at least one more Federal Court of Claims case has been filed. A. Moussako, SD Insurer Seeks $8.9M In 'Risk Corridor' Payments, www.law360.com/articles/902793/sd-insurer-seeks-8-9m-in -risk-corridor-payments (March 17, 2017).

[16] Moda Health Plan, Inc. v. United States, 2017 WL 527588 (Fed. Cl., February 9, 2017). Moda Health is not in liquidation

[17] Presumably this refers to a class action commenced on behalf of Health Republic Insurance Company (Oregon), another non-for-profit health insurer formed under the ACA by the Freelancers Union. A Court of Claims judge recently denied the federal government's motion to dismiss that action for lack of subject matter jurisdiction. Health Republic (Oregon). United States, 129 Fed. Cl. 757 (Fed. Cl. January 20, 2017).

[18] See National Bondholder' Corporation v. Joyce, 276 N.Y. 92, 11 N.E..2d 552 (1937).

Health Republic's Curious Liquidation: Part 11

(April 17, 2017, 5:15 PM EDT)

The View from Part 35

Despite this open exchange during the budget hearing in Albany, very little has been said in filings and appearances before the court with respect to where Health Republic's largest creditor (and largest debtor) stands in the liquidation. Early on in the liquidation proceedings, I asked about the status of the federal government as debtor/creditor in Health Republic's liquidation. Outside counsel for the liquidator, arguing against my request that the liquidator post a balance sheet for the estate, alluded to certain claims against the federal government.[1] This topic also popped up during argument over my motion to appear as a friend of the court, but counsel for the liquidator offered very little information concerning what the liquidator intended to do about the loss corridor funds owed Health Republic.

The status of claims against the federal government came up in a January conference before Justice Edmead. The court asked about claims against the federal government in the context of a request that the unaudited September 2016 balance sheet posted on the Health Republic website be updated.

> Court: * * * We should have a number of what's in the pot. I thought I asked [for] this before. How is it we don't have a number of what the pot consists of today?
>
> Liquidator's counsel: There is a balance sheet that's been posted on the website.
>
> Counsel for Northwell: But there's supposed to be, on the balance sheet, whether or not [the liquidator would] have a contingency for the claim against the federal government.
>
> Court: That's right. * * * So the question is, what has the liquidator done to proceed with its federal claims?
>
> Liquidator's counsel: * * * I don't think it would be controversial to say it would not be beneficial to be discussing that in an open forum.
>
> * * *
>
> Court: Okay. This is going to be like twenty questions here, and maybe you will answer; maybe you won't. There are claims that the liquidator may have for the benefit of the estate.
>
> Counsel: Correct.[2]

It's curious to contrast the superintendent's letter to the senators and her written testimony in Albany with the tight-lipped refusal of counsel for the liquidator to advise the court about how the liquidator intends to collect Health Republic's most significant asset.

Health Republic and the Federal Government: What's Next?

At this point, the liquidator continues to polish and add to the estate's claims adjudication procedures. For example, in a March 24 letter to Justice Edmead, Special Deputy Superintendent David Axinn, who oversees the bureau, told the court that the liquidator would move by order to show cause for approval of "Candidates for Appointment as Referees and Medical Claims Examiners."[3] Axinn enclosed with his letter, now posted as Docket Item 89 on the Health Republic website, a "Health Republic Projected Timeline," which shows the "Resolution of Federal Claims" running through 2019 and to infinity.

Despite all the money that's been spent since Health Republic ceased underwriting and stopped paying claims, this is how Superintendent Vullo realistically described when Health Republic's policyholders will see even a partial payment.

Apart from potential action against the federal government, we do not believe that there will be significant additional assets with which to pay claims. We will not know the amount of liabilities until the end of this year at the earliest, and payments to claimants cannot be made until the dueling claims with the federal government are resolved (emphasis added)[4]

In other words, the liquidator may continue to build an elaborate (and expensive) "claims adjudication procedure," but no policyholder will be paid until the federal government's claims are addressed and resolved.

Sitting on the sidelines and "sitting on a complaint" may save a few dollars in litigation expenses, but until Health Republic's loss corridor and reinsurance claims against the federal government — and any arguably offsetting claims that the federal government may have against the estate —are resolved, no one except the estate's advisors, third-party administrators, accountants, outside counsel, website administrators and bureau's employees, all of whom have been and will continue to be promptly paid, will see any money.

The next item on the Health Republic docket is an in camera session on April 28 during which Justice Edmead will have, in the court's words, a "conversation" with the bureau's counsel concerning the estate's expenses. This in camera session will be followed with an open court conference on May 4. By that point, the liquidator and the bureau will have spent more than $6.5 million without court approval (plus whatever was spent from October 2015 to May 2016).

As far as any Health Republic suit against the federal government is concerned, we'll just have to wait and see. Note, however, that Republican Senators in Congress are preparing to meet any attempts to collect a loss corridors judgment against the federal government with a pending bill — "The HHS Slush Fund Elimination Act."[5] This is how the Slush Fund bill's sponsor, Ben Sasse (R-Neb,) put it shortly after the 2016 election: "We are going to repeal and replace Obama but, in the meantime, the last thing Americans need is for the Obama Administration to sneak in one last bailout on its way out the door."[6] According to an article written about the time Senator Sasse made these remarks, the Justice Department was vigorously defending the loss corridor suits, but the U.S. Department of Health and Human Services (HHS) was "also willing to discuss resolving those suits."[7]

Did the DFS miss an opportunity to compromise and resolve issues surrounding the risk corridor and reinsurance programs during the Obama administration? We don't know because — despite Superintendent Vullo's boasts of full transparency — so little information has been provided to the public, Health Republic's policyholders, or even the Court overseeing the company's liquidation about Health Republic's loss corridor claims.

general information purposes and is not intended to be and should not be taken as legal advice.

[1] Curious Liquidation, Part 6, p. 3; Oct. 11, 2016 Trans., p. 43.

[2] Jan. 11, 2017 Trans. pp. 4-42.

[3] Letter from Special Deputy Superintendent Axinn to Justice Carol Edmead, (Axinn Letter) dated March 24, 2017 a copy of which now appears on the Health Republic websites as Court Docket Item 89.

[4] Superintendent Vullo's Testimony Delivered to the Legislative Fiscal Committees on the State Budget – Health, February 16, 2017, at p. 15.

[5] S.Livingston, GOP Lawmakers move to bar Obama administration from settling risk-corridor lawsuits, http://www.modernhealthcare.com/article/20161118/NEWS/161119894. (Livingston, GOP Lawmakers).

[6] At the same time, GOP senators were writing to then-Secretary Burwell at HHS asking for information about how HHS/CMS was handling the litigation surrounding the risk corridors program.

[7] Livingston, GOP Lawmakers.

Health Republic's Curious Liquidation: Part 12

(July 20, 2017, 3:56 PM EDT)

Part 12 concerns a May 8, 2017, court-ordered proceeding that explored the $7.6 million that Health Republic's liquidator has spent over the past 10 months — all without court approval.[1] The proceeding revealed that:

- even though a monthly claims expense summary posted on the Health Republic website shows that the liquidator has paid consultants, vendors and the New York Liquidation Bureau more than $7.6 million, the incurred figure is $8,263,660![2];
- Health Republic's assets shrank from $118 million as of Dec. 31, 2015, to $99 million as of Sept. 30, 2016, to, as revealed during the proceeding, only $43 million [3];
- the law firm of Weil Gotshal & Manges (Weil), which had represented Health Republic before its liquidation and was later engaged to represent Health Republic's liquidator, has stepped down and in-house counsel at the bureau has been substituted for Weil[4]; and
- the liquidator has hired another outside law firm, Clarick Gueron & Reisbaum, to represent her in any litigation that may be commenced against the federal government to recover about $483 million in risk corridor and reinsurance moneys due the estate.[5]

We'll look at these developments, but first a little context about how we wound up with the bureau making an open-court presentation on moneys spent since May 2016.

The Liquidator's Expenses — Online!

Readers of previous installments in this series know that New York Supreme Court Justice Carol Edmead has opened up Health Republic's liquidation proceeding in ways no other New York court has.[6] Early on, the court directed that the bureau, acting as an agent for Department of Financial Services Superintendent Maria T. Vullo in her role as Health Republic's liquidator, post on the Health Republic website a monthly claims expense summary, as well as copies of vendor contracts, balance sheets and transcripts of all court proceedings.

The Health Republic website also contains a near-real-time docket for the liquidation proceedings. Indeed, the docket on the Health Republic website is easier to access than the New York Supreme Court Electronic Filing System (NYSCEF).[7]

As a result, Health Republic's 206,000 former policyholders, as well as its other creditors, including unpaid health service providers, can now see just how expensive (and potentially wasteful) an insurance company receivership proceeding can be.

To appreciate the significance of having this information available, you need only open the Health Republic website and compare it with the bureau's own website. The bureau's website is a cold

and unfriendly place with very little information posted on each estate, whereas the Health Republic website includes sections for members, providers, vendors and brokers, answers to frequently asked questions, phone numbers to obtain additional information and — thanks to the court — a "Key Documents" section with financial information, timelines and transcripts for all of the court's proceedings, including the May 8, 2017, proceeding discussed below.

The claims expense summary shows how much money the liquidator has paid to outside law firms, consultants, accountants, web site administrators, IT support firms, accountants and, of course, the bureau itself every month from May 2016 through April 2017.[8] But the court never formally approved these expenditures or explored whether this money was well (or appropriately) spent.

A "Conversation" and a "Presentation" on Expenses

In late 2016, the court called for a hearing or proceeding to review the liquidator's expenditures. The bureau's representatives urged that the court wait until October 2017 when the bureau would present a "formal report." But the court insisted on an in-court review. As the court put it: "I may be able to see something on the website, but I can't have a conversation with the website, and I want to have a conversation about the expenses."[9] Justice Edmead arranged for an in camera review of expenses on May 4 followed by an in-court presentation on May 8.

Two in-house attorneys for the bureau, its chief financial officer (CFO), and an assistant special deputy superintendent at the bureau appeared at the May 8 hearing. They brought with them a presentation that you can find on the Health Republic website under Key Documents: "Administrative Expenses – May 8 Review of Administrative Expenses."

The review features graphs and charts designed to show that the estate's expenses are trending down, particularly for the estate's "Top Five Vendors." These vendors include Alvarez & Marsal (consultant — paid $2.2 million); Garden City Group (web-site administrator and "data manager" — paid $731,000); POMCO Inc. (claims processor — paid $1.6 million); Weil (outside counsel — paid $1.3 million); and the bureau itself (paid $1.2 million).

The review claims that these vendors were paid to secure Health Republic's data bases, "maintain (the) integrity of the claim files," build a "claims adjudication procedure," and "transition core functions to in-house ... options," i.e., move these functions over to the bureau.[10] The review however, does not address what action was taken and how much money was spent from October 2015, when Health Republic's board stepped down and consented to liquidation, and May 11, 2016, when the liquidation began.

Presumably some of the work needed to secure data bases, maintain claim files and transition claims procedures was undertaken during this six month gap. The review, however, does not address the fact that during this six-month gap all of the estate's "major vendors," save for the bureau itself, were hired by Health Republic's chief restructuring officer (CRO) at Alvarez & Marsal. During these six months, Alvarez & Marsal's CRO operated under the supervision of the Department of Financial Services (DFS), but I'm not aware of any accounting of the moneys spent or any report on what actions were taken during these six months.

The bureau's representatives then took turns describing the services provided by the "Five Major Vendors ."[11] At one point, the bureau's representatives tried to compare the estate's monthly expenses during the liquidation to Health Republic's monthly administrative expenses while the insurer was in operation.[12] This seems a bit of a stretch — comparing a fully operating insurer with over 600,000 open claims and 200,000 policyholders with a liquidated insurance company operating under an order that essentially stays all its functions (and all actions against it).

In any event, the bureau's general discussion of services rendered and moneys spent left open this critical question: how much money is available to pay Health Republic's approved claims and when will they be paid?

Health Republic's Incredible Shrinking Assets

Neither the bureau's review nor its presentation addressed where the money will come from to pay any approved claims, but the court did. "What is your pot? * * * How are you paying [your] expenses, from what pot?" * * * "What is [the] March 2017 asset number?"[13] The answer turned out to be "approximately $43 million."[14] This prompted the court to ask: "At what point will we start making sure claimants get paid while I have that $43 million ... while it is being chipped away even incrementally — $250,000 a month [in administrative expenses] ... adds up."[15]

The court also asked for an estimate of the value of all potential claims against the estate. The bureau's CFO advised that the value of all potential claims, "including loss adjustment expenses [is] approximately $212 million."[16] The bureau's CFO later agreed with the court's thumbnail estimate of Health Republic's liabilities and assets: "$43 million in assets, $2.5 million annually in expenses; $210 million potential claims. * * * Right?"[17]

If these figures are ballpark accurate, this means that absent significant collections from the federal government or other third-parties (and without taking into account health providers who may also try to recover from the estate as policyholder assignees), an approved policyholders' claim would be worth about 20 cents on the dollar today. This rough estimate, however, will be reduced as the estate's assets are, in the court's words, "being chipped away"[18] by the estate's ongoing expenses.

Battling Balance Sheets

How could Health Republic's policyholders be expected to figure this out? Policyholders now have at least three different Health Republic balance sheets. On the Health Republic website, policyholders can find an audited statutory statement prepared as of Dec. 31, 2015, that shows assets of $118 million and liabilities of $482 million. On the same website, however, policyholders can find an unaudited as-of-Sept. 30, 2016 balance sheet — prepared at the court's direction — that shows assets of $99 million and liabilities of $466 million.

But if a policyholder were to review the bureau's recently published 2016 Annual Report, which appears on the bureau's website, but not on the Health Republic website, a policyholder would find on p. 47 a statement of "Assets and Liabilities" showing Health Republic with year-end 2016 "Total Assets" of $43,003,676 and "Total Liabilities" of $702,700,047![19]

After the bureau's CFO told the court that the estate's assets were about $43 million, the court, at your author's request, asked why Health Republic's assets had dipped from $118 million to $99 million to $43 million.

> Veach: My question is how did we go from $99 million in September of 2016 to $43 million today?
>
> * * * *
>
> Court: Yes.
>
> * * * *
>
> Mr. Labenski: The biggest chunk of that decrease is related to the three audits, included in the assets were the federal reinsurance and risk [corridor payments due from the federal government]. Every so often we get communications from CMS [and] they adjust that number * * * mostly downward, unfortunately."[20]

Labenski then went on to explain that the liquidator had set up a reserve against approximately $50 million due under a federal reinsurance program because the liquidator concluded that the government would apply this amount as an offset against any recoveries the liquidator might seek

under the Affordable Care Act's risk corridor program.[21] Health Republic has a claim for at least $432 million in risk corridor moneys owed by the federal government, as well at $51 million due under a federal reinsurance program.[22]

As discussed in Part 6, the receivers for other failed Affordable Care Act Co-ops have sued the federal government to recover moneys that were due these companies under the risk corridor program. These cases are being actively litigated and are working their way up to the United States Court of Appeals for the Federal Circuit and, possibly, the United States Supreme Court. [23] But DFS Superintendent Vullo told a legislative budget committee in February that while she had directed that a complaint against the federal government be drafted, she was "sitting on it." [24]

More importantly, for Health Republic's policyholders and other creditors, Superintendent Vullo also told the budget committee that "payments to claimants cannot be made until the dueling claims with the federal government are resolved."[25] By "dueling claims" the superintendent was referring to the estate's claims for $483 million in risk corridor and reinsurance moneys that never reached Health Republic and the federal government's subsequent attempts through offset to recover the federal government's start-up and solvency loans, i.e., about $264 million.[26]

To be clear: no claimants, be they policyholders or health providers, will see any money until all of these disputed claims against and from the federal government have been completely sorted out. Nevertheless, the Health Republic estate will continue to pay for a very expensive claims adjudication program. For example, the bureau's review projects that the estate's expenses will soon be trending up to more than $400,000 a month as policyholders begin receiving explanations of benefits (EOBs) that will serve as their claims against the estate.[27] Indeed, the bureau anticipates spending $3.6 million in expenses from April 2017 through December 2017.[28] Most of these charges will relate to the claims adjudication process.

Stay the Claims Adjudication Process (and Update Policyholders)

At the conclusion of the expense presentation, I asked the court to consider imposing a moratorium on the claims adjudication process until it is determined how much money will be available to pay policyholders. In other words, let's stop the bleeding and not put policyholders through a claims process until they have some idea how much their claims are worth.

The court declined to stay the claims adjudication on the ground that the liquidator has not given the court any "directive" to stop processing claims. [29] During a subsequent appearance on the liquidator's application to appoint a panel of referees and a medical review firm to assist with the claims process,[30] I again requested a moratorium on the processing of claims. The court again declined to stay the process, but suggested that I write the superintendent and urge her, in her role as Health Republic's liquidator, to pause the claims review until policyholders have some idea about the value of their claims (and whether it's worth their time and effort to pursue their claims and any appeals from denied claims).[31]

I wrote to the superintendent and a copy of my letter appears on the Health Republic Docket Item 110. In my letter, I urged that the superintendent not only pause the claims processing until all disputes involving the federal government are sorted out, but also asked that the superintendent:

- clarify on the Health Republic and Bureau websites the large differences in assets and liabilities that appear on the Health Republic's balance sheets, update the unaudited September 30, 2016 balance sheet that still appears on the Health Republic website, and continue to update that balance sheet on at least a quarterly basis; and
- post a "plain English" notice for all policyholders and creditors advising them that their claims will not be paid until the liquidator's differences with the federal government are completely resolved.

Policyholders and other creditors should not be told to hurry up and wait through a claims adjudication process — and have the estate spend another $3.6 million dollars (or about 8 percent of its remaining assets) — only to find that barring some significant recoveries from the federal government very few dollars may remain to pay even a small portion of their approved claims. And that notice should also be provided to the court rather than force the court to drag this information out of the bureau's representatives during proceedings and hearings.[32]

[1] A May 8, 2017, transcript of the proceeding is now available on the Health Republic website, which also contains a copy of a Review of Administrative Expense (Review) submitted during the presentation. For a synopsis of earlier parts in this series, see Part 6, n. 1.

[2] May 8, 2017 Trans., p. 20. These paid and incurred expenses occurred from May 11, 2016 through March 31, 2017.

[3] May 8, 2917 Trans. pp. 14-16.

[4] May 8. 2017 Trans., pp.28, 58; Letter from Special Deputy Superintendent David Axinn to Hon. Carol Edmead, dated May 26, 2017 (Axinn May 26th Letter). Since May 11, 2016, Weil billed the Health Republic estate $1,298,501. May 8, 2017 Trans., p. 28.

[5] May 8, 2017 Trans. p. 29. Axinn May 26th Letter, p. 1.

[6] Health Republic's Curious Liquidation, Parts 5 and 8.

[7] The docket on the Health Republic website also includes copies of correspondence with the court, including my letters to the court.

[8] You will see on the site that liquidator paid more than $7.6 million, but at the May 2017 proceeding we learned that "through March 31, 2017, the cumulative expenses for this period total $8,263,660. May 8, 2017 Trans. p. 20.

[9] February 17, 2017 Trans. p. 23.

[10] Review, pp. 5,6; May 8, 2017 Trans. p. 9.

[11] May 8, 2017 Trans. pp . 24- 29, 39-57.

[12] May 8, 2017 Trans. pp. 4-7.

[13] May 8, 2017 Trans. p. 14.

[14] Id.

[15] May 8, 2017 Trans., pp. 15-16

[16] May 8, 2017 Trans. p.16.

[17] May 8, 2017 Trans. p. 17

[18] May 8, 2017 Trans. p. 14.

[19] New York Insurance Law Section 7405(g) requires that the bureau publish annually a report for all of the estates that it oversees.

[20] May 8, 2017 Trans. p. 62.

[21] Part 10 discusses the federal risk corridor program and the estate's potential $483 million claim against the federal government.

[22] Maria T. Vullo, Superintendent of the New York State Department of Financial Services Testimony Delivered to Legislative Fiscal Committees on the State Budget — Health, February 16, 2017, p.14 (Written Budget Testimony).

[23] W. Roberts, et al., Confusion over Risk Corridors Program Payments Continues, Law360 May 4, 2017; https://www.law360.com/articles/920276/print?section=insurance: Insolvent Insurer Says U.S. Government Owes $157M in Affordable Care Act Funds, https:www.lexislegalnews.com/articles/17836/print?section=Mealeys-insolvency.

[24] Oral testimony given before the Legislative Fiscal Committee on the State Budget — Health on February 16, 2017.

[25] Curious Liquidation, Part 9; Written Budget Testimony, p.15.

[26] See unaudited balance sheet prepared as of September 30, 2016 posted on the Health Republic website.

[27] Review p. 19. The bureau told the court that Health Republic's 690,000 open claims will be compressed into about 18,000 — 19,000 EOBs. May 8 Trans. pp. 41-42.

[28] Id.

[29] May 8 Trans. pp. 66-67.

[30] "And if you think that the superintendent needs to address [your stay request], you need to contact the Superintendent and say: 'I want you to formally state that the Liquidation should stop' — and you could do that — ... and then [the Superintendent] could respond directly and I will know what to do." May 18, 2017 Trans. p. 8. A copy of that transcript may now be found on the Health Republic website.

[31] Id.

[32] See, e.g., Jan. 11, 2017 Trans. pp. 41-42.

Health Republic's Curious Liquidation: Part 13

(January 8, 2018, 3:54 PM EST)

We thought about skipping Part 13 and going straight to Part 14, but that might confuse readers who don't suffer from triskaidekaphobia.[1] Let's confront this irrational fear and see where the liquidation of Health Republic Insurance of New York Inc. (Health Republic) now stands.

First, we will look at the processing of Health Republic's unpaid claims. Then we will return to two principal themes of this series: (1) how much of Health Republic's assets has been spent by the state Department of Financial Services (DFS) and the New York Liquidation Bureau (bureau) since Health Republic stopped underwriting in September 2015; and (2) how much money remains to pay Health Republic's policyholder / health provider claims.

As Part 13 was on its way to Law360, the liquidator filed an order to show cause why the court should not approve the bureau's "Report on the Status of the Liquidation of Health Republic (Status Report) ... ." This order to show cause, which is now returnable at 10:00 A.M. on Feb. 14, 2018, also seeks the court's authorization to distribute Health Republic's assets to "allowed claimants." This sounds a lot better than it is, given the substantial impediments to any actual payment to policyholders (or health providers). We will address these impediments, as well as the liquidator's Status Report, in Part 14.

The First of the EOBs

On Aug. 8, 2017, Special Deputy Superintendent David Axinn wrote to Justice Carol Edmead, who oversees Health Republic's liquidation proceeding, to "provide an update on the projected timeline of milestones in the Health Republic liquidation."[2] Perhaps "milestone" overstates it, but at least Health Republic's policyholders and health providers are finally receiving, in lieu of proofs of claim, explanations of benefits (EOBs) for unpaid claims dating back to 2014.

Part 6 of this series described the claims adjustment procedures that the court approved last October.[3] Under these procedures, EOBs serve as both a "proof of claim" and a "Notice of Determination" with respect to Health Republic's unpaid claims.[4] These EOBs, a sample of which has not been posted, apparently contain codes that explain why a claim has been denied or questioned. You can review a table of these codes on the Health Republic website by clicking on the link to "Reason Codes for EOB/Allowance."

The codes provide shorthand explanations as to why a claim has been disallowed or suggest steps to follow to pursue a claim. For example, with respect to the former, the code "ri" means: "Received documentation incomplete. Claim closed." With respect to the latter, the code "d+" means: "Info submitted does not support services rendered." The website advises that EOB determinations may be appealed online by clicking on a link and filling out an appeal submission form. Note that the claimant must do so within 60 days of a date that appears on the EOB.

Axinn's Aug. 8 letter to the court advised that the Health Republic EOBs were being issued on a rolling basis. The first group of EOBs went to policyholders with claims relating to Health Republic's 2014 claims year.[5] Axinn's letter did not indicate how many EOBs had been mailed at that point or whether any health provider or policyholder had filed an appeal, but the liquidator previously proposed — and the court has appointed — two referees and a health care-qualified claims examiner to assist with any appeals.[6]

With respect to when any ultimately approved claim will be paid, the website now contains, within a short description of the appeal procedures, the following notice printed in bright red letters:

> Please be advised that no claim will be paid until all policy claims against Health Republic are adjudicated pursuant to the Claims adjudication [sic] Procedure. Claims will be paid based on available general assets. The amount of payment will depend on the percentage of total assets to total claims in each particular claims class.[7]

I suppose this notice is better than nothing, but it's misleading.

Not only will claims only be paid from "available general assets" and only after all policy claims are adjudicated, but claims will also only be paid after Health Republic's liquidator, DFS Superintendent Maria T. Vullo, has resolved all of her differences with the federal government, including a lawsuit commenced by Superintendent Vullo against the federal government on Sept. 1, 2017.[8]

The red-letter notice quoted above also doesn't point out that New York is one of the few states that never established a guaranty association or security fund for failed health insurers. In other states, e.g., New Jersey and Connecticut, a guaranty association or security fund will pay or already has paid policyholders with approved claims. In New York, on the other hand, Health Republic's meager assets are the only source of funds to pay approved policyholder (or health provider) claims.

Which bring us to our next topic: What Health Republic assets remain to pay approved claims?

Another Health Republic Financial Statement / Balance Sheet

In Part 12, we discussed the Health Republic estate's "incredible shrinking assets."[9] We pointed out that during Health Republic's liquidation proceedings, liquidator Vullo, acting through the bureau, has produced several balance sheets and at least two financial statements. These balance sheets / financial statements were prepared using different accounting bases — cash, modified cash and statutory — that make them difficult to compare.

For example, as discussed in previous parts, the Health Republic estate has generated:

- a Sept. 30, 2016, balance sheet, prepared at the court's direction;[10]
- an as of Dec. 31, 2015, statutory financial statement, prepared by Eisner & Amper (E & A), an accounting firm hired by the liquidator;
- an as of Dec. 31, 2016 statutory financial statement, prepared by E&A, but only for the last seven months of 2016; and
- another balance sheet — of sorts — included with Health Republic's "Estate Profile" in the bureau's 2016 Annual Report (Annual Report) to the DFS. See NYIL § 7405(g)(1). (The Bureau's Annual Report to the DFS comes out in May each year and includes for each failed insurance entity overseen by the Bureau a single page of text and a balance sheet.[11])

Axinn's Aug. 8 letter to the court states that the liquidator "has completed the 2016 financial audit of Health Republic."[12] This is an oblique reference to yet another financial statement, a statement due every Aug. 1 pursuant to NYIL § 7405(g)(2) (financial statement).

The bureau's 2016 financial statement purportedly shows the results of an "audit" of the bureau itself, as well as of every estate that the bureau manages. For a thorough discussion of the bureau's annual report vs. its purportedly "audited" Financial Statement, see Peter Bickford's The Liquidation Process in New York, Parts 1-7.[13]

I recognize that these different financial reports and statements are confusing, but for our purposes note that the bureau's 2016 annual report identifies Health Republic as a "new estate" and includes a one-page Statement of Assets and Liabilities. At the end of the 2016 Financial Statement, you will find a copy of a separate "audited" financial statement prepared by E & A for Health Republic. With this as background, let's look at the most recently produced Health Republic financial statement, as well as the Bureau's 2016 Financial Statement, to see what they reveal about Health Republic's "available general assets."

First, however, we need a little context. Let's walk back to the beginning and then come forward.

Declining Assets

In June 2015, the DFS received an audit prepared by BDO USA showing errors in Health Republic's 2014 annual statement.[14] After a review of corrected filings and other "investigative action[s]," the DFS and federal authorities concluded that Health Report could not "profitably manage its business" without more capital.[15]

When Health Republic filed its last quarterly statement as of June 30, 2015 (2015 second quarter statement), Health Republic had an executive staff, a CEO and a 17-person board of directors / trustees. The 2015 second quarter statement reported total assets of $530,183,771 and total liabilities of $443,995,702. The 2015 second quarter statement also revealed a $136,926,600 risk adjustment liability.[16] The 2015 second quarter statement, which was prepared on a statutory accounting basis and filed on or about Aug. 17, 2015, showed current year to date net premium income of $479,819,107 and a net operating loss of $53,095,722.[17]

On Sept. 25, 2015, the DFS directed that Health Republic stop issuing new policies and commence an "orderly wind down." On the same date, the Centers for Medicare and Medicaid Services, which operates within the U.S. Department of Health and Human Services (HHS), terminated all its loan agreements with Health Republic, a harbinger.[18] By October 2015, the DFS had determined that as of Dec. 31, 2015, Health Republic's total admitted assets would be less than its liabilities and required surplus.

On Oct. 1, 2015, HHS announced that the federal government would pay only 12.6 percent (or $18.8 million) of the $149.3 million owed Health Republic under the CO-OP program.[19] On Oct. 27, 2015, Health Republic's board of directors unanimously consented to the entry of an order of rehabilitation or liquidation pursuant to NYIL Article 74.[20] On Oct. 31, 2015, the DFS notified all of Health Republic's approximately 215,000 enrollees/members that their plans would terminate as of Nov. 30, 2015.[21] On Nov. 9, 2015, the DFS issued an order pursuant to NYIL § 1311 directing that Health Republic immediately stop paying claims to Health Republic's policyholders / members.

On April 22, 2016, the superintendent petitioned to liquidate Health Republic pursuant to NYIL Article 74.[22] The court entered an order of liquidation on May 11, 2016.[23] I am not aware of any financial reports released to the public covering the period from June 30, 2015, the date of Health Republic's 2015 second quarter statement, to May 11, 2016, the date on which the court entered its order of liquidation (gap period).[24]

During a hearing before Justice Edmead on Oct. 11, 2016, the court directed that the liquidator produce, and post on its website, a balance sheet.[25] You can still find that balance sheet, prepared as of Sept. 30, 2016, on Health Republic's website (balance sheet). The balance sheet shows total assets of $99,149,675 and total liabilities of $465,980,848. The balance sheet also describes itself as an "unaudited [statutory basis] balance sheet and related footnotes" that are

"preliminary and subject to adjustments" to the extent that an "audit of the Company's December 31, 2015, financial statement is in progress ... ."[26]

In January 2017, E & A released its audited 2015 statutory financial statement for Health Republic, a report you can review on the Health Republic website (Dec. 31, 2015 statement).[27] In the Dec. 31, 2015 statement, E & A notes that "management [i.e., the Bureau] was responsible for the preparation and fair presentation" of the statement.[28] The Dec. 31, 2015 statement, prepared on a statutory accounting basis, showed admitted assets of $118,710,840 and total liabilities of $482,884,608.

In July 2017, E & A released another financial statement for Health Republic, this time for the period from May 11, 2016 (date of liquidation) through Dec. 31, 2016 (2016 partial statement).[29] The 2016 partial statement was prepared on a "modified cash basis" and shows "cash receipts and disbursements," including "changes in Cash, Cash Equivalents and Invested Assets," for the period from May 11, 2016 through December 31, 2016."[30] In other words, the 2016 E & A financial statement for Health Republic does not cover the period between January 1, 2016, and May 10, 2016.

The 2016 partial statement for Health Republic includes at the end of the statement "Supplementary Information" in the form of a "Statutory Basis Statement of Admitted Assets, Liabilities, and Deficit" that shows Health Republic with total admitted assets of $43,003,676. The E & A notes for the partial statement make clear that the supplementary information "has not been subjected to the auditing procedures applied in the [E&A] audit" and "E & A does not express an opinion or provide any assurance on it."[31] Nor does E & A express any opinion on whether using a "modified cash basis of accounting is an acceptable basis for the preparation of financial statements in the circumstances."[32]

That said, the 2016 partial statement shows Health Republic's estate has total assets of $43,003,676 and total liabilities of $702,700,047.[33] With respect to assets, the 2016 partial statement backs out two of Health Republic's largest potential assets — $51,736,709 in "Amounts Recoverable from Federal Insurance" and $445,134,282 in "Risk Corridors" payments owed by the federal government.[34] Both the "Federal Insurance," i.e., reinsurance, and the "Risk Corridors" payments have been set off with "non-collectability reserves."[35]

The Health Republic estate's obligations with respect to classes of creditors are laid out in its 2016 partial statement according to the creditor classes in NYIL § 7434.[36] Section 7434 assigns all claims against an insolvent New York insurer's estate to nine classes. Class one claims, for example, consist of the "actual and necessary costs and expenses of administration" for the estate, which, in Health Republic's case, includes moneys paid to outside consultants, vendors, web-site administrators, outside counsel and the bureau itself.

Class two claims include "all claims under policies." Class three claims include "claims of the federal government." Class six claims include "claims of general creditors." Class nine claims include "claims of shareholders," of which there are none, unless you count all of the federal taxpayers who paid for Health Republic's solvency and startup loans.

Here is a critical point: NYIL §7434 requires that "[e]very claim in each class shall be paid in full ... before the members of the next class receive any payment." NYIL § 7434 (a). With that caveat in mind, what are Health Republic's obligations to each of these creditor classes?

The 2016 partial statement shows class one claims at $4,097,461, presumably the administrative expenses paid through Dec. 31, 2016. For class two claims, $200,716,597 has been allocated for all allowed and nonallowed policyholder and health provider claims. Class three claims are listed as $197,571,060, which presumably refers to the Affordable Care Act's risk transfer program pursuant to which Health Republic owes money to compensate health insurers that enrolled insureds with higher than average costs.[37] Health Republic's start up and solvency loans, totaling $264,966,400, have been assigned to class eight.[38]

The 2016 partial statement concludes with Note 13 that describes a series of letters to the liquidator from the CMS offsetting amounts due to Health Republic against amounts that Health Republic purportedly owes the federal government. For example, the federal government has offset $46,258,274 it owes to Health Republic under a federal reinsurance program against the $191,338,780 that Health Republic purportedly owes under the risk adjustment program.[39] While Notes 13 and 14 indicate positions taken by the federal government, the notes do not reveal the liquidator's response or whether the liquidator agrees or disagrees with any of the offsets or administrative holds described in the notes.

Recall that under NYIL §7405(g) the bureau must provide its own "annual financial statement." The bureau's 2016 financial statement contains one reference to Health Republic: "During 2016, the NYLB made claim payments for Health Republic from the CDA" or Central Disbursement Account.[40] This is interesting because, to my knowledge, no Health Republic claims have yet been presented to the court for approval, much less approved for payment.

Perhaps this sentence refers to claims that were approved for payment before Health Republic's May 11, 2016, liquidation order was entered. In other words, were claims paid during the period from June 30, 2015, to May 11, 2016 (gap period), i.e., before Health Republic was liquidated, but without Court approval? Or were these claims that were paid before the Superintendent issued the November 9, 2015 Order directing that Health Republic stop paying claims?

Other questions have surfaced recently with respect to funds that were spent immediately before Health Republic was placed in liquidation or with respect to at least one entity that was hired, and may have been paid, during the Gap Period.

Empire Center Report

As described on its website, the Empire Center for Public Policy Inc. (Empire Center), is "an independent, non-partisan, non-profit think tank based in Albany, New York."[41] Empire Center focuses on government transparency, particularly with respect to how New York state government spends taxpayer dollars.[42]

Recently, Empire Center looked at New York state's indigent care pool, which is funded with a tax created as part of New York state's Health Care Reform Act of 1996.[43] The pool reimburses hospitals that provide free care to the poor and uninsured. The Empire Center's analysis of 2016 pool distributions showed that the pool's distributions shortchanged some hospitals, such as St. Joseph's Hospital in Yonkers, while overcompensating other hospitals, such as Memorial Sloan Kettering Cancer Center in Manhattan. The money to reimburse these hospitals comes from two sources: (1) a federal matching program; and (2) surcharges on health insurance, i.e., taxes paid by health insurers such as Health Republic.

The Empire Center report contains a table that shows that Health Republic's owner, Freelancers, paid $40,370,228 in insurance surcharges, i.e., HCRA taxes.[44] According to the report's author, these insurer payments[45] include payments by Health Republic during the first seven months of 2015, not the 2016 calendar year. The October payments would have been due on or about Sept. 23, 2015, or just two days before the superintendent announced Health Republic's shutdown, which raises the following questions:

- Given Health Republic's fragile fiscal condition in September 2015, who at Health Republic approved payment of the HCRA tax?
- Were persons at the DFS who were familiar with Health Republic's condition also aware of the HCRA payment?
- Has anyone suggested or proposed that the HCRA payment be returned to the estate as a preferential payment?

Had the HCRA payment not been made, or if the HCRA payment were returned, the assets available to pay Health Republic's policyholders (and health providers) would double.

Finsbury

If you go to Health Republic's website and look under "Key Documents: Administrative Expenses," you will find a reference to "Finsbury" under the subheading: "Legal." You will note that the two law firms that have represented Health Republic during its receivership — Weil Gotshal & Manges LLP and Clarick Gueron Reisbaum LLP — also appear under this subheading. According to the expense summary on the website, in May and July 2016 the liquidator paid "Finsbury" a total of $11,145.

Crain's New York Business recently reported that Kushner Cos. had hired London and New York-based Finsbury Communications to represent it in the face of several ongoing investigations.[46] Referred to in the article as a "fixer firm," Finsbury Communications numbers among its clients Citigroup, Toyota, Barclays, Volkswagen and Sherri Redstone, as she fought for control of Viacom. Crains described Finsbury Communications as a "significant player in the world of corporate image-making and crisis management." In other words, if "Finsbury" is Finsbury Communications, it's not a law firm, but it may advise "legal counsel."

In an email to counsel for the New York Liquidation Bureau, I asked whether the Finsbury that appears on the list of Health Republic's vendors is the same public relations firm that now represents Kushner Cos. If so, I asked what advice Finsbury provided to the bureau and why its retainer agreement had not been posted.

I received no response from the bureau, but I did learn of a Finsbury Law Solicitors in London with offices on Seven Sisters Lane. I called and a baffled solicitor confirmed that his firm has never acted for the bureau or a failed health insurer in New York.

The Finsbury listed as a bureau vendor on the website prompts the following questions: (1) who hired Finsbury?; (2) what possible advice did Finsbury provide to Health Republic?; and (3) how much was Finsbury paid for services rendered during the gap period?

Where to Now?

I'm writing to Justice Edmead requesting that on the return date for the liquidator's order to show cause the court address a number of questions raised by the liquidator's status report, as well as the liquidator's suit against the United States, an action filed on Sept. 1, 2017. Vullo v. United States, No. 17-1185C (U.S. Court of Federal Claims). In that action, liquidator Vullo seeks "to recover more than $575 million owed to [Health Republic] by the United States government ... ." [47]

We are now a year and a half into Health Republic's liquidation. A few outside law firms, a major accounting firm, a large consulting firm, a website administrator, other vendors and the bureau itself have been paid a total of more than $10 million, but no Health Republic policyholder (or health provider) has received a cent on a single approved claim. We will see what the Feb. 14, 2018 return date / status conference reveals and trust that at least a few of Health Republic's more than 200,000 former policyholders will appear and participate.

[1] See, generally, http://www.triskaidekaphobia.info/.

[2] Letter from Special Deputy Superintendent David Axinn to Hon. Carol R. Edmead, dated August 8, 2017; http://healthrepublicny.org/ (Health Republic Website and Court Docket, Item 118 (Axinn Letter).

[3] Health Republic's Curious Liquidation, Part 6, pp. 1-3.

[4] Id., p. 1.

[5] Axinn Letter, p. 1.

[6] See order entered on May 18, 2017 appointing two referees to resolve objections to the EOBs and authorizing the liquidator to hire Independent Medical Expert Consulting Services, Inc. to provide independent medical review services on an as needed basis in support of the referees' review. Health Republic Website, Docket Item 112.

[7] Health Republic Website: Appeal Procedure.

[8] Health Republic's Curious Liquidation, Part 10, text accompanying nn. 15-17.

[9] Health Republic's Curious Liquidation, Part 12, pp. 3-4.

[10] Health Republic Website: Key Documents/Balance Sheets.

[11] New York Liquidation Bureau: 2016 Annual Report http://www.nylb.org/Documents/AnnualReport_2016%20Final%205.2.17.pdf. The financial snap shots of each estate are prepared on a modified cash basis.

[12] Axinn Letter, p. 2.

[13] http://www.pbnylaw.com/category/nylb/.

[14] Verified Petition, p. 5, n. 11.

[15] Id.

[16] 2015 Second Quarter Statement, pp. Q2, Q3.

[17] 2015 Second Quarter Statement, p. Q4.

[18] Health Republic Website: Legal Documents, Verified Petition, ¶ 12, p. 5.

[19] Health Republic Website: Legal Documents, Verified Petition, ¶ 13, pp. 5-6.

[20] Health Republic Website: Legal Documents, Verified Petition, ¶ 16, p. 6.

[21] Health Republic Website: Legal Documents, Verified Petition, ¶¶ 14, 15, p. 6.

[22] Health Republic Website: Legal Documents, Verified Petition, p. 1.

[23] Health Republic Website: Key Documents, Liquidation Order.

[24] Id.

[25] Health Republic's Curious Liquidation, Part 6.

[26] Health Republic Website: Key Document, Balance Sheet.

[27] Health Republic Website: Key Documents, Audited 2015 Financial Statements.

[28] Health Republic Website: Key Documents, Audited 2015 Financial Statements, January 17, 2017 cover letter, p. 1.

[29] Health Republic Website: Key Documents, Audited 2016 Financial Statements.

[30] Health Republic Website: Key Documents, Audited 2016 Financial Statements, initial note, p. i.

[31] 2016 Partial Statement, p. 2.

[32] 2016 Partial Statement, p. 1 of introductory cover note.

[33] 2016 Partial Statement, pp. 4-5.

[34] 2016 Partial Statement, p. 4.

[35] 2016 Partial Statement, n. 6, p. 15.

[36] 2016 Partial Statement, p. 4.

[37] 2016 Partial Statement, p. 16-17, n. 6.

[38] 2016 Partial Statement, pp. 4, 14-15, n. 5.

[39] 2016 Partial Statement, p. 19, nn. 13 and 14.

[40] 2016 Financial Statement, p. 10. The Bureau titles the "annual financial statement" required by NYIL 7405(g)(2) as an "Annual Audit Report," but does not cite to NYIL 7405(g)(2) in its report, which only attributes to the confusion.

[41] https://www.empirecenter.org/.

[42] See Empire Center's transparency website called SeeThroughNY.net that allows New Yorkers to search the public employee payrolls of New York State, New York City and 19 public authorities. This site also allows you to search databases of legislative member items and office expenditures.

[43] Empire Center, Indigent Carelessness, http://www.empirecenter.org/publicationsinvincible-indigence.

[44] Indigent Carelessness, p. 9.

[45] Id.

[46] Kushner Cos., feeling heat, hires new public relations firm. www.crainsnewyork.com/article/20170824/POLITICS/170829934/with-kushner.

[47] A copy of the complaint has not been posted on the Health Republic Website or included with the liquidator's Order to Show Cause, but can be retrieved via PACER.

Health Republic's Curious Liquidation: Part 14

(February 13, 2018, 5:49 PM EST)

In Part 13, we addressed the explanations of benefits (EOBs) that the liquidator has been issuing since August 2017. We also reviewed the liquidator's "partial" audited financial statement for Health Report, a statement that covers the period from May 11, 2016, through Dec. 31, 2016.

We promised that in Part 14 we would turn to the liquidator's "Report on the Status of the Liquidation of Health Republic Insurance of New York, Corp. and Request for Authority to Distribute Assets," which the liquidator will ask the court to approve on Feb. 14, 2018. We also promised to discuss impediments to any actual payment of policyholder and health care provider claims.

As we approach the second anniversary of Health Republic's liquidation, I'm concluding this series. I thank readers, former policyholders, legislative aides, reporters and others who have commented on and supplied information (and constructive criticism) for these articles, as well as Law360 for providing a platform.

I also want to acknowledge Justice Carol Edmead, recently appointed associate justice to the Appellate Term,[1] for allowing me to write to the court concerning Health Republic and to ask questions during conferences and hearings. Without Justice Edmead's insistence on transparency, these articles would have been a lot less interesting.

A Status Report on the Liquidation, Of Sorts

On several occasions, representatives from the New York Liquidation Bureau, which serves as the superintendent's agent in Health Republic's liquidation proceeding, have alluded to the bureau's filing a status report, in addition to the Bureau's ad hoc presentations offered up at Justice Edmead's direction.[2] The bureau has now produced its report, which you can find on Health Republic's website under Docket Item 121 (Ex. A – court report).[3]

Relying on the report, the liquidator will ask the court on Feb. 14 to approve the more than $10 million spent by the liquidator since May 11, 2016. The liquidator will also ask, tongue-in-cheek, for the court's "authorization to make a partial distribution of Health Republic's assets ... ."[4] Your author will be out of the country on Valentine's Day, but encourages others with an interest in Health Republic's liquidation to come to 60 Centre Street (Part 35, Room 438) at 10:00 A.M. and listen as some of the matters discussed below are considered in connection with the liquidator's Report.

What the Status Report Does Not Address

Like that "curious incident" of the dog that didn't bark in the night,[5] it's what the report doesn't discuss that's revealing.

First, the report skips over the six-month period from the date on which Health Republic's board of directors consented to the entry of an order of liquidation, i.e., Oct. 27, 2015, until the company was placed under court supervision on May 11, 2016. Instead, the report begins with the bland observation that "approximately 18 months into the liquidation, many of the critical functions of the liquidation have been completed."[6] To my knowledge, neither the superintendent nor the New York Department of Financial Services (DFS) has produced any accounting of the money spent or the actions taken during the six months between the date on which the board essentially stepped down — Oct. 27, 2015 — and the entry of the liquidation order on May 11, 2016 (gap period).[7]

The gap period comes up in the report in several contexts. For example, according to the report and the vendor expenses set out on Health Republic's website at healthrepublicny.org, the liquidator has paid the accounting firm of Eisner & Amper (E & A) at least $746,374 to audit Health Republic's financial statements, "[reconcile] Health Republic's financial records," and prepare audit reports for 2015 and 2016.[8]

With respect to the 2016 audit, the report claims that E & A "performed an audit of Health Republic's modified cash basis financial statements as of December 31, 2016, and for the period May 11, 2016 (date of liquidation) through December 31, 2016 ... ." [9] In other words, although E & A's 2015 audit report covered all of 2015, E & A's 2016 audit report ignores the period from Jan. 1, 2016, through May 10, 2016, a time in which many Health Republic vendor contracts were executed and, presumably, considerable money was spent.

The report notes that in October 2017, the Office of the Inspector General of the Department of Health and Human Services (HHS) notified the liquidator that the "Federal Audit Clearing House" had accepted E & A's 2015 audit.[10] We'll see whether HHS's inspector general accepts E & A's 2016 audit report, even though it covers only two-thirds of the year.

Thanks to Justice Edmead's persistence, Health Republic's members/policyholders (policyholders) can see on the website a month-by-month accounting of money spent on consultants, outside counsel, advisers, third-party administrators, auditors, accountants and the bureau itself. Policyholders, however, will not find, either in the report or on the Health Republic website, any information on how much of the estate's money was spent during the gap period. It's important, therefore, to keep in mind that the report confines itself to the 18 months during which Health Republic's assets have been managed by the bureau; the report does not address funds spent during the gap period.

Second, the report fails to name names and often uses the passive voice to obscure who did what to whom. It includes a few paragraphs on events preceding the superintendent's petition to liquidate Health Republic,[11] but doesn't identify who took what action. Here's an example: "Health Republic's board of directors consented to the appointment of an independent monitor to oversee the company's affairs, and an external corporate restructuring firm was engaged to manage the wind-up of the business."[12]

A sentence like this begs questions. Who proposed hiring an "independent monitor?" Was it the DFS and the board merely went along? And who at the DFS oversaw the independent monitor's hiring? Superintendent Maria T. Vullo? Her predecessor, Acting Superintendent Anthony Albanese? Someone else? Did the job of serving as an "independent monitor" go out to bid?

In a similar vein, what precipitated the "engage(ment)" of the "external corporate restructuring firm"? Was that job bid out? Did the board ever work with the "restructuring firm?" Or did the "restructuring firm" work only with someone at the DFS? Presumably, the "restructuring firm" referred to in the report is Alvarez & Marsal,[13] but why should the report's readers have to guess?

Third, the report discloses that the superintendent has finally sued the federal government in the United States Court of Federal Claims, but the bureau did not attach to its report a copy of the complaint.[14] Nor did the bureau provide any additional information about the suit other than to advise that the Court of Federal Claims (in the District of Columbia) has stayed the suit until the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decides two appeals pending before the Court of Appeals.[15]

The report at least reveals that the superintendent is "seeking to recover $575 million owed to Health Republic under ACA [Patient Protection and Affordable Care Act],"[16] but it does not discuss the theory of the suit or describe any of the government's offsetting and administrative holds that prompted the suit. Nor does the report address why the superintendent waited so long to sue the government, even though the chair of the New York Senate Insurance Committee asked about suing the government as far back as February 2016.[17]

Even though the superintendent engaged two outside law firms to prepare an action against the government and literally dozens of shuttered or liquidated co-ops have already sued the government, Health Republic's liquidator did not commence her action until Sept. 1, 2017. Even then, to my knowledge, neither the bureau nor the superintendent issued a press release or otherwise announced the suit.

Health Republic's policyholders and the public can find the complaint via PACER,[18] if they sign up and qualify to use PACER, and thus see what wasn't visible before, i.e., the set-offs taken by the federal government against moneys purportedly due Health Republic. (I attached a copy of the complaint to my most recent letter to the court, which may eventually be posted on the docket portion of the Health Republic website.) Those with access to the complaint can now read some of the correspondence that the superintendent's counsel and the bureau have been exchanging with HHS and its Centers for Medicare and Medicaid Services (CMS), correspondence that we review below.

Fourth, the report's remarkably self-laudatory description of the bureau's handling of the Health Republic estate ignores the court's struggle to drag information out of the bureau and its representatives over the course of almost a dozen conferences and hearings. For example, the report claims that during the "Initial Intake" of Health Republic, the liquidator "was responsible for ... [p]reparing an opening balance sheet,"[19] but that obscures how the opening balance sheet came to be prepared.

Early on in the liquidation proceedings, your author asked the court to direct the liquidator to prepare and post a balance sheet in order for policyholders to get some idea about the value of their claims. Outside counsel for the liquidator initially argued against producing a balance sheet on the ground that a "vast majority of the assets of [Health Republic]" would come from litigation against third-parties, including the government, and that an estimate of the value of those assets would invite speculation.[20]

Justice Edmead overrode counsel's objections and the bureau posted on the website a simple balance sheet, prepared as of Sept. 30, 2016. The balance sheet shows a $51 million "amount recoverable from federal reinsurance" and $432 million in "accrued retrospective receivables," the latter of which was then backed out. The Sept. 30, 2016 balance sheet nowhere refers to the liquidator's potential suit against the government.[21]

Finally, the report makes a number of vague claims without supporting detail. For example, it states that the liquidator has "protected Health Republic's former members ... ."[22] But from what or from whom has the liquidator "protected" them? The liquidator certainly hasn't stood with the policyholders with respect to whether they alone constitute class two creditors, as opposed to their sharing the estate's limited assets with health care providers, thus reducing policyholder payments. [23]

The report also claims that the liquidator has "collected monies owed to Health Republic,"[24] but

doesn't identify from whom these "monies" were collected, how much was collected or how much it cost the estate to collect these "monies." Which brings us to the liquidator's belated suit against the government.

Vullo v. U.S.

The liquidator's suit, Maria T. Vullo, in her capacity as liquidator of Health Republic Insurance of New York,Corp.. v. The United States of America,[25] is one of almost 40 actions commenced against the federal government for failing to fund programs to support health insurers writing qualified health plans (QHPs) under the Affordable Care Act.[26] The complaint sets out the government's capital and solvency loans to Health Republic (about $265 million)[27] and Health Republic's debts under the Risk Adjustment program (about $272 million).[28] The complaint also sets out the amounts allegedly owed by the government to Health Republic, including $445 million owed under the Risk Corridors program,[29] $110 million owed under the Reinsurance program ($110 million),[30] and $22 million owed under the Financial Assistance program. [31]

The gist of the complaint concerns how the government has not only refused to make any further payments under the Risk Corridors program, but has also placed administrative holds on any other moneys due Health Republic under the Reinsurance and Financial Assistance programs. Or, as the liquidator alleges in her complaint: "The Government is employing an unlawful setoff methodology to withhold from Health Republic payments due under funded programs [the Reinsurance and Financial Assistance programs], while seeking to 'pay' Health Republic with balances remaining in allegedly unfunded programs [e.g., the Risk Corridors program]."[32]

The liquidator attacks the government's offsetting amounts due under its capitalization and solvency loans. The liquidator claims that under New York Insurance Law Article 74, "claims under Health Republic policies have priority over the Government's claims * * * and the Government has cut the line ahead of higher-priority policy claimants." [33] Citing the loan agreements themselves, the liquidator alleges that demands for repayment of Health Republic's loans are subordinate to the claims of "policyholders and providers." [34]

In support of her arguments against the government's offsetting, the liquidator attaches to her complaint correspondence with the government, some dating back months before Health Republic ceased underwriting. This correspondence reveals at least three things.

Letters, We Get Letters

First, even though New York state and its DFS were primarily responsible for determining whether Health Republic was solvent and operating safely, we see in the attached correspondence that the government apparently concluded that Health Republic was a goner either simultaneously with or even before the DFS determined that Health Republic could not survive. And the government so concluded for specific reasons not mentioned in the Superintendent's Petition to Liquidate Health Republic.

In a Sept. 25, 2015, letter from Kevin Counihan, Chief Executive Officer, Health Insurance Marketplaces, to Health Republic's then-Chief Executive Officer, Debra Friedman, Counihan writes that by July 28, 2015, the CMS had identified issues "that threatened Health Republic's viability." [35] According to his letter, the CMS asked for additional information concerning Health Republic's 2016 rate filings, as well as its 2015 regulatory filings.[36] He describes "numerous conversations with state insurance regulators" and an on-site review of Health Republic's books and records on Aug. 19-20, 2015.

According to Counihan, by mid-August 2015, the CMS had concluded that it was "unlikely that [Health Republic] [would be] able to maintain a viable CO-OP due to several issues," including:

- a lack of accurate billing, enrollment and claims payments records;

- anticipated failure to satisfy risk-based capital requirements;
- a history of call center issues;
- missed projections; and
- a Health Republic report that "reflects that an inadequate vendor management alone has resulted in nearly $11 million in inaccurate claims payments through June 2015."[37]

Accordingly, Counihan advised Health Republic that the CMS was terminating its loan agreement between Health Republic and the CMS effective Dec. 31, 2015.[38]

The Counihan letter goes on to address what would happen if the superintendent petitioned to liquidate Health Republic.

> However, if the state regulator [DFS] takes an action such as filing an order of liquidation and the judge signs the liquidation order prior to December 31, 2015, the [loan] agreement will terminate on the date the judge signs the liquidation order. [39]

It's unclear whether this threat affected the superintendent's decision to hold off on petitioning to liquidate Health Republic.

On the same date that Counihan sent his letter, Health Republic's board agreed to stop underwriting. Then on Oct. 27, 2015, the board consented to entry of an order of liquidation. Even though as early as July 2015, the CMS had notified Health Republic that the CMS had serious concerns about the "viability" of Health Republic, then-acting Superintendent Vullo waited until mid-April 2016 to place Health Republic under court supervision.

Second, the attached correspondence shows that the government, in letters addressed to Health Republic's restructuring advisor Alvarez & Marsal, outside counsel for the superintendent, and, eventually, the bureau itself, regularly advised that the government was imposing administrative holds on "payables" to Health Republic. Indeed, letters attached to the complaint show that as early as March 2016 the CMS had informed Health Republic that "due to the pending wind-down of Health Republic," the CMS had implemented an administrative hold on payables to Health Republic "under any law or program."[40] The CMS continued to write to the bureau's chief financial officer during 2017 identifying specific amounts that had been set-off against moneys that Health Republic owed under the Risk Adjustment program.[41]

Third, from the letters we learn that yet another outside law firm represented the DFS with respect to the government's offsetting and administrative holds. In May 2016, and prior to entry of the order liquidating Health Republic, attorneys at Freeborn & Peters LLP in Chicago, representing acting-Superintendent Vullo, wrote to Counihan at the CMS.[42] Two attorneys at Freeborn signed the letter and asked "that CMS reconsider its decision to impose an administrative hold" on moneys due Health Republic, and requested a meeting with "appropriate officials from CMS and DOJ" to resolve the set-off-related issues. [43] It's unclear when Freeborn ceased representing Vullo.

In other words, throughout the gap period, as well as during the initial months of the Health Republic liquidation proceeding, positions were hardening and holds were being placed on government payments to Health Republic, but without notice to policyholders or the court overseeing the liquidation.

Impediments to Policyholder Payments

As soon as the liquidator filed her complaint, her counsel and counsel for the government moved to stay the Vullo suit until Jan. 12, 2018 or until the Federal Circuit decides appeals in Land of Lincoln Mutual Health Insurance Company v. United States (Land of Lincoln),[44] a case in which a U.S. Court of Federal Claims had ruled against the liquidator of a failed co-op, and Moda Health Plan Inc. v. United States (Moda),[45] a case in which a U.S. Court of Federal Claims ruled in favor of a surviving co-op.[46] The liquidator and the government advised the court in Vullo that

appeals from the decisions in Land of Lincoln and Moda had been consolidated and would be argued before the same panel in the Federal Circuit. Counsel for the liquidator and the government asked that the Vullo action be stayed pending a decision by the Federal Circuit in the Land of Lincoln and Moda appeals. The court granted their motion and subsequently extended the stay to Feb. 12, 2018.

The Federal Circuit heard the consolidated Moda and Land of Lincoln appeals on Jan. 10, 2018.[47] Although at least 15 amicus briefs supporting Land of Lincoln's appeal were filed with the Federal Circuit, and even though information and positions taken in those amicus briefs were included in Land of Lincoln's briefs,[48] Health Republic's liquidator did not file an amicus brief. We're advised that a decision from the Federal Circuit will probably come down within the next three to four months, but regardless of how the Federal Circuit rules, it's unlikely that the Vullo suit will be concluded anytime soon.

In addition to the likelihood that the losing parties' in the Land of Lincoln / Moda appeals will petition the United States Supreme Court for further review, the Land of Lincoln and Moda cases will not resolve all of the liquidator's issues with the government. The Vullo suit seeks moneys under the Reinsurance, Advanced Premium Tax Credit and Cost-Sharing Reduction programs, and only two of the Health Republic complaint's six causes or action concern Risk Corridor monies.

In addition, the Vullo action seeks a determination that the government's administrative holds and set-offs are "unlawful on their face under federal law, New York State law, the Loan Agreement, and the New York Supreme Court's Liquidation Order" and constitute a type of "unlawful self-help."[49] The pending Land of Lincoln and Moda appeals will not resolve any of the arguments over the government's off-setting, issues that must be resolved before any payments to policyholders or health providers can be made.

New York Late to the Party

Nevertheless, the Land of Lincoln and Moda decisions do demonstrate how quickly U.S. claims courts addressed the Risk Corridors issues raised in those and other cases. In Land of Lincoln, the co-op's management and board of directors commenced suit on June 23, 2016. Shortly thereafter, the Illinois director of insurance, in her capacity as Land of Lincoln's rehabilitator, stepped in and carried the case forward.

Judge Charles Lettow, to whom the Land of Lincoln case was assigned, arranged for an accelerated schedule for submission, held a hearing on Nov. 7, 2016, and issued a decision on Nov. 10, 2016. Judge Lettow ruled in the government's favor finding that HHS reasonably interpreted the Affordable Care Act as not requiring full annual Risk Corridor payments and further finding no implied intent on the government's part to enter into a contract requiring full Risk Corridor payments.[50]

The Moda case concerned a co-op that operated in both Oregon and Alaska. Moda commenced suit in June 2016 and its case was assigned to Judge Thomas Wheeler. The government moved to dismiss Moda's complaint and Moda cross-moved for summary judgment. Before the government could respond, Judge Lettow issued his decision in Land of Lincoln. The government moved to stay the Moda case pending the outcome of the appeal in Land of Lincoln, a motion that Judge Wheeler ultimately denied.[51]

Judge Wheeler heard argument on Jan. 17, 2017. A few days later, another Federal Claims court judge, Margaret Sweeney, ruled in favor of another co-op.[52] Judge Wheeler, incorporating some of Judge Sweeney's reasoning (and rejecting most of Judge Lettow's reasoning) ruled in Moda's favor on Feb. 9, 2017.

Judge Wheeler held that Congress intended that HHS / CMS make full Risk Corridor payments to co-ops in 2014, 2015 and 2016.[53] Judge Wheeler also found, in the alternative, that the government had breached an implied-in-fact contract with Moda. Judge Wheeler, therefore,

entered judgment in Moda's favor under both the Affordable Care Act and the co-op's implied contract with the government. Judge Wheeler then concluded with a flourish. "Whether under statute or contract, the Court finds that the Government made a promise in the risk corridors program that it has yet to fulfill. * * * After all, to say to [Moda], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government.'"[54]

While New York waited to file suit, the Moda and Land of Lincoln were decided, appealed, consolidated, briefed, and argued, all without New York state's having weighed in.

What's Next for the Health Republic Estate?

The briefing in the consolidated Moda and Land of Lincoln appeals also revealed how much is at stake. In a joint letter to the clerk of the court, the parties advised that in January 2018 HHS had announced its Risk Corridor calculations for 2016, the final benefit year for the Risk Corridor program. "The total amount of 'payments in' collected by HHS for [2014, 2015, and 2016] ... is approximately $12.3 billion less than the total amount of 'payments out' calculated with respect to those years ... ."[55] In other words, the government potentially owes QHP providers, including the ACA co-ops, $12.3 billion!

A memo from HHS/CMS attached to the joint letter also shows the amounts due to all issuers of QHPs. The memo states that certain insurers, Health Republic included, were not required to submit Risk Corridor data and no data has been supplied by Health Republic for the 2016 benefit year. Nevertheless, the chart also shows that last January Health Republic should have received at least $1,299,031.53 as an additional installment on money due it as payment for the 2014 benefit year.[56] Presumably, however, that money was immediately offset against amounts that the government claims it is owed.

It's highly unlikely that any of Health Republic's steadily shrinking assets will be distributed to policyholders (or health care providers) anytime soon. For one thing, although the liquidator maintains that the government is a Class Three creditor, and thus subordinate to all Class Two creditors (policyholders and health care providers), she and any other representative of the Health Republic estate, i.e., bureau employees, are personally liable for any moneys that the estate pays out before paying any claim owed the government.[57] Therefore, barring some extraordinary resolution of the liquidator's disputes with the government, she will not distribute the estate's assets while the estate is engaged in trench warfare with HHS/CMS.

Meanwhile, although the bureau strives with the report's charts, graphs and illustrations to show that the estate's expenses are generally trending down,[58] the bureau will continue to charge the estate, every month, not only for fees paid to vendors, e.g., outside law firms, website managers, claims handlers, referees, auditors and others, but will also charge the estate for the time spent by the bureau's employees on estate-related work, which includes a pro rata share of the cost of operating the bureau itself, e.g., the bureau's rent, insurance and retirement benefits.

According to the report,[59] the bureau's "monthly average incurred expenses" for Health Republic came to about $136,000 a month in 2017. These base charges and the outside vendors' fees will continue month after month and year after year until all of the issues relating to Health Republic's claims against and obligations to the government are finally and completely settled.

[1] Justice Carol Edmead Appointed to Appellate Term, New York Law Journal, February 8, 2018, p. 1.

[2] At a point when the liquidator was represented by Weil Gotshal & Manges LLP, instead of the bureau's in-house counsel, the liquidator argued against posting a basic balance sheet of the estate's assets. October 11, 2016 Trans., pp. 42-44. Later, the bureau's counsel objected to the court's request for a monthly update of a timeline for the liquidation proceeding and alluded to a "formal report" that would be presented in October 2017 or thereabouts. February 17, 2017 Trans., p, 23. Nevertheless, the court insisted that the bureau appear at a hearing for a "conversation" about the estate's expenses. See Curious Liquidation, Part 12, p. 2 and February 1, 2017 Trans., p. 23.

[3] You can find the docket on the Health Republic website, which is maintained by the Garden City Group, not the bureau, at www.healthrepublicny.org (Website).

[4] Report, p. 1.

[5] See A.C. Doyle, THE COMPLETE SHERLOCK HOLMES, Vol. 1 (Barnes & Noble Classics 2003) Silver Blaze, pp. 413, 415.

[6] Report, p. 1.

[7] The report does include a few paragraphs on events preceding the superintendent's petition to liquidate Health Republic, Report, p. 3, but without any hint of the costs incurred during the gap period.

[8] Report, p. 5, Website: Key Documents: Administrative Expense Documents.

[9] Report, p. 5.

[10] Report, p. 5.

[11] Report, p. 3.

[12] Report, p. 3.

[13] Report, p. 6.

[14] Report, pp. 1, 11.

[15] Report, p. 11.

[16] Report, p. 11.

[17] Curious Liquidation, Part 10, p. 2.

[18] https://www.pacer.gov/login.

[19] Report, p. 4.

[20] October 11, 2016 Trans., pp. 42-44; Curious Liquidation, Part 6, p. 3.

[21] Website, Key Document:Balance Sheets.

[22] Report, p. 2.

[23] See Curious Liquidation, Part 6, p. 2.

[24] Report, p. 2.

[25] No. 17-1185C, U.S. Court of Federal Claims.

[26] At least 23 of these actions have been filed in the U.S. Court of Federal Claims. See G. Michell and J. Halligan, Unfulfilled Promises: The Federal Government's Liability Under the ACA's Risk Corridor Program, The Insurance Receiver, Vol. 24, No. 3, available at www.iair.org.

[27] Complaint, ¶ 82.

[28] Complaint, ¶¶ 78, 79.

[29] Complaint, ¶ 55.

[30] Complaint,¶ 65.

[31] Complaint, ¶¶ 70, 72, 74.

[32] Complaint, ¶ 106.

[33] Complaint, ¶ 117.

[34] Complaint, ¶ 118.

[35] Letter from Kevin Counihan, dated Sept. 25, 2015, to Debra Friedman, Health Republic's Chief Executive Officer, with a copy to Troy Oeschner, Health Deputy Superintendent, DFS (Counihan Letter), a copy of which is attached to the Complaint as Ex. "E."

[36] Counihan Letter, p. 1.

[37] Counihan Letter, p. 2.

[38] Counihan Letter, p. 1.

[39] Counihan Letter, p. 1.

[40] Letter from Kevin Counihan to D. Smith & N. Miller (Alvarez & Marsal), dated March 8, 2016, p. 1, a copy of which is attached to the complaint as Ex. G.

[41] Letters from CMS to Ron Labenski at the bureau, copies of which are attached to the complaint as Exs. J, K, L, and M.

[42] Letter from Deborah Dorman-Rodriquez, Freeborn & Peters LLP, dated May 6, 2016 (Freeborn Letter), responding to Kevin Counihan's March 8, 2016 letter to David Smith, Neil Miller, and the "Receiver for Health Republic," copies of which are attached to the complaint as Exs. H and G.

[43] Freeborn Letter, dated May 6, 2016, Complaint Ex. H, pp. 1-2.

[44] 129 Fed. Cl. 81 (2016).

[45] 130 Fed. Cl. 436 (2017); Joint Motion to Stay Proceedings, Vullo v. U.S., No. 17-1185C, p. 2.

[46] Joint Motion to Stay Proceedings, Vullo v. U.S., No. 17-1185C, p. 2.

[47] You may listen to the argument at: http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=&field_date_value2%5Bvalue%5D%5Bdate%5D=2018-01-10&=Search

[48] Reply Brief of Appellant Land of Lincoln Mutual Health Insurance Company v. United States, U.S. Court of Appeals for the Federal Circuit, 2017-1224, pp. 18, 25.

[49] Complaint, ¶¶ 105, 107, 108, 109.

[50] Land of Lincoln, 129 Fed. Cl. at 106, 112.

[51] Moda, 130 Fed. Cl. at 449.

[52] Health Republic Insurance Company (Oregon) v. United States, 129 Fed. Cl. 757 (2017).

[53] Moda, 130 Fed. Cl. at 452-3.

[54] Moda Health, 130 Fed. Cl. at 466 quoting Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970).

[55] Counsel's Joint Letter to Clerk of Court, United States Court of Appeals, dated December 4, 2017, included as document 160 on the docket for Case 17-1224 (Joint Letter).

[56] Memorandum attached to Joint Letter, p. 14.

[57] Report, p. 21 citing 31 U.S.C. § 3713(b).

[58] Report, pp. 15-20.

[59] Report, p. 19.
