



HHS Cost-Sharing Payments Under ACA Held Unlawful

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Health insurers relying on federal funds promised by the Affordable Care Act received bad news May 12, as a federal court blocked the government from further reimbursing them for cost-sharing reductions required by the act.

The U.S. District Court for the District of Columbia, however, stayed the injunction pending an appeal of the decision. That means there may be some delay until the effects of Judge Rosemary M. Collyer's ruling are felt.

If the ruling is upheld on appeal, insurers no longer would receive advance payments for lost-cost health plans. Since January 2014, those payments have amounted to "billions of dollars," according to the court.

"This case is far from over," Timothy S. Jost, emeritus professor at Washington and Lee University School of Law, Lexington, Va., told Bloomberg BNA. "The administration will, of course, appeal," but the decision won't have any "immediate effect" due to the stay, he said.

Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, Washington, agreed. He gave even odds on whether the appeals court will consider the issue before the November general election. It depends on how quickly the government acts in pressing its appeal, he told Bloomberg BNA.

Shapiro called Collyer's decision a "straightforward ruling." The court said the money spent by the Health and Human Services and Treasury secretaries since January 2014 to reimburse insurers for reducing policyholders' deductibles and co-pays was never appropriated by Congress.

The secretaries, therefore, violated U.S. Const. Art. I, § 9, cl. 7, the court said. The clause states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This means that public funds may be spent only when Congress has authorized the expenditure.

Not Part of Permanent Appropriation

Congress passed several reforms in the ACA to encourage individuals to obtain health insurance. Section 1401 of the act, for example, added a new section to the Internal Revenue Code, 26 U.S.C. § 36B. That section created an income tax credit for eligible taxpayers who purchased insurance on ACA exchanges. It was designed to help those taxpayers afford their premiums.

Section 1402 requires the issuer of a qualified health plan in which an eligible taxpayer enrolled to reduce the insured's cost-sharing—i.e., the additional amount the insured would have to pay for care, including deductibles, co-pays, coinsurance and similar charges. But the insurer was supposed to get its money back from the federal government through the cost-sharing reduction program.

The parties agreed that Congress made the money to pay for the Section 1401 program available through a permanent appropriation by way of 31 U.S.C. § 1324(b). Section 1402, however, didn't contain language referring to the permanent appropriation.

Because the ACA “unambiguously” appropriated money for Section 1401 premium tax credits, but not for Section 1402 reimbursements to insurers, the payments to the insurers were illegal, the court said.

Collyer rejected the administration's argument that an appropriation could be inferred in Section 1402 based on the legislative history, the centrality of the provision to reform and the “unintended” results that would follow if the insurers were denied the payments. An appropriation “cannot be inferred,” Collyer said.

The court also rejected the administration's renewed argument—previously rejected in a ruling on its motion to dismiss the House's complaint—that the House didn't have standing to sue the administration over its interpretation of a federal law.

Collyer said that, while the administration's arguments required an interpretation of federal statutes, the House's arguments didn't, as that body's claim related solely to the constitutionality of the administration's action.

The court blocked the administration from making any further payments to the insurers.

‘Clearly Incorrect.’

The decision is “clearly incorrect” and is likely to be reversed on appeal, Simon Lazarus, senior counsel at the Constitutional Accountability Center in Washington, told Bloomberg BNA.

There isn't any basis for saying that less than the full Congress may sue the administration on a matter that requires statutory interpretation, he said. Therefore, the U.S. Court of Appeals for the District of Columbia Circuit, to which an appeal would be taken, should reverse the ruling on standing grounds.

Lazarus added that the administration's standing claim wasn't "merely a technical" argument. If some portion of Congress has the ability to bring a complaint against the administration in the courts, it would "hugely magnify" the dysfunction already existing in Washington, he said.

Alternatively, if the appeals court reaches the merits, it should find that the secretaries were acting within their rights in authorizing the payments to the insurers, Lazarus said.

Jost, too, predicted that the administration would win on appeal, saying the secretaries were "likely to prevail on its argument, rejected by Judge Collyer last fall, that the House cannot constitutionally sue the administration when it disagrees with the administration over the interpretation of a statute."

If the appeals court reaches that conclusion, that will be the end of the case, Jost said. He doesn't see the Supreme Court granting review because the law on standing is clear.

Future Impact

Jost told Bloomberg BNA that the decision shouldn't have any immediate effect on insurers, as the ruling has been stayed. It shouldn't have any long-term effect either if the appeals court, as he predicted, reverses the ruling.

Additionally, this is a problem that Congress could fix, Jost said. Lazarus agreed, saying the administration could ask Congress to appropriate the funds for the Section 1402 program, and Congress could agree to do so.

Congress has pushed for, and made, multiple changes to the ACA, Lazarus said. Additionally, it hasn't ever expressly said that it won't fund the cost-sharing program, as it did with respect to the risk-corridor program, he said.

Much of what Congress does will depend on the general election in November.

Shapiro told Bloomberg BNA that the decision may have some impact on the narrative of the election, as it adds to the argument that the administration has been acting illegally in implementing the ACA.

He also said it could add to the debate over the confirmation of President Barack Obama's nominee to the Supreme Court, Judge Merrick Garland. Although Garland has recused himself for the time being, he is the chief judge of the court that would preside over the appeal in this case.

Administration, Speaker React

Politicians were quick to react to the ruling, beginning with the Obama administration. White House press secretary Josh Earnest said during a May 12 press conference that "this suit represents the first time in our nation's history that Congress has been permitted to sue the executive branch over a disagreement about how to interpret a statute."

Obviously, there have been “significant differences between the executive branch and Congress,” but “these are the kinds of political disputes that characterize a democracy.” Earnest said it was “unfortunate that Republicans have resorted to a taxpayer funded lawsuit to re-fight a political fight that they keep losing.” Congressional republicans “have been losing this fight for six years,” he said, adding that “they’ll lose it again.”

In answer to a question on whether the administration plans to appeal the ruling, Earnest said Department of Justice attorneys had just begun reviewing the opinion and that any formal announcement of an appeal would come from the DOJ. Earnest said he hadn't “heard, at this point, any sort of analysis about the potential impact of a legal outcome consistent with this decision.”

House Speaker Paul Ryan (R-Wis.) called the decision “an historic win for the Constitution and the American people” in a statement released May 12. “The court ruled that the administration overreached by spending taxpayer money without approval from the people's representatives.”

“Here, the executive branch is being held accountable to We the People, and that's why this decision is very good news,” Ryan said.

The House of Representatives in November 2014 sued the HHS and Treasury secretaries alleging that the Constitution didn't permit them to use unappropriated funds to reimburse insurers under the cost-sharing program (226 HCDR, 11/24/14).

The administration moved to dismiss the complaint (65 HCDR, 4/6/15).

The trial court, however, denied the motion, holding that the House had standing to bring the lawsuit (175 HCDR, 9/10/15).

The administration appealed that decision (184 HCDR, 9/23/15).

The appellate court rejected the administration's arguments and sent the case back to the district court (202 HCDR 202, 10/20/15).

Jonathan Turley, Washington; and Kerry W. Kircher, William Pittard, Todd B. Tatelman, Eleni M. Roumel, Issac B. Rosenberg and Kimberly Hamm, of the U.S. House of Representatives Office of General Counsel, Washington, represented the House. Benjamin C. Mizer, Channing D. Phillips, Jennifer D. Ricketts, Sheila Lieber and Joel McElvain, of the U.S. Department of Justice, Washington, represented the HHS.