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Latest Attack on the Affordable Care Act Soundly Defeated: “The Government should honor its obligations.”

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President Obama’s Affordable Care Act has survived yet another challenge in the federal courts. In a resounding 8-1 decision this Monday, April 27, 2020, the U.S. Supreme Court ruled that health insurance companies who suffered losses entering the new marketplaces established by the Affordable Care Act (“ACA”) were entitled to compensation for those losses.

The ACA expanded healthcare coverage to those who otherwise lacked or could not afford access by, among other things, establishing healthcare exchanges: online marketplaces where insurers could sell plans to individuals. To mitigate insurers’ risk entering unpredictable new marketplaces, Congress created the “Risk Corridors” program, set out in §1342 of the ACA, which allowed insurers to share both profits and losses in the new marketplaces’ first three years of existence. Pursuant to § 1342, if the insurance plans was not profitable, then the federal government “shall pay” the insurers according to the formula specified in the statute, to compensate for their losses; but if the insurance plans were profitable, then the insurers were required to share the benefits with the federal government by paying it according to the statutory formula. *See* §1342, 124 Stat. 211–212 (codified at 42 U. S. C. §18062). In total, after applying the statutory formula, the Risk Corridors program ran a deficit exceeding $12 billion owed to insurers who had participated in unprofitable healthcare exchanges – a sum the federal government refused to pay.

In three consolidated cases, healthcare insurers sued the government for damages under the ACA, invoking the Tucker Act, 28 U. S. C. §1491, which waives the United States' immunity from damages suits under certain circumstances. In each of the underlying cases, the petitioners argued that §1342 of the ACA obligated the government to pay participating insurers the full amount of their losses as calculated by statute. The United States Court of Appeals for the Federal Circuit ruled for the government in each appeal, holding that although §1342 initially created an obligation to pay the insurers, subsequent appropriations riders passed by Congress had impliedly repealed or suspended the Government's obligation. These riders, attached to appropriations bills enacted in 2014, 2015, and 2016 after a 2013 push by Senator Marco Rubio to end Risk Corridors payments, provided that none of the funds made available in those Acts from certain health care-related appropriations could be used for Risk Corridors payments.

The Supreme Court reversed.

In an 8-1 decision authored by Justice Sonia Sotomayor, the Supreme Court first held that the Risk Corridors statute created a government obligation to pay insurers the full amount set out by §1342's formula. The Supreme Court explained that "Congress can create an obligation directly through statutory language[,]" even without also detailing how that obligation may be paid, and without expressly providing budget authority. The express language of §1342, particularly the utilization of the mandatory word "shall" rather than the discretionary word "may," which was used in other sections of the ACA, imposed a legal duty on the United States that could mature into a legal liability through the insurers' participation in the healthcare exchanges.

Second, the Supreme Court held that Congress did not repeal §1342, despite the government's arguments that Congress had impliedly done so through the 2014, 2015, and 2016 appropriations riders. In so holding, the Supreme Court noted its long "aversion to implied repeals" of statutes, particularly in the context of appropriations. Either Congress's intent to impliedly repeal a statute must be "clear and manifest," or the laws in question must be "irreconcilable." The Supreme Court reasoned that the mere failure to appropriate the sum required to satisfy Congress's obligations, without any language indicating a modification of the statutory obligation to pay in full, did not constitute an "implied" repeal of §1342.

Third, and finally, the Supreme Court held that the insurers had properly relied on the Tucker Act to sue for damages in the Court of Federal Claims. Generally, the Supreme Court held, a statutory claim falls under the Tucker Act's sovereign immunity waiver where the statute can be fairly interpreted as mandating compensation by the federal government for damages sustained. The Risk Corridors statute's mandatory "shall pay" language makes the statute one of the "rare laws permitting a damages suit[,]" the Supreme Court held, particularly because, as the Risk Corridors program expired years ago, the insurers sought specific sums already calculated, past due, and designed to compensate for already-completed labor. It was on this point that Justice Alito focused his dissent. The dissent would have required further briefing on how to reconcile the possibility of a private right of action under the Tucker Act with the Court's general approach to the recognition of implied rights of action—a question which he felt did not receive the attention to which it was entitled.

Palpable throughout the Supreme Court's decision was the following guiding principle: "The Government should honor its obligations." A state which does not do so, according to Alexander Hamilton (and, though not cited, George R.R. Martin), will lose respect and trust. This week, the Supreme Court agreed with the Lannisters: the federal government must always pay its debts.

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