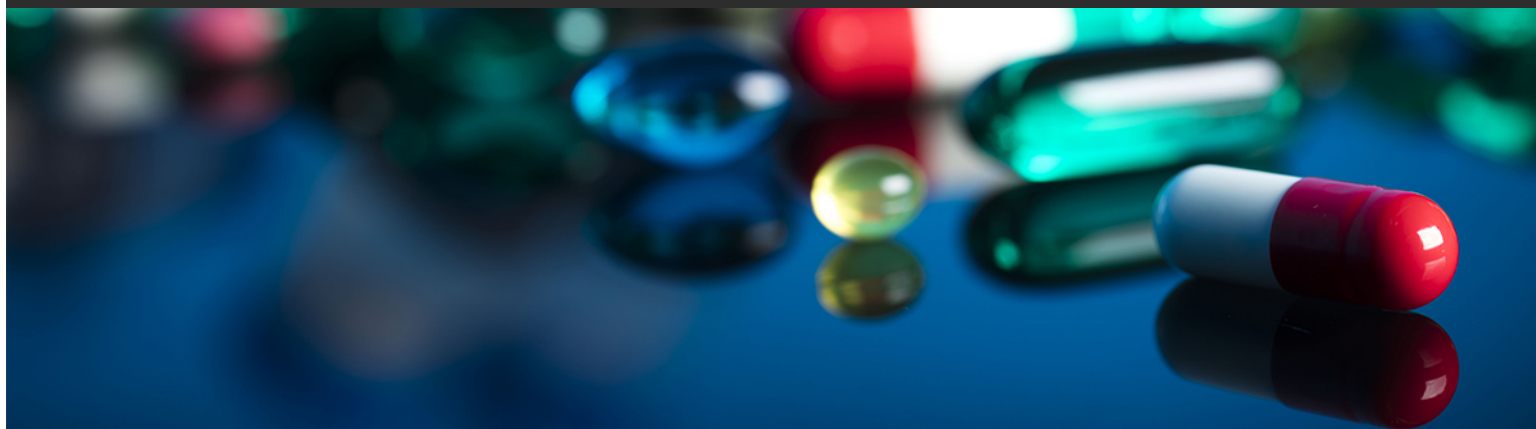


## **Alert** | Health Care & FDA Practice



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### **Federal Appeals Court: Appropriations Riders Trump ACA Risk Corridor Payment Obligations**

On June 14, 2018, the United States Court of Appeals for the Federal Circuit held that although the Patient Protection and Affordable Care Act (ACA) obligated the government to pay insurers full risk corridor program payments, Congress suspended the obligation in subsequent appropriations riders, reversing a lower court ruling that found in favor of plaintiff insurer Moda Health Plan, Inc. (Moda).

The risk corridor program was a three year program (CY 2014-2016) established in the ACA to incentivize insurers to enter the individual health insurance market given the significant risk they faced in expanding the pool of covered individuals. Insurers who participated would either pay in to the fund (if their profits exceeded their costs) or receive a payment from the fund (if their costs exceeded the premiums they collected) – all calculated using a formula established by statute and regulation. The Government Accountability Office (GAO), at the request of Congress, identified two sources from which the government could draw funds for payments due under the program – either through “Program Management” funding or “sums...collected from authorized user fees.” In appropriations riders for each of the three years the program was in effect Congress explicitly limited funding for the program to only one of the two sources that the GAO identified – the “user fees” source. Thus, the government lacked the funds to make full payments under the calculation set forth in the statute and instead only made prorated payments to insurers.

Moda brought suit seeking the difference between the prorated payments made by the government and what it claims it is owed under the ACA. Moda contended that (1) the ACA obligates the government to pay insurers full risk corridor payments, notwithstanding the amount appropriated, and (2) the

government made a contractual agreement to pay full risk corridor payments, and breached that agreement by making prorated payments.

The Court agreed that the statute requires the government to make full risk corridor payments; however, it agreed that the appropriations riders effectively suspended the government's obligation. The government argued that the program was required to be budget neutral and that the government was not permitted to make payments in excess of the funds it collected, but the Court disagreed stating that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt."<sup>1</sup> The Court was also not persuaded by the government's argument that the Anti-Deficiency Act (ADA) prohibited the government from making expenditures in excess of appropriations, stating that the ADA only constrains government officials, not agencies.

While the Court agreed that the ACA created an obligation on behalf of the government, it agreed that the appropriations bills "repealed or suspended" the obligation.<sup>2</sup> The Court acknowledged that "[r]epeals by implication are generally disfavored," but further acknowledged that a repeal can be accomplished where an appropriations rider "adequately expressed Congress's intent to suspend payments."<sup>3</sup> In finding that Congress intended to suspend the funding for the risk corridor program payments through the appropriations riders, the Court referred to the specific reference in the appropriations bill to the risk corridor program, and also cited comments by the House Appropriations Committee Chair that were included in the Congressional Record. The Court emphasized that Congress's intent is the key question and that simply failing to appropriate funds would not eliminate an obligation.

Moda claimed that the full payment could be made out of the "Judgement Fund," a fund that could be used "to pay final judgments."<sup>4</sup> The Court was unpersuaded and again looked to Congress's intent not to make any payment or incur any liability under the risk corridor program, thus cutting off this avenue of funding as well.

Finally, Moda argued that the ACA created an implied-in-fact contract, which it alleged the government breached. Moda's allegations stemmed not only from the statutory language, but also from the implementation of the risk corridor program; the Court was unpersuaded. The Court stated that, absent clear intent, legislation and regulation cannot establish a contract. The Court notes that laws establish policy, which "are inherently subject to revision and repeal," unlike contracts.<sup>5</sup> The Court also found that the risk corridor program was formed as an incentive program, which it found did not evidence contract. Therefore, the Court held that the legislation and regulations did not create a contract whereby the government promised to make risk corridor payments.

The dissent disagrees with the majority opinion in nearly every respect. Judge Newman notes that the government continued to benefit from full payments into the risk corridor program by insurers, while not making full payments out. The dissent concludes that the government must have a reputation as a "fair partner" in order to "benefit from participation of private enterprise"<sup>6</sup> and believes that in failing to make full payments, the government failed to live up to this reputation.

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<sup>1</sup> *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir., June 14, 2018) at 17.

<sup>2</sup> *Moda* at 20.

<sup>3</sup> *Id.*

<sup>4</sup> *Moda* at 27.

<sup>5</sup> *Moda* at 33.

<sup>6</sup> *Moda* at 19 (Newman, J., dissenting).

The dissent argues that repeal of a statute cannot occur absent clear and express terms, noting that repeal by implication is disfavored. The dissent finds that the cases cited by the majority favor its position, pointing out that the obligations suspended in those cases were other appropriations and not legislation that incurred a statutory obligation. Judge Newman points out another case cited by the majority, *New York Airways, Inc. v. United States*, stating that it finds that an obligation cannot be cancelled for failure to appropriate, but simply prohibits the government from disbursing the funds. It further notes that the individual must seek recovery in court. Thus, *Moda*, under the dissent's theory, could seek recovery under the Judgement Fund. The dissent also notes that precedent does not support the retroactive effect of the appropriations rider on the obligations incurred for performance achieved.

Our expectation is that *Moda* will likely appeal the decision – whether through a request for rehearing (either through the same panel or *en banc*) or to the Supreme Court. Additionally, we are uncertain whether Congress would take any steps to expressly appropriate funding before they recess in September. Finally, while there appears to be bipartisan support for these types of programs in the Senate, it is unlikely that such legislation will be considered.

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