



{HEALTH CARE ADVISORY}

SCOTUS Sides with Insurers

Supreme Court justices on Tuesday appeared sympathetic to health insurers' arguments that the federal government owes them billions of dollars after renegeing on a promise to fund an Obamacare program.

Health insurers say they'd been subjected to a "bait and switch" that led to shortfall of over \$12 billion in an Obamacare stabilization program, which was included in the law to encourage companies to sell coverage in the newly overhauled individual insurance markets. They say the government promised to fund the program, known as risk corridors, when it passed the 2010 law, though later Congresses blocked the payments through spending bills.

The Trump administration contended in oral arguments that Obamacare didn't require the federal government to make risk corridors payments, since they were never explicitly appropriated by Congress. Justices Elena Kagan and Stephen Breyer expressed skepticism that the government could back away from its promise, and Chief Justice John Roberts questioned how the government could argue the law didn't mandate payment.

The government's obligation turns out to be "if we feel like it," Kagan said. "What kind of statute is that?"

The three small health insurers who brought the lawsuit — Maine Community Health Options, Moda Health Plan and Land of Lincoln Mutual Health — said the government undermined its integrity as a business partner by reversing course on payments in the risk corridors program. The ruling will serve as a precedent for a host of similar cases in lower courts, with billions of dollars on the line.

This is the fifth Obamacare-related challenge that's reached the Supreme Court. But it's not a case that could undermine the entire law — unlike a pending challenge to the law's constitutionality that could land before the high court next year.

Still, a win for insurers could boost their standing in a series of suits on another Obamacare subsidy program President Donald Trump eliminated two years ago. And it could have broader implications for the already politicized process of how Congress sets policy through appropriation bills.

The justices during the hourlong argument parsed language in the health care law. Deputy Solicitor General Edwin Kneeder, who argued on the government's behalf, said the law wasn't clear on whether the federal government was required to make the payments.

Roberts, who offered tough questions for the government and insurers, along with Samuel Alito questioned why the law didn't specifically appropriate risk corridors payments. Roberts seemed skeptical of insurers' framing that they were "basically seduced" into selling Obamacare coverage by the risk corridors program.

"But they have good lawyers," Roberts said. "Why didn't they insist on an appropriations before signing an agreement?"

The risk corridors program was supposed to be funded by insurers — those who made money in the markets would pay into a government-managed fund, and the government would send funds to companies that lost money. However, new Obamacare customers proved healthier than expected, and insurers ended up qualifying for billions more in assistance than was paid into the program. Although the Obama administration had promised the program wouldn't cost taxpayers any money, insurers said the law required that the government cover the shortfall.

Republicans in Congress, railing against a "bailout" of insurers, used appropriations riders to block the federal government from fully subsidizing insurers who lost money in the program.

The health insurers called on the Supreme Court overturn an earlier 2-1 decision for the government at the U.S. Court of Appeals for the Federal Circuit, where judges ruled Congress took clear action to block federal payouts for the program.

Justice Ruth Bader Ginsburg said the riders on spending bills didn't repeal the government's mandate to make payments to insurers. She noted that the appropriation bills by nature are temporary, since they control payments for specific fiscal years.

The three insurers in the Supreme Court case are seeking hundreds of millions of dollars. But the court's ruling, expected early next year, will affect more than 100 insurers who have filed lawsuits — including one class-action case — claiming they're owed more than \$12 billion.

The Supreme Court case could still affect another pipeline of Obamacare litigation involving dozens of insurers who have challenged Trump's decision to eliminate a subsidy program helping them pay for poor customers' medical bills. As with the risk corridors payments, insurers said the government has broken its promise to fund the subsidy program, known as cost-sharing reductions.

The Trump administration stopped the government payments in 2017, citing a federal judge's decision that the subsidies, worth about \$7 billion per year, were never appropriately funded by Congress. Many insurers, who were still required to lower their customers' bills, hiked premiums to make up for the loss of those federal subsidies.

Insurers have been on a winning streak in lawsuits over the cost-sharing payments, including in a class-action case brought by about 100 health plans. A win for insurers in the risk corridors case could bolster their argument and encourage more insurers to file suit.