Nos. 2019-1290, 2019-1302, 2019-1633, 2019-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SANFORD HEALTH PLAN,
MONTANA HEALTH CO-OP,
Plaintiffs-Appellees,
v.
UNITED STATES,
Defendant-Appellant.

Appeals from the United States Court of Federal Claims in Nos. 1:18-cv-136 and 1:18-cv-143, Judge Elaine Kaplan

---

COMMUNITY HEALTH CHOICE, INC.,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims in No. 1-18-cv-5, Chief Judge Margaret M. Sweeney

---

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims in No. 1:17-cv-2057, Chief Judge Margaret M. Sweeney

---

SUPPLEMENTAL BRIEF FOR APPELLANT ON THE SUPREME COURT'S DECISION IN *MAINE COMMUNITY HEALTH OPTIONS*

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

Pursuant to this Court's order of April 28, 2020, we address the impact of *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), on these cases. The Supreme Court's decision rested on statutory grounds and thus guides the analysis of plaintiffs' statutory theory of liability. In light of the decision, we withdraw a secondary aspect of our argument—the argument that the Anti-Deficiency Act made the obligation to make cost-sharing reduction (CSR) payments contingent on appropriations—because the Supreme Court rejected an analogous argument with respect to risk-corridors payments. *Id.* at 1321-22.

The Supreme Court's reasoning otherwise confirms that plaintiffs' statutory theory of liability should be rejected. Plaintiffs contend that the Patient Protection and Affordable Care Act (ACA) is fairly interpreted to mandate compensation on an ongoing basis for their expenses of reduced cost sharing, even though plaintiffs (and other insurers) raised premiums to account for these expenses. Nothing in *Maine Community* supports plaintiffs' remarkable contention that insurers should recover these expenses twice. In holding that "[t]he Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims," *id.* at 1329, the Supreme Court emphasized that the risk-corridors program was a backwards-looking program designed to compensate insurers for losses incurred during the first three years of the Exchanges' operation. It was undisputed that Congress's failure to appropriate sufficient funding had left insurers with more than $12 billion in unreimbursed losses, *id.* at 1318, and the Supreme Court stated that the government would not be "respected and trusted" if it did not honor those debts, *id.* at 1331.

By contrast, the cost-sharing reduction program is one part of an ongoing program under which the subsidies authorized by the ACA are designed to reduce premiums. ACA § 1412(a)(3). By operation of the ACA's interlocking provisions, if the CSR subsidies are directly funded, they make it unnecessary for insurers to increase premiums to account for the expense of reducing cost sharing for eligible insureds. That, in turn, prevents the statutory triggering of an outsized increase in the premium tax credits—the other part of the ACA subsidy program—that are pegged by statute to benchmark premiums and are available to far more people than the subset eligible for reduced cost sharing. Conversely, if the CSR subsidies are not directly funded, both premiums and premium tax credits rise, and the expenses of reduced cost sharing are "funded through higher premiums and larger premium tax credit subsidies instead of a direct [CSR] payment." Congressional Budget Office (CBO), *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 8 (May 23, 2018), https://go.usa.gov/xdBQa (May 2018 CBO Report).

Thus, the ACA's structure leaves no "past injuries or labors" to compensate when CSR payments are not directly funded, and no basis to infer a right to compensation. *Maine Community*, 140 S. Ct. at 1329 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988)). The CBO—whose views the Supreme Court credited in *Maine Community*—concluded that the indirect funding of the expense of reduced cost sharing will substantially increase both total government spending and total enrollment in the Exchanges. Accordingly, Congress enacted legislation that protects this indirect funding method through 2021, apparently without objection from insurers. Plaintiffs cannot plausibly suggest that trust and respect for the government is diminished when the expenses of reduced cost sharing are funded through higher premiums and larger premium tax credits.

We recognize that, for the last 2 ½ months of 2017, plaintiffs' rates did not yet account for their expenses of reduced cost sharing. Congress, in enacting the ACA, would not have anticipated that scenario, which arose only because CSR subsides had been paid from a permanent appropriation that plaintiffs concede should not have been used for that purpose. It is by no means evident that Congress would have intended the ACA to mandate compensation under those unusual and unanticipated circumstances. And this issue should have limited practical significance for the reasons discussed in our supplemental briefing on damages: The increased tax credits that flow from silver loading should leave plaintiffs and other insurers better off financially, even taking into account the period before silver loading began. The damages principles discussed in our supplemental briefing are unaffected by the *Maine Community* decision, because damages issues were not contested in that litigation.[1]

[1] Likewise, the *Maine Community* decision has no impact on plaintiffs' implied-in-fact contract theory, because the Supreme Court declined to address the petitioners' implied-in-fact contract theory. *See* 140 S. Ct. at 1331 n.15.

BACKGROUND: THE *MAINE COMMUNITY* DECISION

The *Maine Community* decision involved the ACA's risk-corridors program, "a temporary framework meant to compensate insurers for unexpectedly unprofitable plans during the marketplaces' first three years." 140 S. Ct. at 1315. "To encourage insurers to enter those marketplaces," the "since-expired Risk Corridors statute, § 1342, set a formula for calculating payments under the program." *Id.* "If an insurance plan loses a certain amount of money, the Federal Government 'shall pay' the plan; if the plan makes a certain amount of money, the plan 'shall pay' the Government." *Id.* Some plans made money and paid the government, but many plans suffered losses and sought reimbursement. *Id.* "The Government, however, did not pay." *Id.*

The Supreme Court held that the unreimbursed losses constituted a "valid yet unfulfilled Government obligation" for which damages may be sought. *Id.* at 1327. The Court concluded that the risk-corridors statute created an obligation to pay insurers the full amount set out in the statutory formula, *id.* at 1319-21, and rejected the government's argument that the Anti-Deficiency Act made that obligation contingent on appropriations, *id.* at 1321-22. The Court did not interpret subsequent funding restrictions to repeal that obligation, *id.* at 1323-27, noting that "finding a repeal in these circumstances would raise serious questions whether the appropriations riders retroactively impaired insurers' rights to payment," *id.* at 1324.

The Court then further held that "[t]he Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims." *Id.* at 1329. The Court explained that "§ 1342's mandatory text is significant," reasoning that statutory "shall pay" language "often reflects congressional intent 'to create both a right and a remedy' under the Tucker Act." *Id.* (quoting *Bowen*, 487 U.S. at 906 n.42). The Court concluded that this interpretation was bolstered by "§ 1342's focus on compensating insurers for past conduct." *Id.* The Court explained that, in assessing Tucker Act claims, it had previously distinguished between statutes that "attempt to compensate a particular class of persons for past injuries or labors" (which may proceed under the Tucker Act) and laws that subsidize future expenditures (which may not). *Id.* (quoting *Bowen*, 487 U.S. at 906 n.42). The Court concluded that "[t]he Risk Corridors statute sits securely in the first category." *Id.* It therefore could "fairly be interpreted as mandating compensation by the Federal Government." *Id.* (quoting *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)). The Court stated that its holdings would help ensure that the government is "respected and trusted" in its financial engagements. *Id.* at 1331.

ARGUMENT

I. The *Maine Community* Decision Confirms That Plaintiffs' Statutory Theory Of Liability Should Be Rejected

In light of the *Maine Community*'s reasoning, we withdraw the argument that the Anti-Deficiency Act, 31 U.S.C. § 1341, made the obligation to make cost-sharing reduction payments contingent on appropriations. As discussed above, the Supreme Court rejected an analogous argument with respect to risk-corridors payments. *See Maine Community*, 140 S. Ct. at 1321-22.

The Supreme Court's decision otherwise confirms that plaintiffs' statutory theory of liability should be rejected. The Supreme Court reaffirmed that the Tucker Act does not create substantive rights, which instead must be premised on substantive law. *See id.* at 1327. The Court explained that for a statutory claim to proceed under the Tucker Act, the substantive statute must "fairly be interpreted as mandating compensation by the Federal Government." *Id.* at 1329 (quoting *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)). "Satisfying this rubric is generally both necessary and sufficient to permit a Tucker Act suit for damages in the Court of Federal Claims," unless the substantive law provides its own detailed remedies or the Administrative Procedure Act provides an avenue for relief. *Id.* at 1328.

Plaintiffs contend that the ACA should be interpreted to mandate compensation for insurers' expenses of reducing cost sharing for eligible enrollees—on an ongoing and indefinite basis—even though plaintiffs and other insurers raised premiums to account for these ongoing expenses and received increased tax credits from the government as a result. On this theory of liability, which the trial courts adopted, insurers would be owed billions of dollars each year for the indefinite future, even though their expenses of reduced cost sharing are "being funded through higher premiums and larger premium tax credit subsidies instead of a direct [CSR] payment." May 2018 CBO Report at 8.

Nothing in *Maine Community* supports plaintiffs' contention that insurers should recover twice the expenses of reducing insureds' cost sharing. In *Maine Community*, the Supreme Court explained that the purpose of the "since-expired Risk Corridors statute" was "to compensate insurers for unexpectedly unprofitable plans during the marketplaces' first three years." 140 S. Ct. at 1315. There was no dispute that Congress's failure to appropriate sufficient funding had left insurers with more than $12 billion in unreimbursed losses. *Id.* at 1318. Emphasizing the "backwards-looking" nature of the program, the Supreme Court concluded that "[t]he Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims." *Id.* at 1329. The Court stated that its "holdings reflect [the] principle" that the government "should honor its obligations," and observed that this principle helps to ensure that the government is "respected and trusted" in its financial dealings. *Id.* at 1331.

By contrast, the ACA cannot fairly be interpreted to mandate additional compensation for insurers that account for the expense of reduced cost sharing in setting rates. Whereas the risk-corridors program was a time-limited, backwards-looking program that left more than $12 billion in unpaid government debts, the cost-sharing reduction program is an ongoing program under which insurers' expenses are being funded by increased premiums and increased premium tax credits.

As our prior briefing explained, the ACA's cost-sharing reduction program has two components. First, it mandates that insurers reduce cost sharing for eligible individuals who enroll in a silver plan through an Exchange. That requirement is no different in kind from the host of other regulations that the ACA imposes on insurers, such as the requirement to provide essential health benefits and the requirement to accept all applicants regardless of health status. All of these regulations are straightforward exercises of Congress's Commerce Clause power.

Ordinarily, insurers account for such requirements and resulting business expenses when they set premiums. However, the ACA authorized targeted CSR subsidies that, if funded, make it unnecessary for insurers to raise premiums to account for reduced cost sharing. *See* ACA § 1412(a)(3). The targeted CSR subsidies, if funded, prevent a disproportionate increase in the ACA's premium tax credits, which are pegged by statute to benchmark premiums (the second-lowest-cost silver plan available on the area's Exchange) and which are available to far more people than the subset eligible for reduced cost sharing. *See* ACA § 1401. Conversely, if the CSR subsidies are not directly funded, premiums and premium tax credits rise, and the expenses of reduced cost sharing are "funded through higher premiums and larger premium tax credit subsidies instead of a direct [CSR] payment." May 2018 CBO Report at 8.

The ACA's structure thus leaves no "past injuries or labors" to compensate when CSR payments are not directly funded. *Maine Community*, 140 S. Ct. at 1329 (quoting *Bowen*, 487 U.S. at 906 n.42). There is no plausible contention that the government will not be "respected and trusted," *id.* at 1331, if the expenses of reduced cost sharing are funded by higher premiums and larger premium tax credits rather than by direct CSR payments. The CBO—on whose views the Supreme Court relied in *Maine Community*—concluded that this indirect funding method will substantially *increase* both total government spending and total enrollment in the Exchanges. May 2018 CBO Report at 9; CBO, *The Effects of Terminating Payments for Cost-Sharing Reductions* at 2 (Aug. 15, 2017), https://go.usa.gov/xdZQ8. Similarly, a RAND Corporation report emphasized that a return to direct payments for cost-sharing reductions would "decrease both federal spending and health insurance enrollment." Prethi Rao and Sarah Nowak, *Effects of Alternative Insurer Responses to Discontinued Federal Cost-Sharing Reduction Payments* at 14 (2019), https://www.rand.org/pubs/research_reports/RR2963.html. Accordingly, Congress enacted legislation that preserves the indirect method of funding reduced cost sharing through at least the 2021 year—apparently without objection from insurers or their trade associations. *See* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. N, § 609, 133 Stat. 2534, 3130 (Dec. 19, 2019).

Therefore, as a general matter, the ACA's cost-sharing reduction provisions are not among the "rare laws permitting a damages suit in the Court of Federal Claims." *Maine Community*, 140 S. Ct. at 1329.

We recognize that a closer question may arise for the last 2 ½ months of 2017, when plaintiffs' rates did not yet account for their expenses of reduced cost sharing. Congress, in enacting the ACA, would not have anticipated that scenario, which arose only because direct CSR subsidies had been paid from a permanent appropriation that plaintiffs concede should not have been used for that purpose. *See* Community Br. 31 (acknowledging that "Congress did not intend for CSR payments to be funded by permanent appropriations"); Sanford Br. 40 (acknowledging that "Section 1401 contains a permanent funding source and Section 1402 does not"). It is by no means evident that Congress would have intended the ACA to mandate compensation for cost sharing expenses under those unusual and unanticipated circumstances. On the other hand, the Supreme Court's concern that the government make good on unfulfilled past debts may be implicated by the last 2 ½ months of 2017. But even if the ACA were interpreted to mandate compensation for reduced cost sharing under those unusual circumstances, that issue should have limited practical significance for the reasons discussed in our supplemental briefing on damages. The increased tax credits that flow from silver loading on an ongoing basis (through at least 2021) should leave plaintiffs and other insurers better off financially, even taking into account the period before silver loading began.

II. The *Maine Community* Decision Has No Impact On Plaintiffs' Implied-In-Fact Contract Theory Or On The Damages Issues Addressed In Supplemental Briefing

The Supreme Court expressly declined to address the petitioners' alternative argument for recovery under an implied-in-fact contract theory. *Maine Community*, 140 S. Ct. at 1331 n.15. Accordingly, the decision has no impact on plaintiffs' implied-in-fact contract theory of liability. That theory is foreclosed by the precedents discussed in our merits briefs and by this Court's decision in *American Bankers Association v. United States*, 932 F.3d 1375 (Fed. Cir. 2019), which was issued after the close of merits briefing.

The *Maine Community* decision likewise has no impact on the damages issues addressed in the supplemental briefing in these cases. The government did not claim that the petitioners in *Maine Community* had raised premiums or otherwise litigate any damages issues in those cases. Here, by contrast, plaintiffs do not deny that they raised premiums to account for the absence of direct CSR payments. Nor do plaintiffs deny the impact on premium tax credits that the petitioners in *Maine Community* emphasized: "higher premiums on the exchanges" make "tax subsidies far more expensive for the government." Brief for Petitioners at 4, *Moda Health Plan, Inc. v. United States*, No. 18-1028, 2019 WL 4235524 (Aug. 30, 2019). Assuming liability, any damages awards should be reduced pursuant to the principles discussed in our supplemental briefs.[2]

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN

/s/ Alisa B. Klein
ALISA B. KLEIN
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597
alisa.klein@usdoj.gov

May 2020

[2] For the Court's awareness, we note that the implications of *Maine Community* have also been raised in another case pending before this Court. *See* Letters of May 4, 2020 and May 6, 2020, *National Veterans Legal Services Program v. United States*, Nos. 19-1081 & 19-1083 (Fed. Cir.) (oral argument heard February 3, 2020 before Circuit Judges Lourie, Hughes, and Clevenger).

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the Court's order of April 28, 2020, because it is no longer than 15 pages, double-spaced. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Alisa B. Klein
Alisa B. Klein