

## Supreme Court Rules Congress Bilked ACA Insurers

By Jeff Overley

*Law360 (April 27, 2020, 10:05 AM EDT)* -- The federal government acted unlawfully when it reneged on a commitment to shield Affordable Care Act insurers from heavy financial losses, the U.S. Supreme Court ruled Monday.

The ruling reversed a Federal Circuit decision that left in place Congress' denial of \$12 billion in "risk corridor" funding, which the ACA dangled as an incentive for insurers during the law's first three years of operation.

"The risk corridors statute created a government obligation to pay insurers the full amount set out" in the ACA, that obligation survived Congress' effort to block funding, and insurers may sue for damages, Justice Sonia Sotomayor wrote in Monday's 8-1 decision.

Justice Samuel Alito, who grumbled at oral arguments in December about showing "special solicitude for insurance companies," was the lone dissenter.

Congress' about-face has been widely blamed for destabilizing smaller insurers that struggled to find a foothold in ACA markets. Lawmakers blocked the risk corridor dollars at the urging of Republicans, who have assailed the ACA relentlessly since its passage 10 years ago and are asking the high court in a separate case to nullify it entirely.

A major theme of the litigation was a possible erosion of private-sector faith in public officials; insurers at one point likened the situation to a "Peanuts" comic strip scene where Lucy dupes a trusting Charlie Brown into trying to kick a football.

The Supreme Court on Monday called that concern legitimate, saying that the holdings in its opinion "reflect a principle as old as the nation itself: the government should honor its obligations."

Crowell & Moring LLP partner Stephen J. McBrady, counsel for one of the insurance company petitioners, told Law360 on Monday that he was pleased with the ruling and that "the delicate balance



The U.S. Supreme Court found the federal government unlawfully reneged on shielding ACA insurers from heavy financial losses. (AP)

between public and private entities can only be maintained if the government can be relied on to meet its statutory and contractual obligations."

The risk corridor program was funded partly with contributions from highly profitable ACA insurers, but there was still a \$12 billion shortfall. Litigation has centered on the ACA's directive that the U.S. Department of Health and Human Services "shall pay" money to certain money-losing insurers — a directive that insurers have called unequivocal and inescapable.

The Supreme Court agreed Monday, concluding that "the statute meant what it said: the government 'shall pay' the sum that [the ACA] prescribes."

The high court also rejected the federal government's argument that the clear-cut language essentially had an asterisk allowing risk corridors dollars to be spent only if specifically appropriated by Congress.

"The plain terms of the risk corridors provision created an obligation neither contingent on nor limited by the availability of appropriations or other funds," Monday's opinion said, adding that Congress never implicitly repealed its risk corridor obligation.

Insurance companies can sue for the risk corridors cash in the U.S. Court of Federal Claims under the Tucker Act, the majority said, acknowledging that the ACA is "one of the rare laws" permitting such a damages suit.

Justice Alito's dissent lamented that the majority was creating a "massive bailout for insurance companies." He focused his criticism on the court's recognition of a right for insurers to sue, ultimately concluding that the issue hadn't been sufficiently briefed and that he "would request supplemental briefing and set the cases for re-argument next term."

A spokesperson for the U.S. Department of Justice, which argued against forcing the government to pay insurers, had little comment Monday, saying only that the DOJ is "disappointed in the court's ruling."

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

--Editing by Marygrace Murphy and Katherine Rautenberg.

*Update: This story has been updated with more information and comment about the ruling.*