

Insurers' Suit Against Government for Affordable Care Act Payments May Proceed; If Successful, Insurers Entitled to Billions from the United States

by Alex Hontos and Michael Rowe

In a closely watched case, the Court of Federal Claims last week refused to dismiss a health insurer's putative class action against the Federal government for payments authorized under the Affordable Care Act. The Court's decision in *Health Republic Insurance Co. v. United States*, Slip Op. No. 16-259C (Fed. Cl. Jan. 10, 2017) means that the government could eventually be ordered to pay billions of dollars in underpayments to insurers participating in the ACA marketplace.

By now, most everyone is familiar with the Patient Protection and Affordable Care Act ("ACA"). Among other things, the law requires the establishment of insurance marketplaces whereby individuals can purchase a health-insurance policy they are now required to carry. Although these markets offer insurers the ability to market to a new group of prospective customers, many insurers had little previous experience evaluating actuarial risk for this group and thus, faced risks in pricing individual policies. To reduce these risks, the ACA offered insurers a number of benefits to entice them to join the marketplace, including the so-called temporary "risk-corridor program." Under § 1342 of the ACA, insurers were entitled to certain payment adjustments if their costs significantly exceeded the collected premiums. Likewise, insurers were required to reimburse the government if the collected premiums significantly exceeded their costs. By statute, the temporary risk-corridor program was to run in 2014, 2015, and 2016, or presumably until the insurers could gain pricing experience.

In 2014, calculated risk-corridor payments to insurers greatly exceeded the payments due to the government (\$2.87 billion owed to insurers versus \$362 million owed to the government). Because the Department of Health and Human Services had projected that the payments would be offset by receipts, it decided to prorate the risk-corridor payments owed to insurers. For Plaintiff Health Republic, the government paid only 12.6% of the \$7.9 million owed. The next year was no better. In 2015, the government paid Health Republic \$262,000 as a credit against the outstanding 2014 balance, and it paid nothing toward the \$13,000,000 due under the 2015 risk corridor program. In 2016, Health Republic filed suit, claiming that the government owes it for the unpaid portions of the

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- Alex Hontos
- Michael Rowe

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2014 and 2015 risk-corridor payments.

In seeking dismissal, the government principally argued that the Federal government had not clearly waived its sovereign immunity for section 1342 claims. The Court disagreed. It first noted that the parties did not seriously dispute that section 1342 (and its implementing regulations) was a money-mandating provision entitling a plaintiff to seek damages from the government. See 42 U.S.C. § 18062(b)(1)(A) (“the Secretary shall pay to the plan”); 45 C.F.R. § 153.510(b) (“issuers will receive payment from HHS”). Instead, the government, relying on *United States v. King*, 392 U.S. 1 (1969), argued that its sovereign-immunity waiver was limited to claims for presently due money damages, and Plaintiff could not make such a showing without first obtaining a declaratory judgment. The Court again disagreed, and found that unlike in *King*, the remaining risk-corridor payments owed to Plaintiff were due in the absence of any other non-monetary relief. In sum, Health Republic was entitled to sue the government. In a less far-reaching holding, the Court also found Plaintiff’s suit ripe. It ruled that when read together, the statute, regulations, and even legislative history compel the government to make annual risk-corridor payments.

The lawsuit will now proceed to discovery.