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Legal Sidebar

# Using the Power of the Purse to Change Policy: SCOTUS Case on ACA Risk Corridors Asks Important Appropriations Law Question

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In the world of recent litigation involving the Patient Protection and Affordable Care Act (ACA), most attention has focused on the ongoing litigation in the U.S. Court of Appeals for the Fifth Circuit surrounding the constitutionality of the individual mandate. However, the Supreme Court is scheduled to hear several cases involving another, perhaps lesser known provision of the ACA concerning "risk corridors." While the risk corridors cases—three cases consolidated under the lead case of *Maine Community Health Options v. United* States—do not raise a question as to the validity of the entire ACA, they do raise important issues regarding the interpretation of appropriations acts, particularly when such acts conflict with authorizing statutes. After providing some background on the statutory provisions at issue, this Sidebar discusses relevant Supreme Court precedent regarding resolution of those conflicts and the broader implications that the risk corridor cases may have.

## Background

The ACA provided for a temporary risk corridors program to balance profits and losses of applicable insurers in the individual and small group markets in the early years following the statute's 2014 rollout. For years 2014 through 2016, the law specified that the "[Health and Human Services] Secretary shall pay" to insurers experiencing a shortfall a subsidy calculated as a percentage of their losses. Conversely, insurers with costs below revenue from premiums would need to pay a percentage of their profits to the agency.

Although the amounts of incoming and outgoing payments under the risk corridor program are established in statutory formulas, Congress used appropriations riders to limit the funds available for all outgoing payments under the risk corridors program to the total amounts received from insurers. Such riders typically provided that:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the ''Centers for Medicare and Medicaid Services—Program Management'' account,

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> may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Accordingly, when receipts from profitable insurers under the program fell short of the amount needed to pay insurers experiencing losses, those insurers only received a prorated share of the total amount that the government would have otherwise paid them for the year. In 2017, CMS reported that the total receipts under the program from 2014 to 2016 fell short of the total amount of outgoing payments according to the formula by more than $12 billion.

After CMS began reducing outgoing risk corridor payments, more than two dozen insurers sued the federal government in the U.S. Court of Federal Claims, seeking to obtain full risk corridor payments notwithstanding the limitation on appropriations established by Congress. Fundamentally, the insurers' maintain that the ACA's statutory language and accompanying regulations require that risk corridors payments be made according to the statutory formula, even absent sufficient congressional appropriations. The executive branch argue that Congress's actions in limiting appropriations for such payments have required the program to be operated in a budget-neutral fashion, such that payment obligations to insurers depend on the availability of payments made into the program.

The plaintiffs obtained mixed results in the U.S. Court of Federal Claims with competing decisions issued in favor of both the government and insurers. However, in June 2018, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), resolved the varying decisions by holding, in *Moda Health Plan, Inc. v. United States*, that Congress had implicitly limited the government's obligation to make risk corridor payments by limiting the appropriations available to make such payments. Subsequently, the insurer in that case asked the Supreme Court to review the Federal Circuit's decision, which the Supreme Court agreed to do as part of its October 2019 term.

# Appropriations Acts and Repeals by Implication

An agency's statutory authorization for a particular activity (i.e., authorizing legislation) may be distinguished from legislation authorizing the withdrawal of money from the Treasury to pay for such activities (i.e., appropriations acts). In general, the simple act of appropriating less than what is required to make all payments under a statutory scheme is insufficient to indicate a congressional intent to implicitly amend or repeal the authority for such payments. Nevertheless, without an appropriation, the disbursing authority of the agency is still limited, and recovery of payment may require recovery through litigation.

That was the route pursued by the insurers in these cases to recover unfunded risk corridor payments. If Congress had explicitly repealed or suspended the risk corridors statute or amended the law to make the Secretary's obligation to make payments subject to the availability of appropriations, the insurers' case would be far weaker, as they would likely not be entitled to recover the shortfall under the plain language of the authorizing statute. However, Congress did not act so explicitly. As a result, these cases invoke the doctrine of repeal by implication, in which one statute is construed to amend, repeal, or otherwise modify the operation of a second, despite the lack of express language to that effect.

The Supreme Court has frequently noted that repeals by implication are disfavored. This presumption against repeals by implication "applies with full vigor" when, as in these cases, it is asserted that a provision in an appropriations act is implicitly repealing another statute. Nevertheless, if it is "unmistakable" that Congress intended to effectuate such a repeal, courts are required to give effect to that construction. In looking at questions of legislative intent, courts traditionally begin with the enacted text, but may also look to the context and statements in the legislative history surrounding enactment to help inform potential ambiguities in the text.

## Textual Considerations

The Supreme Court has resolved a number of cases involving repeals by implication in appropriations acts. For example, in *United States v. Langston*, Congress appropriated only $5,000 for the salary of a foreign minister, even though the rate of pay had been set higher at $7,500. The Supreme Court held that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years," especially when that appropriation "contained no words that expressly, or by clear implication, modified or repealed the previous law." In support of this conclusion, the Court noted that Congress had repeatedly reauthorized the statute fixing the officer's salary without modification, providing no indication that appropriating a lower amount was meant to effectuate a reduction in salary.

However, where the language of an appropriation structurally changes the nature of a payment scheme, that fact may constitute strong evidence of Congress's intent to repeal or suspend the underlying statute authorizing payment. For example, in *United States v. Mitchell*, Congress enacted a statute setting the salaries of interpreters within the Department of the Interior at either $500 or $400 each "in full of all emoluments and allowances whatsoever." Congress subsequently enacted appropriations providing for compensation of such interpreters at only $300 each, while providing an additional lump-sum appropriation of $6,000 for additional pay of such interpreters in the discretion of the Secretary of the Interior. The Supreme Court distinguished this set of facts from *Langston* in which Congress had not appropriated "any or a sufficient sum" to pay the salary of an officer fixed in law, holding that the subsequent appropriation at issue in *Mitchell* clearly expressed a change in *policy* regarding the compensation of interpreters. Whereas the initial statute had a set a fixed sum "in full of all emoluments and allowances whatsoever," the appropriations, in the Court's view, contemplated some variation in compensation at the discretion of the Secretary of the Interior. As a result, the Court viewed Congress's intent to "fix, by the appropriation acts … the annual salaries of interpreters . . . at $300 each" was "plain on the face of the statute."

## Legislative History

The Supreme Court has, at least as a historical matter, viewed the absence or presence of statements in the legislative history surrounding an enactment also to be probative of a congressional intent to repeal through an appropriations act. For example, in *United States v. Vulte*, the Supreme Court held that an appropriations riders limiting the payment of certain marine corps officer bonuses did not effectuate a permanent repeal of a statute authorizing the payment of those bonuses, such that when the appropriations rider was removed, the contested bonus payments again became available. In contrast, in *United States v. Dickerson*, the Supreme Court held that an enlistment bonus that had been explicitly suspended for five years in appropriations language continued to be suspended in the sixth year, citing to statements in the Congressional Record indicating that both proponents and opponents of the policy understood the provision to be suspending the enlistment bonuses. Similarly, in *United States v. Will*, the Supreme Court concluded that appropriations riders had repealed or postponed pay raises for certain federal officials including judges, citing passages in the Congressional Record that, for the Court, "indicate[d] clearly that Congress intended to rescind these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable."

# Potential Implications for the ACA and Future Appropriations Riders

At the Supreme Court, the Justices may probe whether the text and structure of the appropriations rider concerning risk corridor payments evidenced a change in policy for the program or whether Congress simply underfunded the program. If it is the former, then that strongly suggests, under *Mitchell*, that Congress intended to change the promise it made to insurers. If the text and structure does not resolve the question, an open question is whether the Court may turn to the legislative history to discern congressional intent. The Federal Circuit focused on statements made by the former Chairman of the House Appropriations Committee in which he said that the government "will never pay out more than it collects from issuers over the three-year period risk corridors are in effect." Notwithstanding the historical precedent in *Dickerson* and *Will*, some members of the judiciary have regarded the practice of using legislative history to divine congressional intent with skepticism, and it remains to be seen whether the Court will view the statements the Federal Circuit relied upon as similarly persuasive.

If the Court sides with the insurers in these cases, the payments will help defray losses they may have incurred during plan years 2014-2016. While a decision in either direction would not appear to have great significance for the ongoing operation of the ACA because the risk corridors program has lapsed, it may provide additional guidance on how to interpret other appropriations riders Congress has enacted or may enact in the future to shape federal policy. For example, if the Court holds that the risk corridors rider's silence regarding its effect on existing law is conclusive, then other comparable riders may receive similar treatment by courts.

Oral arguments in the risk corridor cases are scheduled for December 10, 2019.

## Author Information

Edward C. Liu
Legislative Attorney

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