



There are at least 10 similar cases pending in the U.S. Court of Federal Claims, including a class-action lawsuit led by Wisconsin's Common Ground Healthcare Cooperative. | Getty Images

## Montana insurer's victory may put taxpayers on the hook for big ACA payments

By [PAUL DEMKO](#)

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A nonprofit insurer's successful bid to be compensated for Obamacare payments that the Trump administration cut off could have huge financial ramifications for taxpayers.

A federal judge ruled on Wednesday that Montana Health Co-Op is entitled to \$5.2 million that it would have received in the last quarter of 2017 if the administration hadn't eliminated payments that defrayed the cost of covering some Obamacare customers.

There are at least 10 similar cases pending in the U.S. Court of Federal Claims, including a class-action lawsuit led by Wisconsin's Common Ground Healthcare Cooperative. Dozens of other insurers are expected to file claims if they're likely to collect damages.

At issue are cost-sharing reduction payments that insurers rely on to reduce out-of-pocket costs for the poorest Obamacare enrollees. The administration pulled the money last October, citing a lawsuit filed by House Republicans that successfully argued that the payments were illegal

because they had never been appropriated by Congress. The Justice Department also halted its appeal of that lower-court ruling.

But insurers maintain there's a statutory obligation to make good on the payments. The Montana ruling suggests that they have a strong legal case — and that taxpayers will end up footing the bill. The payments were expected to total \$7 billion in fiscal 2017, according to the Congressional Budget Office, so the shortfall to insurers is likely more than \$1 billion.

"We're really pleased at the outcome because there is a significant amount of money involved," said Karen Early, Montana Health Co-Op's operations director, noting that the dollars simply get passed on to customers. "There's no money to be made by the insurance companies."

Nicholas Bagley, a professor at University of Michigan Law School who has written extensively about ACA legal issues, expects other judges to reach similar conclusions on the merits of the claims.

"To say it was the expected result is an understatement," Bagley said. "This is an application of clear, black-letter law to an obvious government promise."

But the cases are similar to litigation stemming from the federal government's failure to make good on risk corridor payments that insurers expected to receive for attracting a sicker, more expensive group of Obamacare customers than anticipated.

In those cases, the lower courts split on the merits of the claims, with one federal judge siding with Moda Health Plan and another siding with the federal government over Land of Lincoln Health. In June, a divided three-judge appellate panel ruled against the insurers. Moda and Land of Lincoln have asked the full appellate court to reconsider; that motion is currently pending before the U.S. Court of Appeals for the Federal Circuit.

There's a distinction between those cases and the CSR litigation that could prove significant. Congressional Republicans had taken action to specifically limit risk corridor payments, decrying them as a bailout for the insurance companies. In the case of CSRs, there was no equivalent action, only the failure to appropriate funds.

Another perplexing question in the CSR cases is whether there is an ongoing legal obligation for the federal government to make the payments. Insurers had no way to protect themselves financially in 2017, since premiums were already set. But they jacked up rates for this year in order to compensate for the shortfall. Montana's lawsuit only sought compensation for 2017, but that's not true for all the other cases.

"Do they get to keep coming back to court every year to collect what they're owed?" Bagley asked. "We could be looking at the beginning of a long-term drain on the federal treasury." The Montana ruling is almost certain to be appealed. That means it will likely be months, if not years, before the final outcome is known.

"We're hopeful that it sets a precedent," said John Baackes, CEO of L.A. Care Health Plan, which has its own CSR lawsuit pending in federal court. "It's just one judge in one district."

**Authors:** [Paul Demko pdemko@politico.com](mailto:pdemko@politico.com)