

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA**

STATE OF NEW YORK,
COMMONWEALTH OF
MASSACHUSETTS, DISTRICT OF
COLUMBIA, STATE OF
CALIFORNIA, STATE OF
DELAWARE, COMMONWEALTH
OF KENTUCKY, STATE OF
MARYLAND, STATE OF NEW
JERSEY, STATE OF OREGON,
COMMONWEALTH OF
PENNSYLVANIA,
COMMONWEALTH OF VIRGINIA,
and STATE OF WASHINGTON,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR, R.
ALEXANDER ACOSTA, in his
official capacity as Secretary of the
U.S. Department of Labor, and
UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 18-1747-JDB

**DECLARATION OF MARLENE CARIDE IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

I, Marlene Caride, declare:

1. I am the Commissioner of the New Jersey Department of Banking and Insurance ("DOBI"). I have served as Commissioner of DOBI since June 2018, after having served as Acting Commissioner since January 16, 2018. I previously served as an Assemblywoman in the New Jersey General Assembly and as an attorney in private practice.

2. The statements in this declaration are based upon information made available to me in my official capacity and upon conclusions and determinations reached and made in accordance therewith.

The New Jersey Department of Banking and Insurance

3. DOBI administers the laws of New Jersey as they pertain to the protection of the insurance consumer through the regulation of the insurance industry. The work of DOBI includes: monitoring financial solvency; licensing insurance companies and producers; reviewing and approving rates and forms; overseeing the takeover and liquidation of insolvent insurance companies and the rehabilitation of financially troubled companies; and investigating and enforcing state laws and regulations pertaining to insurance.

The 1992 New Jersey Legislation

4. In 1992, the New Jersey legislature created two programs (P.L. 1992, c. 161 and 162) to standardize and regulate insurance policies available to individuals (Individual Health Coverage Program, "IHC") and small businesses of 2 to 49 (later extended to 1 to 50) employees (Small Employer Health Benefits Program, "SEH"). The IHC Program was created to address a crisis in the availability of "individual" health coverage and to alleviate the issue of health coverage sought by persons who were not eligible to be insured under a group health insurance policy or Medicare. The SEH Program was created to improve New Jersey's small employer health insurance marketplace.

5. The IHC and SEH laws require that insurance be offered in these markets through standard plans promulgated in regulation by the Programs, guarantee the issuance and renewal of coverage, subject the insurers in those markets to a minimum loss ratio requirement, require insurers to use modified community rating with limited rating factors and tight rating bands, and

permit consumers to easily compare insurers' offerings and premiums currently through use of web sites. The IHC and SEH governing boards function within DOBI and regulate the Programs. It is significant to note that the standard plans provide comprehensive health benefits coverage, including unlimited coverage for services such as maternity, mental illness and substance use disorder, and prescription drugs.

6. "Individual health benefits plan" is defined in the IHC law at N.J.S.A. 17B:27A-2 to include "a certificate issued to an eligible person which evidences coverage under a policy or contract issued to a trust or association, regardless of the situs of delivery of the policy or contract, if the eligible person pays the premium..." Since the premium for association plans is typically fully paid by the member, the result of this definition is to require that association plans, even when issued outside of New Jersey, comply with the New Jersey IHC law. The policy or contract must be one of the standard plans; comply with a minimum loss ratio requirement; be modified community rated with limited rating factors and narrow rate bands; and not be medically underwritten. The health plans previously offered by associations did not comply with these robust consumer protections. As such, they have been prohibited in New Jersey since 1992.

7. Similarly, N.J.S.A. 17B:27A-19j(1) provides that health benefits plans issued to small employers through associations, multiple employer associations or out-of-state trusts, regardless of the situs of delivery of the health benefits plan, must comply with the guarantee issue, standard plan, guarantee renewal, participation, and rating and minimum loss ratio requirements of the SEH law. Thus, the 1992 law protected New Jersey residents and small businesses by applying extraterritorially to association plans issued outside of New Jersey. If an employer with 50 or fewer employees participates in an association plan, the small employer must comply with the SEH law.

8. The Patient Protection and Affordable Care Act (“ACA”) incorporated many of the protections that New Jersey put into place in 1992.

Impact of the Association Health Plan (“AHP”) Final Rule on New Jersey

9. The Department of Labor’s Final Rule re-interpreting ERISA’s definition of employer (“Final Rule”) is expected to have a substantial negative impact on the individual and small group insurance markets in New Jersey. In particular, we expect the following: (a) an exponential increase in the marketing and promotion of AHPs that fail to comply with our state laws as detailed above; (b) a decrease in enrollment and an increase in premiums in the individual and small employer markets; and (c) substantial financial and medical risk to our residents who obtain coverage through AHPs.

10. As a result of the Final Rule, DOBI expects that a number of individuals and entities will increase their efforts to market and promote AHPs in New Jersey that comply with the requirements of the Final Rule, but previously would not have been recognized as health plans sponsored by a single “employer” under ERISA. DOBI anticipates that the State will need to expend additional resources and monies to enforce applicable state laws against these AHPs that are fraudulent and/or underfunded.

11. In the past, AHPs have attempted to promote their products in New Jersey in contravention of New Jersey law. DOBI and the New Jersey Office of the Attorney General have resolved several investigations that concerned associations illegally offering health plans to New Jersey residents, including:

- In 2010, CIGNA Healthcare of New Jersey, Inc. and Connecticut General Life Insurance Company, agreed to pay a substantial civil penalty and issue refunds for the improper issuance of group policies to a trust situated in Delaware that provided health insurance to self-employed members of various guilds and associations affiliated with the entertainment industry. Consent Order No. C10-101.

- In 2013, United States Fire Insurance Company agreed to pay a substantial civil penalty and issue refunds for the improper issuance of policies under an association plan. Consent Order No. E13-87.
- In 2016, Fidelity Security Life Insurance Company agreed to pay a civil penalty of \$200,000, and pay over \$1 million in refunds, for the improper issuance of group medical indemnity policies to a trust situated in Illinois that provided individual health benefit plans to 14 employers groups, covering 1,676 persons, located in New Jersey. Consent Order No. E16-15.
- In 2016, Transamerica Premier Life Insurance Company agreed to pay a substantial civil penalty, and \$250,000 in refunds, for the improper issuance of purported hospital confinement indemnity coverage to New Jersey residents through out-of-state trust policies. Consent Order No. E16-109.

12. Due to the Final Rule, DOBI expects that it will need to hire additional employees and devote additional funding to ensure that AHPs are not improperly and impermissibly marketed in our State, and ensure that these plans comply with applicable state and federal laws and regulations. I believe that these additional enforcement resources will be necessary to protect both individuals and small employers in New Jersey. This type of case-by-case enforcement is resource intensive, protracted and requires the involvement of multiple state agencies including the State Office of the Attorney General.

13. DOBI expects enrollment in the individual and small employer markets to decrease while healthier small groups and working owners will leave the individual and small employer markets.

14. The small groups and individuals who leave the IHC and SEH markets are expected to have inferior insurance benefits to that which they would have obtained if they had remained in the IHC and SEH markets. For example, AHPs that are marketed and promoted to small groups and individuals, under the Final Rule, will likely not offer the comprehensive and essential benefits that are required of small groups and individual policies pursuant to the ACA and New Jersey law, including coverage for maternity services, mental health and substance use disorder services, and prescription drugs, among other types of benefits. As a result, the members of these small groups

and individuals who leave the individual and small employer markets and purchase inferior AHPs will be at risk of unanticipated health care costs should they or their dependents become pregnant or suffer a sickness or injury that is not covered.

15. A direct financial harm to New Jersey is expected by the implementation of the Final Rule. Currently, in New Jersey, health insurance companies and health service corporations pay a premium tax of 2% on individual health insurance premiums and 1% on group insurance premiums. Health maintenance organizations pay corporate business tax and a 2% assessment on all premiums. As business moves from the individual and small group markets to self-funded association health plans, the taxes paid on premiums from the former markets will decrease. If business moves to insured AHPs under the Final Rule, premium taxes may be paid in the state of issue, instead of New Jersey.

16. The Final Rule will cause an indirect financial harm to New Jersey. Members of AHPs that do not cover essential health benefits will obtain care that puts them in financial distress or unable to pay their bills. New Jersey residents who enroll in AHPs that turn out to be fraudulent or become insolvent may be unable to pay bills when their claims are denied or are not paid. Further, there is expected to be an increase in uncompensated care for hospitals and other providers as well as an increase in charity care expenses for the State.

17. Health care consumers and providers in New Jersey are expected to be put at risk as a result of the Final Rule. Consumers that obtain inadequate health insurance from AHPs that do not cover their health care needs may decide to forego care due to the unexpected and additional cost. Others, who remain in the individual and small employer markets, will likely need to pay higher premiums if they do not receive state and federal subsidies or may be unable to afford insurance if state and federal subsidies do not offset these higher premiums.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Marlene Caride
Commissioner, New Jersey Department of Banking
and Insurance

Dated: August 14, 2018