

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITEDHEALTHCARE OF NEW YORK.

and

OXFORD HEALTH INSURANCE, INC.

Plaintiffs,

-against-

DECLARATION
17-CV-7694
(JGK)

MARIA T. VULLO, in her official capacity as
Superintendent of Financial Services of the
State of New York,

Defendant

JOHN POWELL, pursuant to 28 U.S.C. §1746, declares under penalty of perjury that the foregoing is true and correct to my knowledge:

1. I am the Director of Rate Review, Health Bureau of the New York State Department of Financial Services (“DFS”). In that role I am responsible for overseeing the regulation of the New York health insurance market and the health insurers doing business in New York State. I am fully familiar with the facts of this case and, in particular 11 NYCRR §361.9.
2. I submit this Declaration in support of the Defendant’s Motion to Dismiss – specifically, the elements of Defendant’s motion made pursuant to Federal Rule of Civil Procedure 12(b)(1) that address the implementation status of 11 NYCRR §361.9.

Pertinent Background

3. In 1992 New York State enacted Chapter 501 of the Laws of 1992 in response to the State's growing health insurance problems (hereinafter "1992 Legislation").
4. Following passage of the 1992 Legislation, the Superintendents of Insurance and DFS utilized, administered, and enforced a risk adjustment pool in the individual and small group insurance markets in New York State.
5. Although the specific mechanisms and formulas used for risk adjustment have evolved over time, as tracked by the evolution of the Department's regulations (see 11 NYCRR §§ 361.4, 361.5, and 361.6) a risk adjustment mechanism promulgated and administered by DFS has been a constant feature in the regulation of the commercial health insurance markets in New York since the early 1990s.

DFS' 2017 Emergency Regulation

6. Following publication by the U.S. Department of Health and Human Services of an interim final rule in May 2016 "encourage[ing] States to examine whether any local approaches, under State legal authority, are warranted to help ease this transition to new health insurance markets" based on federal risk adjustment, New York adopted, on an emergency basis, a new regulation using the authority provided by New York Insurance Law § 3233. See 11 NYCRR §361.9.
7. This emergency regulation ("2017 Emergency Regulation") was first promulgated on September 9, 2016. 38 N.Y. Reg. 63 (Sept. 28, 2016). That initial Emergency Regulation expired on December 7, 2016, and was promulgated again as an Emergency

Regulation on that same date. 38 N.Y. Reg. 20 (Dec. 28, 2016). Subsequent expirations and emergency promulgations occurred in the same manner on March 6, 2017, June 21, 2017, July 31, 2017, September 28, 2017, and November 24, 2017.

8. The 2017 Emergency Regulation has a variety of key features, but for purposes of the limited scope of this Declaration I will address only one such element. As codified at 11 NYCRR 3619(e), the 2017 Regulation does not automatically mandate that a State risk adjustment pool be used for the 2017 plan year.
9. To the contrary, the regulation provides that a state risk adjustment pool can only be used if, after reviewing the results of the federal risk adjustment program for the 2017 plan year, the Superintendent determines that a market stabilization mechanism is a necessary amelioration. See 11 NYCRR § 361.9(e)(1).
10. It remains uncertain today whether a State risk adjustment pool will be used for the 2017 plan year and, if so, what the magnitude of the adjustments required by the pool will be.
11. That is to say, the 2017 Emergency Regulation only gives the Superintendent the authority to exercise risk adjustment and establish the risk pool – but the adjustment itself has not yet been implemented and is not even scheduled for implementation until, at earliest, the Fall of 2018.
12. As such, Plaintiffs have not transferred any funds to the Superintendent consequent to the 2017 Emergency Regulation.

DFS' 2018 Proposed Regulation

13. On May 3, 2017, the Department published a proposed regulation that would authorize the use of state risk adjustment pools in the 2018 plan year and all future plan years (“2018 Proposed Regulation”). See Notice of Proposed Rule Making, DFS-18-17-00020-P, 38 N.Y. Reg. at 11 (May 3, 2017).
14. The 2018 Proposed Regulation remains just that – a proposed regulation. It has not been adopted as either a final regulation or an emergency regulation and no final agency action has been taken with regard to the subject matter of the Proposed Regulation as of the date of this Declaration.

Dated: Albany, New York
December 15, 2017


John Powell