

Fed Circ. Agrees Feds Can't 'Leapfrog' Insurer Liquidation

By **Hannah Albarazi**

Law360 (May 18, 2021, 10:17 PM EDT) -- The Federal Circuit on Monday affirmed a lower court's ruling that the U.S. Department of Health and Human Services can't abolish its \$24.5 million debt owed to a defunct Colorado insurance co-op under the Affordable Care Act simply because the co-op owes HHS \$42 million under another ACA provision.

The government cannot use offsets to "leapfrog other insolvency creditors" in the liquidation of Colorado Health Insurance Cooperative, U.S. Circuit Judge Kimberly Ann Moore wrote in an opinion joined by Circuit Judges Raymond Chen and William Bryson.

The panel said that nothing in the ACA or in Colorado law gives the government that right, nor has the U.S. Supreme Court suggested that the government has a common law right to offset that is broader than that of a non-government creditor, the panel wrote.

"And we will not create a new rule of federal common law that would allow HHS to offset," the panel wrote.

The panel said that just like any other creditor, "the government lacks a right to offset in Colorado state court during insolvency proceedings," affirming a ruling by the U.S. Court of Federal Claims and ordering the government to pay up.

Colorado Health, a co-op program insurer, participated in the Colorado reinsurance and risk-adjustment programs for benefit year 2015. But in 2016, a Colorado court ordered Colorado Health into liquidation and creditors got in line.

Colorado's Insurers' Rehabilitation and Liquidation Act, which prioritizes distribution of assets for administrative expenses and policyholders over the federal government, governs Colorado Health's asset liquidation.

The government and the liquidator agree that at the time the liquidation order came down, HHS owed Colorado Health nearly \$24.5 million for reinsurance debts under the Affordable Care Act and related regulations, while Colorado Health owed HHS about \$42 million for risk adjustment debts, another program under the ACA and related regulations.

But the government expressed its intent to offset Colorado Health's risk adjustment debt against HHS' reinsurance debt. Michael Conway, Colorado Health's liquidator, fought back and sued HHS in federal

claims court, seeking direct payment of HHS' reinsurance debt, according to the appellate panel's summary of the years-long dispute.

The claims court entered judgment on the merits in Conway's favor.

The government appealed the judgment, arguing that Colorado law gives HHS a right to offset ACA debts during insolvency proceedings. HHS argued that its ACA debts take priority over all other creditors' claims during Colorado insolvency.

But on Monday, the Federal Circuit panel disagreed.

"The government attempted to leapfrog other insolvency creditors through offset, rather than paying its debt in full and making a claim against Colorado Health's estate as an insolvency creditor," the panel wrote.

The panel found the government's arguments "unpersuasive."

"[W]e hold that the government did not have a right to offset ACA obligations during Colorado Health's insolvency proceedings and that the Claims Court's money judgment was proper," the panel wrote.

Representatives and counsel for the parties did not immediately respond to requests for comment Tuesday.

U.S. Circuit Judges Kimberly Ann Moore, William C. Bryson and Raymond T. Chen sat on the panel for the Federal Circuit.

Conway is represented by Clifton S. Elgarten, Charles Baek, Skye Mathieson, Stephen John McBrady, Monica Rose Sterling and Daniel William Wolff of Crowell & Moring LLP.

The U.S. is represented by Alisa Beth Klein and Jeffrey Eric Sandberg of the U.S. Department of Justice's Civil Division.

The case is Michael Conway, In His Capacity As Liquidator Of Colorado Health Insurance Cooperative, Inc., v. U.S., case number 2020-1292, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Regan Estes.