WINSTON & STRAWN LLP

CLIENT ALERT

Supreme Court Rules Government Must Compensate Health Insurers for ACA Losses

APRIL 30, 2020

On April 27, 2020, the Supreme Court held that health insurance companies are entitled to compensation if they lost money through participating in online marketplaces established by the Affordable Care Act. Insurers argued they were entitled to compensation under a provision in the ACA intended to mitigate the risk insurers faced in offering health plans, while the government argued that Congress had repealed the government's obligation to pay. The Court ruled in favor of the insurers. The decision is significant as it is yet another ruling affirming provisions of the ACA in what is has been and is expected to continue to be further litigation seeking to unwind portions of the statute.

To encourage insurers to enter the online marketplaces established by the ACA, Congress created programs to cabin the risks insurers would face when offering plans without the ability to estimate the cost of providing care to an expanding pool of individuals. At issue in this case was the now-expired "Risk Corridors" program under Section 1342 of the ACA, which established a formula that would limit participating plans' profits and losses during the exchange's first three years: profitable plans would make "payments in" to the government, while unprofitable plans would receive "payments out" from the government. In 2014, Congress passed appropriations measures including a rider that limited the funding available to compensate insurers for their losses. Those losses heavily outweighed the profits. In the first year, the government owed unprofitable plans $2.87 billion, while the profitable plans owed the government only $362 million.

Four health insurance companies sued the government for damages, alleging that §1342 of the ACA obligated the government to pay the full amount of their losses as calculated by the statutory formula. The Court of Federal Claims entered judgment for the insurer, but the Federal Circuit reversed, holding that while §1342 created an obligation to pay the full amounts, the appropriation riders passed in 2014 impliedly "repealed or suspended" that obligation.

The Supreme Court disagreed, reversing the Federal Circuit in an 8-1 decision. Writing for the majority, Justice Sotomayor held that the plain language of the Risk Corridors statute created a government obligation to pay insurers the amount set out in §1342's formula, regardless of whether appropriations or other funds were available.

In the process, the Court held that Congress did not impliedly repeal the government's obligations through the appropriations riders that prohibited the use of funds for Risk Corridor payments. Because Congress did not expressly repeal §1342, the obligation created by that section would remain effective unless Congress impliedly

repealed it. The Supreme Court has a high bar for repeals by implication, which are generally disfavored. In the appropriations context, the Court has held that the government must point to "something more than the mere omission to appropriate a sufficient sum." Here, the Court held that the government failed to make such a showing. Instead, Congress "merely appropriated a less amount than that required to satisfy the government's obligation, without expressly or by clear implication modifying it." "[E]specially because the Government had already begun incurring the prior year's obligation each time Congress enacted a rider, reasonable (and nonrepealing) interpretations exist." The court further noted, "finding a repeal in these circumstances would raise serious questions about whether the appropriations riders retroactively impaired insurers' rights to payment."

Finally, the Court held that the petitioners properly relied on the Tucker Act to sue for damages in the Court of Federal Claims. The United States waives its immunity for statutory claims under the Tucker Act only if the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." This is known as the "fair interpretation test." There are two exceptions to the test: a statute provides its own detailed remedies or the Administrative Procedure Act provides an avenue for relief. The Court held that the Risk Corridors statute is fairly interpreted as mandating compensation for damages and that neither exception applies. It reasoned that Congress chose not to use the many tools it has for limiting or conditioning its obligations, and the "shall pay" language reflects Congress's intent to create both a right and a remedy under the Tucker Act.

Justice Alito dissented, solely with respect to the Tucker Act issue. He took issue with the Court's inference of a right of action under the Tucker Act based solely on the statutory language that the United States "shall pay" for the companies' losses. Justice Alito noted several recent cases in which the Supreme Court has "gotten out of the business of recognizing private rights of action not expressly created by Congress." He found this an important question in this case, not only because billions of taxpayer dollars were on the line, but also because the "shall pay" language appears in many federal statutes. Because the question did not receive sufficient attention in the opinion, Justice Alito would have preferred that the Court request briefing on the question of inferring causes of action to recover damages under the Tucker Act.

The Court's consideration of ACA-related issues will continue both this Term and next. Last month, the Court granted two petitions involving the constitutionality of the ACA's individual mandate, *Texas v. California*, No. 19-1019, and *California v. Texas*, No. 19-840. And next week, the Court will hear argument in the case of *Trump v. Pennsylvania*, No. 19-454, which addresses whether the Department of Health and Human Services and Treasury had statutory authority under the ACA to expand the conscientious exemption to the contraceptive-coverage mandate.

4 Min Read

Related Locations

Charlotte | Chicago | Dallas | Houston | Los Angeles | New York | San Francisco | Silicon Valley | Washington, DC

Related Topics

Supreme Court | Appellate & Critical Motions | Health Care

Related Capabilities

Appellate & Critical Motions | Health Care

Related Regions

North America

Related Professionals

Matthew Carter

Linda Coberly

Courtney Block

© 2024 Winston & Strawn LLP.