

ART Gallery column for September

Obamacare iceberg: worry about the part you don't see

By Dick Goff

Watch for the next big wave of Obamacare news coverage this month when the government cranks up its PR effort to sell the idea to a largely skeptical public, and next month when people can sign up for the new health care insurance exchanges – except in those states where they can't.

But nowhere in the news coverage will you learn that the government is working hard behind the scenes to drag people out of a defined group of employer-sponsored plans into the exchanges. This is because the government thinks employed people are the healthiest and will strengthen the financial viability of the exchanges. That's the hidden larger part of the Obamacare iceberg that can sink our ship.

For example, the Department of Health and Human Services remains capable of implementing new federal regulations on self-funded health insurance. The New York Times reported, "The Obama administration is investigating the use of stop-loss insurance by employers with healthier employees, and officials said they were considering regulations to discourage small and midsize employers from using such arrangements to circumvent the new health care law."

It's an upside-down Alice-in-Wonderland moment: we think the government is using Obamacare to circumvent self-insurance, and the government thinks the opposite. And we'll get the Mad Hatter to arbitrate.

Phyllis Borzi, architect of Obamacare implementation as assistant secretary for employee benefits of the Department of Labor, provided a truly Shakespearean moment when, speaking to the Employee Benefits Research Institute, she protested too much: "We are not secretly writing a stop-loss regulation that we're going to put in some underground pipeline and spring on the community." Well, that clears that up, right?

We sought clarification, as usual, from attorney Tess Ferrera, partner and head of the ERISA litigation practice group in the Washington DC office of Schiff Hardin LLP. Tess knows these issues from both sides of the looking glass as former ERISA trial

attorney for the DOL. She sees the combined power of the federal Affordable Care Act (ACA) and like-minded states to be a powerful force against self-insurance.

“To succeed, the small business health option (“SHOP”) exchange must attract the maximum possible number of small employer groups,” she said. “ACA regulations have demonstrated a fair amount of hostility toward groups that aggregate small employers, such as multiple employer welfare arrangements (MEWA). There is no question a goal of the regulations is to make it as difficult as possible for MEWAs to exist.

“Small employers are also exploring self-funding arrangements as many are concerned that the ACA will increase the cost of insurance,” she continued. “A balanced approach by government could serve health and safety concerns while ensuring that the health coverage market remains competitive and gives small employers the maximum options. Limiting options does not help anyone.”

A report by Georgetown University’s Health Policy Institute made it clear that states are attacking self-insurance through the stop-loss insurance plans that make self-funding viable: “(Under ERISA) A state may not prohibit an employer from self-funding or set rules for the coverage provided by a self-funded plan, but it is generally understood that a state may regulate a stop-loss policy as insurance.

“Among states that have taken regulatory action, approaches vary – such as setting minimum attachment points; banning the sale of stop-loss coverage to small employers; or regulating stop-loss coverage sold to small employers under the same rules that apply to fully insured plans sold in the small group market, such as underwriting and rating rules.”

SIIA has long fought for the principle that stop-loss insurance is not health insurance, and is supported in that position by a dozen federal court rulings. But the states don’t care about federal precedent and apparently no entity on our side of the fence is strong enough to knock them back on their heels.

Attorney Ferrera sees another player at work: “The National Association of Insurance Commissioners (NAIC) wants to push as many small groups as possible into the state exchanges as an expansion of states’ power from near zero among ERISA plans to one hundred percent among the health care insurance exchanges. State laws raising

attachment points are not new – the NAIC has a model rule that sets minimum attachment points for small groups.”

I believe the 900-pound gorilla in the room is the newly established Federal Insurance Office located in the Department of the Treasury, from which we are beginning to hear rumblings of activity. It will be a major problem for the industry if the office turns out to be another activist agency following the party line. That’s the wild card in this game.

As the vaudeville pitchmen used to say, “Folks, you ain’t seen nothin’ yet.”

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