Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

'Bait And Switch' Or 'Bailout?' Justices Take $12B ACA Row

By **Jeff Overley**

Law360 (June 24, 2019, 9:37 AM EDT) -- The U.S. Supreme Court on Monday agreed to scrutinize Congress' refusal to authorize $12 billion in expected funding for an Affordable Care Act stabilization program aimed at encouraging sales by health insurance companies during the law's first few years.

In a brief order, the justices said they would contemplate whether Congress acted permissibly by blocking funding for the ACA's so-called risk corridors program. A divided Federal Circuit upheld the funding denial for risk corridors, which lasted three years and was meant to cap financial losses for insurers that faced an unpredictable market when the ACA was new. Insurers subsequently filed three petitions seeking high court review.

Lawmakers prohibited spending on risk corridors at the urging of Republicans who deemed the program a "bailout." Insurers quickly cried foul and accused Congress of **a** "bait and switch." Risk corridors still got some funding from highly profitable insurers, but that wasn't remotely enough to cover losses, and the program ended up with a $12 billion shortfall.

Some insurance companies that went out of business in recent years have blamed their financial woes on the dearth of risk corridors money. One of those insurers was Land of Lincoln Mutual Health Insurance Co., which became insolvent in 2016 and brought one of the three cases that the Supreme Court on Monday agreed to hear.

Kevin Fry, acting director of the Illinois Department of Insurance and the court-appointed liquidator of Land of Lincoln, said in a statement that he was "pleased that the Supreme Court has agreed to hear the case and looks forward to continuing to protect the interests of Illinois consumers and Land of Lincoln."

More broadly, some observers have argued that Congress' action, and the Federal Circuit's decision to uphold that action, have caused alarming damage to private-sector confidence in government promises.

"The ACA risk corridors cases put front-and-center the issue of whether or not private companies can trust the government to live up to its obligations," Crowell & Moring LLP partner Stephen J. McBrady, counsel for an insurer in a case that the Supreme Court accepted, told Law360 on Monday.

The U.S. Department of Justice, which declined to comment on Monday, has pushed back against that hand-wringing, arguing that insurers had "powerful business incentives" to sell ACA policies. The DOJ has also described insurance company motivations as largely irrelevant, contending that the federal

government never created a contractual commitment to fully fund risk corridors.

The ACA says that the U.S. Department of Health and Human Services "shall pay" money to certain money-losing insurers. But the government has argued that the command isn't as unequivocal as it seems, contending that Congress still must formally free up cash before HHS can spend it.

During the Obama administration, HHS at times was sympathetic to insurer views, saying in 2015 that unpaid risk corridor dollars remained an "obligation of the United States government for which full payment is required."

A spokesperson for HHS could not immediately be reached for comment Monday.

Moda and Blue Cross are represented by Paul Clement, Erin E. Murphy and C. Harker Rhodes IV of Kirkland & Ellis LLP. Moda is also represented by Caroline Brown of Brown & Peisch PLLC.

Maine Community Health Options is represented by Stephen J. McBrady, Clifton S. Elgarten and Daniel Wolff of Crowell & Moring LLP.

Land of Lincoln is represented by Daniel Albers and Mark Rust of Barnes & Thornburg LLP and Jonathan Massey of Massey & Gail LLP.

The cases are Moda Health Plan Inc. v. U.S., case number 18-1028; Maine Community Health Options v. U.S., case number 18-1023; and Land of Lincoln Mutual Health Insurance Co. v. U.S., case number 18-1038, in the U.S. Supreme Court.

--Editing by Alyssa Miller.