

ACA Cost-Sharing Payments Mandatory, Claims Court Rules

By **Daniel Wilson**

Law360 (September 5, 2018, 4:32 PM EDT) -- The federal government owes a nonprofit health insurance cooperative \$5.3 million in Affordable Care Act cost-sharing reduction payments, the Court of Federal Claims has ruled, finding that the payments are mandatory under the ACA despite Congress failing to appropriate specific funding.

Montana Health Co-op was entitled to cost-sharing payments for the last quarter of 2017 because the ACA created a mandatory obligation for the government to pay insurers who implement cost-sharing reductions under the ACA, Judge Elaine D. Kaplan ruled Tuesday, granting summary judgment to the cooperative.

The government had argued that the cooperative had no claim to those cost-sharing payments because Congress did not appropriate any specific funding for the payments, reflecting that lawmakers never intended to create an enforceable obligation. But Montana Health, which provides qualified plans on the Montana and Idaho ACA insurance exchanges, “has the better of the arguments,” according to Judge Kaplan.

“[The court] agrees that the government violated a statutory obligation created by Congress in the ACA when it failed to provide Montana Health its full cost-sharing reduction payments for 2017, and that Congress’s failure to appropriate funds to make those payments did not vitiate that obligation,” she said.

The arguments in the case had come down to the central question of whether the government was statutorily obligated to provide the disputed cost-sharing reduction payments, and the ACA’s language “clearly and unambiguously” imposes that obligation, Judge Kaplan found, pointing to a clause noting that HHS “shall make periodic and timely payments.”

While the government argued that such payments must come with a specific statutory payment or budgetary provision to be obligatory, that argument goes against controlling court precedent, including a similar Federal Circuit decision involving ACA “risk corridor payments” — even as that case was ultimately decided in favor of the government — according to the judge.

The government had also drawn too long a bow when it argued that the lack of permanent appropriations for cost-sharing reduction payments in the ACA showed a clear intent not to fund those payments, as the most that had been shown is that Congress did not intend for the payments to be

funded by permanent appropriations, Judge Kaplan ruled.

The decision is the first final ruling among several similar ongoing cases, and Stephen McBrady of Crowell & Moring LLP, counsel for Montana Health, hailed it in a statement Wednesday as “an important win for Montana Health and the healthcare industry, generally, which has a significant stake in the CSR cases.”

Representatives for the U.S. departments of Justice and Health and Human Services did not immediately respond to requests for comment.

As part of the sweeping ACA, passed in 2010, lawmakers mandated exchanges in each state for individual and small group health insurance. To try to ensure plans on those exchanges were affordable, the law put in place both tax credits for insurance premiums, covering people up to a specified income, and cost-sharing reductions, requiring insurers to reduce copayment and other out-of-pocket costs for some enrollees.

In turn, insurers were to be compensated by the government for their cost-sharing reductions. The U.S. Department of Health and Human Services between January 2014 — the date by which those ACA exchanges were required to be established — and October 2017 made such payments to insurers, despite no specific appropriations having been made by Congress.

Instead, the payments were being funded through a permanent appropriation for tax credit refunds, as supported by the Obama administration, which argued that appropriation was available to fund all aspects of the ACA’s subsidy system.

The Republican-majority House of Representatives, however, disagreed with that view, suing HHS and the U.S. Department of the Treasury for allegedly unconstitutionally spending unappropriated funds on cost-sharing reductions, saying the permanent appropriation covered only tax credits.

A district court agreed with the House, issuing an injunction against HHS making cost-sharing payments without a specific appropriation in place, although it was stayed for appeal.

While that litigation played out, President Donald Trump was elected, and although HHS continued to make cost-sharing reduction payments through Oct. 11, 2017, a letter from Trump's U.S. Attorney General Jeff Sessions advised HHS and Treasury that the DOJ had concluded that the permanent ACA appropriation did not cover those payments, prompting the agencies to halt payments the next day.

That in turn led to several lawsuits from health insurers, including Montana Health, and from 19 states and Washington, D.C., who ultimately dropped their suit in July after saying they had found a workaround for the issue.

Montana Health Co-op is represented by Stephen J. McBrady, Daniel W. Wolff, A. Xavier Baker, Skye Mathieson and Monica Sterling of Crowell & Moring LLP and John Morrison of Morrison Sherwood Wilson & Deola PLLP.

The government is represented by Christopher J. Carney, Claudia Burke, Robert E. Kirschman Jr., Chad A. Readler, Eric E. Laufgraben and Veronica N. Onyema of the U.S. Department of Justice.

The case is Montana Health Co-Op v. U.S., case number 1:18-cv-00143, in the U.S. Court of Federal Claims.

--Additional reporting by Emily Brill. Editing by Connor Relyea.

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