

JUL 20 2010

MICHAEL S. HICHEL
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

KIM HOLLAND, Insurance Commissioner,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA HEALTH CARE)
 AUTHORITY; STATE OF OKLAHOMA)
 ex rel. STATE TREASURER; and)
 STATE OF OKLAHOMA, ex rel.)
 OFFICE OF STATE FINANCE)
)
 Respondents.)

Case No.

#108519

EMERGENCY EXPEDITED APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. Pursuant to Sup.Ct. R. 1.191(b), Kim Holland, Insurance Commissioner, seeks declaratory relief from this Court that HB 2437 is unconstitutional and preempted by federal law, and that the Insurance Commissioner cannot enforce the legislation consistent with her constitutional and statutory authority to regulate the insurance industry in Oklahoma and her oath of office.

2. An emergency exists because HB 2437 becomes effective August 27, 2010, and without this Court's intervention, the Insurance Commissioner will have to enforce unconstitutional legislation to collect a tax for another agency to be used for a purpose outside Oklahoma Insurance Department (OID) regulatory authority, namely the funding the Medicaid program administered by Respondent Oklahoma Health Care Authority ("OHCA"). No other Court has jurisdiction or authority to make the urgent and final determination of this matter of public interest.

3. The Insurance Commissioner, Kim Holland, is constitutionally and statutorily charged with the duty of administering and enforcing the provisions of the Oklahoma Insurance Code, 36 O.S. § 101 et seq. in relation to the business of insurance in Oklahoma.

4. The Insurance Commissioner has taken an oath to "support the Constitution and the laws of the United States of America and the Constitution and the laws of the State of Oklahoma", and to "faithfully discharge, according to the best of my ability, the duties of my office," and cannot administer or enforce HB 2437 consistent with this oath and her fiduciary duties as a public officer.

5. The Insurance Commissioner has no duties regarding or authority over the Oklahoma Medicaid program.

6. The Oklahoma Health Care Authority ("OHCA") is statutorily charged with the duty of administering and enforcing the provisions of the Oklahoma Health Care Authority Act, 63 O.S. § 5000.24 et seq. The OHCA administers the Oklahoma Medicaid program.

7. HB 2437's sole purpose is to generate new revenue for the Medicaid Program. It is a revenue bill as that term is used in the Oklahoma Constitution.

8. On Friday, May 21, 2010, the Oklahoma House of Representatives passed House Bill 2437.

9. On Monday, May 24, 2010, the Oklahoma Senate passed HB 2437. The Legislature adjourned *sine die* on Friday, May 28, 2010 – four days after the passage of HB 2437.

10. Pursuant to Oklahoma Constitution Article 5, Subsection 33(B), "No revenue bill

shall be passed during the five last days of the session.” Because HB 2437 was a revenue bill and it was passed during the five last days of session, it should be held unconstitutional.

11. HB 2437 does not contain an effective date. According to the Secretary of State's website, HB 2437 becomes effective August 27, 2010 Presumably this date was calculated according to Article 5 § 58 of the Oklahoma Constitution, which provides that a bill becomes effective ninety (90) days after *sine die* adjournment of the legislature.

12. HB 2437 requires access payments be made by health carriers as defined in HB 2437 to fund the Oklahoma Medicaid program which is administered by OHCA. Therefore, OHCA is a necessary party and made a Respondent to this action for this sole reason.

13. Pursuant to HB 2437, Commissioner Holland is required to collect such access payments from health carriers and transfer those payments through the State Treasurer to OHCA for a purpose outside OID regulatory authority; specifically, the funding and support of the state's federally subsidized Medicaid program and to make full use of any matching funds available to the state, a very broad and general designation. Commissioner Holland is also required to promulgate rules and procedures for the implementation of the duties imposed upon the OID by HB 2437.

14. HB 2437 creates a fund that will contain the access payment revenue to be maintained by the State Treasurer. This will impose certain transfer and other duties upon the State Treasurer and require expenditure of the access fees collected on warrants issued by the State Treasurer. Therefore, the State Treasurer is a necessary party and made a Respondent to this action for this sole reason.

15. The Oklahoma Office of State Finance has fund expenditure responsibilities under HB 2437. All expenditures of the access payments in question are required to be made on warrants of the State Treasurer, based on claims made as prescribed by law with the Director of the Office of State Finance for approval and payment. Therefore, the Director of State Finance is a necessary party and made a Respondent to this action for this sole reason.

16. The so-called “access payments” to be levied and collected from health carriers have been predicted and are intended to generate an estimated \$78 million in new revenue for the state coffers, plus three times that amount in federal matching funds. Raising additional revenue is not merely incidental to the legislation; it is the *sole purpose* of the legislation. The payments are a forced charge assessed in accordance with a reasonable rule of apportionment by authority of the state to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses. Therefore, the “access payments” to be levied and collected by the OID, as defined and established by HB 2437, constitute a tax.

17. According to Oklahoma Constitution, Article 5 § 33(C), a revenue bill cannot take effect unless it is referred to voters and approved by a majority of those who actually vote. Because this was not done, HB 2437 is unconstitutional and the Insurance Commissioner cannot lawfully enforce it.

18. The only exception to Article 5 § 33(C) is to secure the passage of the bill by an approval of *three-fourths (3/4) of the membership* in both the House of Representatives and the State Senate as provided in subsection 33(D).

19. For a revenue bill to receive the constitutionally mandated three-fourths vote in

the House of Representatives, seventy-six (76) votes in favor of the measure are required. The vote on passage of HB 2437 in the House of Representatives was fifty-nine (59) aye votes and thirty-three (33) nay votes with nine (9) members absent. The bill was seventeen votes short of what it needed in the House to avoid a vote of the people.

20. To receive the constitutionally mandated three-fourths vote in the Senate, thirty-six (36) votes in favor of the measure are required. The vote on final passage of HB 2437 in the Senate was twenty-nine (29) aye votes and fourteen (14) nay votes with five (5) members absent. The bill was seven votes short of what it needed in the Senate to avoid a vote of the people.

21. HB 2437 failed to receive the required super-majority vote in *either* of the houses of the Legislature.

22. HB 2437 is all or in part preempted and unenforceable pursuant to the federal Employee Retirement Income Security Act, Section 514, 29 U.S.C.A. § 1144 (“ERISA”), to the extent it relates to ERISA employee welfare benefit plans and does not “regulate insurance” as that term has been developed and construed by the U.S. Supreme Court.

23. Because the Insurance Commissioner has these concerns about HB 2437, she seeks guidance and clarity from this Court as to her duties, particularly because companies, firms and individuals affected by HB 2437 are already seeking guidance from the Insurance Commissioner about its application, its constitutionality, and the authority by which the OID must prepare to administer and enforce the bill now for its effective date on August 27, 2010. Ultimately, the question whether an agency must enforce legislation which, based on its best considered judgment, violates the constraints on revenue generation of Article 5 § 33 – and the requirements of accountability and

transparency imposed by that Section -- is a matter of such weight, magnitude and public importance, it must be decided by this Court.

24. While the Insurance Commissioner understands the dilemma faced by state leaders as to financing needed services to Oklahomans in times when funding for those services have fallen in a recessionary period, the Insurance Commissioner, cannot, consistent with her oath, enforce an unconstitutional and federally pre-empted legislative act upon the health carriers she regulates or the employers she is preempted from regulating, as HB 2437 would require her to do.

25. The Insurance Commissioner is faced with the imminent administration and enforcement of the provisions of HB 2473 as of August 27, 2010. The startup efforts and costs will be substantial. If the law is struck down in whole or in part after tax collection activities have begun, the efforts and costs to unwind and refund previous collections will also be substantial.

26. The health carrier payers as defined by HB 2437 and the citizens of Oklahoma will be irreparably harmed if constitutional revenue generating prohibitions on the legislature and ERISA federal law preemption rules are ignored.

27. For the above reasons, it is important to get a timely and final decision on the merits.

28. This application and petition is not filed within 10 days of any scheduled trial or hearing involving the matters at issue.

WHEREFORE, the Insurance Commissioner respectfully requests the Court to assume original jurisdiction and issue a judgment declaring that HB 2437 is unconstitutional and preempted by federal law, to declare that HB 2437 cannot be

enforced by the Insurance Commissioner consistent with her grant of constitutional and statutory authority to regulate the insurance industry in Oklahoma, and to enter an order against the enforcement of the bill. Due to the August 27, 2010 effective date for HB 2437, the Insurance Commissioner respectfully requests the Court to set an expedited date for Respondents to file briefs in response to this Application and Petition and that the Court set oral argument as soon as possible after completion of briefing.

Respectfully Submitted,



Michael Ridgeway, OBA No. 15657
Kelley C. Callahan, OBA No. 1429
Oklahoma Insurance Department
Five Corporate Plaza
3625 N.W. 56th Street, Suite 100
Oklahoma City, Oklahoma 73112
Telephone: (405) 521-2746
Fax: (405) 522-0125

ATTORNEYS FOR KIM HOLLAND,
OKLAHOMA INSURANCE
COMMISSIONER

CERTIFICATE OF SERVICE

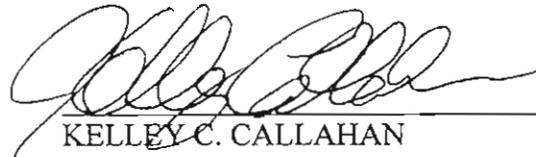
I, Kelley C. Callahan, hereby certify that a true and correct copy of the above foregoing document was hand delivered and served via mail postage prepaid with return receipt requested on this 20th day of July, 2010, to:

Oklahoma Health Care Authority
4545 N. Lincoln, Suite 124
Oklahoma City, Oklahoma 73105
Attn: Michael Fogarty, CEO

Oklahoma Office of State Finance
2300 N. Lincoln Blvd., Room 112
Oklahoma City, Oklahoma 73105
Attn: Michael Clingman, Director

Oklahoma State Treasurer
State Capitol, Room 217
Oklahoma City, Oklahoma 73105
Attn: Scott Meacham, Treasurer

Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105
Attn: W.A. Drew Edmondson, Attorney General



KELLEY C. CALLAHAN
Senior Attorney
Oklahoma Insurance Department