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Supreme Court Holds That the Federal Government Is Obligated to Pay $12 Billion to Insurers Under the Affordable Care Act's Risk Corridors Program

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On Monday, April 27, 2020, the Supreme Court of the United States held that the federal government has an obligation to pay insurance companies approximately $12 billion under the Risk Corridors Program of the Patient Protection and Affordable Care Act (the "ACA"). The opinion, *Maine Community Health Options v. United States*, emphasizes that, by enacting a statute, Congress may create a legal obligation to pay third parties, even absent adequate appropriation.

Below is a summary of the key elements of the Risk Corridors Program, a summary of the Court's decision and an analysis of possible implications of the decision for insurers and other health care industry stakeholders.

Risk Corridors Program

The Risk Corridors Program was established by the ACA to induce insurers to participate in the new health benefit exchanges, which required that plans accept every applicant for insurance, regardless of the applicant's health. Under the program, for the 2014 through 2016 plan years, the risks to participating insurers were limited based on a statutory formula.[1] Relatively more profitable plans were to remit a percentage of earnings above certain established ceilings to the Centers for Medicare and Medicaid Services ("CMS"), while relatively less profitable plans were to receive payments from CMS.

Congress did not require the program to be budget neutral, meaning that the government's payment obligation to some plans could exceed revenues collected from other plans. CMS recognized that the statute created an obligation to pay insurers. However, Congress later passed three appropriations bills with riders specifically preventing CMS from spending funds on the Risk Corridors Program.[2] By the end of the 2016 calendar year, the Risk Corridors Program deficit exceeded $12 billion, which CMS otherwise considered an obligation of the federal government for which full payment was required.

The Underlying Litigation

Several health insurance companies that participated in the exchanges between 2014 and 2016 filed separate suits in the United States Court of Federal Claims seeking damages based on the Risk Corridors Program. The plaintiffs saw mixed results. On appeal, a divided panel for the United States Court of Appeals for the Federal Circuit ruled for the federal government in each case, finding that Congress had impliedly repealed any obligation to pay under the Risk Corridors Program through its appropriations riders. The Supreme Court consolidated the cases for review.

[1] *See* 42 U.S.C. § 18062.

[2] *See, e.g.*, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (Dec. 16, 2014) ("None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).") (emphasis added).

Key Holdings of the Court

1. The ACA Obligated the Government to Pay Insurers the Amounts Established by the Risk Corridors Program.

The Court held that the federal government is required to pay all amounts owed under the Risk Corridors Program.

Although it does not typically do so, Congress may obligate itself to pay directly by statute, and a failure to appropriate funds to meet the obligation does not extinguish beneficiaries' right to payment.[3] Reading the plain language of the statute,[4] the Court held that Congress's repeated use of the word "shall" evidenced that Congress intended for the federal government to pay the Risk Corridors Program amounts to insurers who participated in the exchanges. The ACA provision was not made contingent on the availability of subsequent appropriations.

The Court did not accept the government's arguments that the Appropriations Clause of the Constitution and the Anti-Deficiency Act conditioned the payments upon the adequacy of subsequent Congressional appropriations. The Court noted that those authorities constrain federal employees and officers in making or authorizing payments without Congressional appropriation, but do not limit Congress's own ability to create or incur an obligation by statute.[5]

2. Congress's Appropriations Riders Did Not Repeal the Obligation to Pay.

The Court held that Congress did not impliedly repeal the payment obligation established under the ACA, reversing the lower holdings of the Federal Circuit.

The Court emphasized that it disfavors finding an implied repeal of a statute as a matter of statutory interpretation, especially when the alleged repealing statute is an appropriations act. Under long-settled case law, mere failure to appropriate does not discharge an obligation to pay.[6] Accordingly, the Court found that Congress's 2014 through 2016 appropriations riders had merely failed to appropriate funds to pay the obligations created under the program, but had not repealed those obligations.

3. The Insurers May Bring Their Claims for Risk Corridors Payments Under the Tucker Act.

The Court held that the Risk Corridors Program is among the rare federal statutes that permit plaintiffs to sue the federal government for damages under the Tucker Act.[7] The Tucker Act provides that a plaintiff may bring suit for damages against the federal government in the United States Court of Federal Claims. The Act requires a plaintiff to have a cause of action against the federal government based on an independent source of law, such as a statute or contract.

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[3] *See Maine Community Health Options v. United States*, No. 18-1023, slip op. at 10–11 (U.S. Apr. 27, 2020).

[4] *See* 42 U.S.C. § 18062 ("The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. . . . The Secretary shall provide under the [Risk Corridors Program] that if . . . (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.") (emphasis added).

[5] *See Maine Community Health Options*, *supra* note 3, at 13.

[6] *See Maine Community Health Options*, *supra* note 3, at 16–19.

[7] *See, e.g.*, *Common Ground Healthcare Cooperative v. United States*, 142 Fed. Cl. 38, 50–52 (2019), *appealed*, No. 20-1286 (Fed. Cir. Dec. 23, 2019).

In reaching its decision, the Court emphasized the mandatory text of the statute and that the plaintiffs were seeking damages for past conduct, not payment for future actions.[8] Because the Court recognized that the Risk Corridors Program's obligations are justiciable under the Tucker Act, insurers' successful claims for such payments may be satisfied through the Judgment Fund, a permanent and indefinite appropriation to pay awards for which payment has not otherwise been provided.[9]

Potential Implications of the Court's Decision for Health Care Industry and Others

The Court's decision could have several implications for insurers that participated in the ACA health benefit exchanges in 2014, 2015 or 2016, as well as for other health care industry participants:

The Court remanded the plaintiff insurers' cases for further proceedings consistent with the decision. Those proceedings may result in judgments for the insurers, to be satisfied out of the Judgment Fund.

- Because the Tucker Act has a six-year statute of limitations, other insurers that offered plans on the health benefit exchanges between 2014 and 2016 and that are owed payments under the Risk Corridors Program will likely file claims promptly before the Court of Federal Claims to preserve their ability to receive payment from the Judgment Fund (if they have not already done so).
- The Court's decision could increase the likelihood that lower courts will interpret other provisions of the ACA that contain similar mandatory (*i.e.*, "shall pay") language to require satisfaction through the Judgment Fund should adequate appropriations not be made for such obligations. These include payments to qualified health plans to cover reduced or eliminated cost-sharing for certain low-income enrollees.[10]
- Both within and outside the health care sector, we anticipate that private parties relying on statutorily mandated payments that have not materialized for lack of appropriations could also evaluate potential litigation under the Tucker Act.

The Health Care team at Ropes & Gray LLP is able to assist with any questions that may arise based on the Court's decision in *Maine Community Health Options v. United States.*

[8] In a dissenting opinion, Justice Samuel Alito disagreed with the Court's holding that the Risk Corridors Program statute created a private cause of action under which the plaintiffs could seek damages under the Tucker Act.
[9] *See Maine Community Health Options, supra* note 3, at 7.
[10] *See* 42 U.S.C. § 18071 ("An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions."). In fact, the Court of Federal Claims in 2019 issued at least two decisions confirming the government's obligation to pay qualified health plans for reduced cost sharing under this provision. *See, e.g.*, *Common Ground Healthcare Cooperative v. United States*, 142 Fed. Cl. 38, 50–52 (2019), *appealed*, No. 20-1286 (Fed. Cir. Dec. 23, 2019); *Maine Community Health Options v. United States*, 143 Fed. Cl. 381 (2019), *appealed*, No. 19-2102 (Fed. Cir. July 5, 2019).