



Written by [Michael Tennant](#) on April 29, 2020

Supreme Court Orders Government to Pay \$12-Billion ObamaCare Bailout

The Supreme Court [ruled](#) 8-1 Monday that the government must pay health insurers a promised \$12 billion to cover their ObamaCare losses, even though Congress passed legislation explicitly prohibiting such payments.

“These holdings reflect a principle as old as the Nation itself: The Government should honor its obligations,” Justice Sonia Sotomayor wrote for the majority.



At issue were “risk corridor” payments the Affordable Care Act (ACA) promised to insurers who would jump into its exchanges at the start. In order to induce companies to issue comprehensive policies to all applicants at roughly the same premiums regardless of their pre-existing conditions, as required under the ACA, Democrats created a program to repay insurers for any losses they might incur during the first three years.

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The risk-corridor program required participating insurers to remit a portion of their annual profits to the government, which would then use those funds to mitigate other insurers’ losses. The Congressional Budget Office initially scored the program as revenue-neutral, and by 2014, ObamaCare’s first year of operation, it was forecasting an [\\$8-billion surplus](#).

It didn’t take long for ObamaCare’s flaws to manifest themselves, and by the end of 2014, “insurers’ claims under the program exceeded government collections ... by an 8-to-1 ratio,” [noted Washington and Lee University Law Professor Timothy Jost](#). By the time the program ended, it was \$12.3 billion in the hole.

Despite the shortfall, insurers still expected to be paid. The law, after all, simply said the government would pay; it never stated that the program had to pay for itself or that money had to be specifically appropriated for it.

But ObamaCare’s passage had also ushered in a Republican Congress that opposed the risk-corridor program, which many GOP lawmakers regarded as a bailout for insurance companies. Every single year the program was in force, Congress attached riders to appropriations bills explicitly forbidding its funding from the Treasury.

“More than 50 lawsuits were filed in the U.S. Court of Federal Claims (Court of Claims) by insurers who had losses under the risk-corridor program, including a class action suit with about 150 claimants,” penned Jost. “The insurers sued under the Tucker Act, which permits claims against the government when it violates its constitutional, statutory, or contractual obligations.”

The Court of Claims decided four of these cases, with the plaintiffs winning just one. The U.S. Court of Appeals for the Federal Circuit ruled that while the ACA does indeed create an obligation to pay under the risk-corridor program, the appropriations riders overrode that obligation. The insurers appealed to



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the Supreme Court.

The Supreme Court's opinion has its merits. It does not seem fair for the government to entice insurers into participating in the exchanges with an explicit promise to repay their losses and then to pull the rug out from under them when those losses grow too large.

Justice Samuel Alito, however, did not buy it. In his dissent, Alito agreed that the ACA created an obligation for the government, but he disagreed that the law also conferred the right to sue for payment when it was denied.

"The Court infers a private right of action that has the effect of providing a massive bailout for insurance companies that took a calculated risk and lost," he wrote. "These companies chose to participate in an Affordable Care Act program that they thought would be profitable."

"Under the Court's decision," he added, "billions of taxpayer dollars will be turned over to insurance companies that bet unsuccessfully on the success of the program in question. This money will have to be paid even though Congress has pointedly declined to appropriate money for that purpose."

He further pointed out that the decision could have far-reaching effects because of the numerous other laws with similar language on the books.

"A different way to look at this ruling, then, is that the Supreme Court is essentially ordering the federal government to appropriate funds to pay private businesses in order to offset their losses, creating an appropriation where none existed," [observed Reason's Peter Suderman](#).

That violation of the separation of powers may turn out to be far more damaging in the long run than merely shelling out another \$12 billion in corporate welfare.

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