



Written by [Michael Tennant](#) on May 5, 2016

ObamaCare Insurers Sue for Taxpayer Bailouts

A \$5 billion class-action lawsuit against the federal government, brought by health insurers with a little nudge from the Obama administration, threatens to take spending decisions out of the hands of Congress and place them in the hands of the executive and judicial branches.

Health Republic Insurance of Oregon, a failed ObamaCare co-op, filed the suit on behalf of itself and other insurers that participated in the healthcare law's risk-corridor program but did not receive the payments they requested after Congress put the kibosh on spending taxpayer dollars on such bailouts. The plaintiffs claim they are owed full payment because the Affordable Care Act (ACA) demands it, later congressional action notwithstanding.



The risk-corridor program, which began in 2014 and will end this year, forces insurers participating in the ACA's exchanges to remit a portion of their profits to the government. In theory, Uncle Sam is to use these so-called "user fees" to bail out other participating insurers who have suffered losses.

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"Insurers needed to consider the Risk Corridor program in making a decision whether to enter the exchanges and, if so, what sort of products and prices to offer," averred University of Houston law professor [Seth Chandler](#). "On its face, the program meant that there was much less risk than would otherwise exist selling insurance in this new market, but also much less chance of making a lot of money. And there is no doubt but that insurers did consider Risk Corridors to at least potentially be very important. In a free market, assuming it could find someone trusting enough to enter such an arrangement, a business would have to pay a fortune for the sort of financial derivative the Affordable Care Act's Risk Corridors program gave insurers for free."

The ACA, however, was not explicit about how the bailout portion of the program was to be funded; and in any event, the Congress that passed the law could not force future Congresses to spend money in ways they did not desire. There was, therefore, no guarantee that insurers would receive the bailouts they requested.

Nevertheless, in 2013, the Department of Health and Human Services (HHS) published a regulation stating, "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." In other words, if the requested bailouts exceeded the confiscated profits, HHS would simply use other funds to make up the difference regardless of whether they had been appropriated by Congress.



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Republicans on Capitol Hill, led by Senator Marco Rubio (R-Fla.), seized the opportunity to try to kill the risk-corridor program altogether. Rubio's bill was stalled while the administration reversed itself on the program's budget neutrality and then returned to its original position after intense lobbying from the insurance industry. Although the program itself survived, eventually it was forced to be entirely self-funded as part of the 2015 "Cromnibus" bill and the 2016 budget, both of which were signed by President Barack Obama.

The administration adhered to the law and paid out the first year's insurer bailouts strictly from its "user fees." This forced unprofitable insurers — many of whom, according to the [Daily Signal](#), had "included their full risk corridor payments in their financial forecasts, which helped pad their bottom lines" — to settle for about 13 cents on the dollar of their requests. Some, including Health Republic and five other co-ops, closed up shop as a result.

However, in November, a Centers for Medicare and Medicaid Services (CMS) [memo](#) declared: "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation of the United States Government for which full payment is required."

Some, such as policy analyst [Phil Kerpen](#), believe this was a wink at the insurance companies, letting them know that the administration is on their side and will roll over for them in court so they can collect their bailouts, which may also help prop up ObamaCare a little longer. Sure enough, the stiffed insurers are now suing for the rest of their bailouts.

"In this case, the argument is the statute requires the government to pay out for the risk corridors, but Congress refused to appropriate the money to do that and therefore the court is going to have to award a judgment since the administration, under the direction of Congress, is violating the law," Washington and Lee University law professor Timothy Jost told the *Daily Signal*.

Presumably, the administration, if it settled or lost the case, would pay the plaintiffs out of the Judgment Fund, an appropriated fund administered by the Treasury Department. If so, this would not sit well with those concerned about the Constitution's separation of powers.

"If Congress can enact language to prevent payments from being made and an administration can scheme its way around it by inviting a lawsuit, then no funding restriction is worth the paper it's printed on," wrote Kerpen. "The power of the purse is a dead letter and Congress is written out of the Constitution."

Although, as Chandler pointed out, there is at least one precedent that suggests the suing insurers could win, there are many more that could be used against them. Furthermore, the fact remains that between the last two budgets, Congress has made its intent perfectly clear: No taxpayer dollars are to be used to bail out insurers.

Congress thus has good reason to weigh in on the case. Chandler and others are calling on House Speaker Paul Ryan (R-Wis.) to get involved under a 2014 resolution that authorizes the speaker to intervene in any civil actions regarding the executive branch's failure to abide by the law "with respect to implementation of any provision of the" ACA. "Speaker Ryan should intervene swiftly in order to make sure that the litigation does not proceed without an opportunity for the Court to consider Congressional power over the purse," urged Chandler.

The administration has until June 24 to file its brief in the case. Until then, forecasting how it will respond is mere speculation. Jost believes the Justice Department will likely mount a defense of the



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reduced risk-corridor payments based on duly enacted laws. Others worry that the administration will settle and pay insurers out of the Judgment Fund, which wouldn't be the first time it has rewarded allies in this way. "The Obama administration's use of the Judgment Fund has come under fire in recent years, particularly after it was reported the Justice Department used the fund to pay billions to farmers who alleged discrimination by the Department of Agriculture, circumventing Congress," reported the *Daily Signal*.

Hans von Spakovsky, a former Justice Department official, told the website that the "administration has a history of using the Judgment Fund," explaining, "They're getting political friends to sue them and settle without going to Congress."

Given the administration's track record, especially with regard to ObamaCare, one thing is certain: Whatever it chooses to do in this case is unlikely to be driven by any concern for the law or the Constitution.





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