

**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.

UNITED STATES DEPARTMENT OF
LABOR, R. ALEXANDER ACOSTA,
Secretary of the United States Department of
Labor, AND UNITED STATES OF
AMERICA,

Defendants.

Case No. 18-1747-JDB

**DECLARATION OF
CHRISTOPHER R.
MONAHAN**

DECLARATION OF CHRISTOPHER R. MONAHAN

I, Christopher R. Monahan, declare:

1. I am the Deputy Insurance Commissioner for the Office of Market Regulation of the Pennsylvania Insurance Department (“Department”), and submit this declaration in support of Plaintiff States’ Motion for Summary Judgment.

The Pennsylvania Insurance Department

2. The Department is the primary regulator for all health insurance products sold in Pennsylvania. As such, the Department:

- a. Examines and licenses insurance companies, producers, and administrators who interact with consumers in matters involving financial and health insurance information.
- b. Monitors the financial solvency of insurance companies to assure the financial strength and stability of entities that make promises to pay health insurance claims.
- c. As specified in law, reviews and approves rates and forms for insurance policies sold in Pennsylvania to assure that the coverage meets the requirements of Pennsylvania law and that rates are not excessive, inadequate or unfairly discriminatory.
- d. Coordinates the rehabilitation or liquidation of insolvent insurance companies, including the access to guaranty fund protections due to policyholders of appropriately licensed companies.
- e. Researches and resolves consumer complaints regarding insurance coverage.
- f. Investigates alleged violations and enforces statutes and regulations pertaining to insurance agents, brokers, companies and other related persons.

3. Health care insurance coverage is a significant piece of Pennsylvania's insurance market, accounting for over \$42 billion in direct written premiums in 2016.¹ This includes all

¹<https://www.insurance.pa.gov/Companies/IndustryActivity/BCBS%20Surplus/Commissioners%20Annual%20Statistical%20Report%20period%20ending%202016%20Final.pdf> (retrieved 7/30/18).

fully-insured coverage, whether in the individual market, the small group market, or the large group market.

4. Pennsylvania has the fifth largest insurance market in the United States, in terms of premium volume, and the 14th largest insurance market in the world.²

Health Care Coverage Jurisdiction

5. The Department has jurisdiction to regulate insured health care coverage provided by an employer to its employees. The Department also has jurisdiction to regulate insured health care coverage sold to individuals, including sole proprietors.

6. Health insurance coverage must be issued by an insurance company licensed by the Department, authorized by the Department to write accident and health insurance, and must offer coverage that complies with Pennsylvania law.

7. However, self-funded health care coverage is not subject to Department oversight and the consumer protections it provides. An employer that self-funds its employees' health care coverage as one aspect of its employee benefit plan is subject to the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA") and regulated by the U.S. Department of Labor ("DOL").

8. Self-funded employer-based coverage may make sense when a single employer is large enough that it can absorb the risk of employees' potentially large medical claims, and, due to influences such as business reputation and shareholder expectations, cannot easily afford to fail its employees.

² See Pennsylvania Insurance Department. *Meet the Insurance Commissioner* at <http://www.insurance.pa.gov/Pages/MeettheCommissioner.aspx> (retrieved 7/3/18).

9. Self-funded employer-based coverage raises concerns when an employer is small and does not have the financial capacity to absorb employees' large medical claims; or when an employer does not answer to shareholders or have an ongoing business reputation to maintain.

10. If an employee of an employer with an insured plan complains to the Department, the Department has jurisdiction to require the licensed issuer of the plan to resolve the concern.

11. On the other hand, if an employee of an employer with a legitimate single employer self-funded plan complains to the Department, the Department has no jurisdiction to require the plan to resolve the concern; the federal DOL is the only regulator for that plan.

12. However, if an individual claims to have coverage through a multiple employer welfare arrangement ("MEWA"), and the Department, on investigation, learns that the MEWA is operating in Pennsylvania, the Department may take action against the MEWA for engaging in insurance activity without a license, though the Department does not have the full panoply of regulatory tools to rectify the consumer's harm.

13. DOL's Final Rule, titled "Definition of 'Employer' Under Section 3(5) of ERISA – Association Health Plans" (the "AHP Final Rule"), identifies an association health plan as "a type of MEWA."³

³ See, e.g., 83 Fed. Reg. at 28919 n. 18 ("AHPs are one type of MEWA"); 28959 ("MEWAs, including AHPs (which are a type of MEWA))".

Pennsylvania's Experience with Associations

14. Pennsylvania has extensive experience with associations securing health coverage for their members, including experience with associations that purported to secure coverage for their members where the coverage was illusory or inadequately funded.

15. In the late 1970s through the early 1980s, there were MEWAs in existence that exploited ERISA's federal preemption of state law, and operated sham "employee benefit plans" exempt from state insurance laws. Pennsylvania and other states had the burden of demonstrating that these were not legitimate employee benefit plans.

16. Because of the issues involving sham, self-funding MEWAs avoiding regulation in Pennsylvania and other states, ERISA was amended in 1983 to expressly permit states to apply their insurance laws to MEWAs to allow states to regulate them to the extent state laws are not inconsistent with Title I of ERISA.

17. After joint regulation of MEWAs between the federal DOL and the Department was established, Pennsylvania formulated a dedicated MEWA Task Force in the early 1990s to tackle the issues regarding an uptick in sham MEWAs.

18. On April 24, 1992, the Department and DOL issued a "Joint State/Federal Statement on Regulation of MEWAs." That statement to "all Pennsylvania insurance agents" reminded those agents that MEWAs acting without a certificate of authority were acting in violation of Pennsylvania law. The Statement included DOL's affirmation of the state's authority:

The U.S. Department of Labor (the Department) joins in this bulletin to notify you that, in general, the federal law regulating employee benefit plans, the Employee Retirement Income Security Act ("ERISA"), will not interfere with the State's authority to enforce its own insurance regulations, including the State's authority to apply insurance licensing requirements to MEWAs under 40 P.S. §46.

The April 24, 1992 Joint State/Federal Statement on Regulation of MEWAs is attached hereto as Exhibit A, and is also published at 22 Pa. B. 3235 (June 27, 1992).

19. Since that time, Pennsylvania has litigated a number of cases, obtaining suspension, seizure and liquidation orders against illegal MEWAs; and revoking the licenses of agents who sold policies for these entities.

20. The consumer harm caused by these MEWAs was significant, leaving many consumers with no coverage and millions of dollars in unpaid claims. This situation was not unique to Pennsylvania. As noted in a 2004 GAO report, small employers were frequent targets of these illegal entities, and states reported that unauthorized entities had at least \$252 million in unpaid claims nationwide from 2002-2004. *See* “U.S. Gen. Accounting Office, GAO-04-312, Private Health Insurance: Employers and Individuals are Vulnerable to Unauthorized or Bogus Entities Selling Coverage”, at 4 (2004).

21. Because of solvency issues and the potential for consumer harm, Pennsylvania still prohibits most self-funded MEWAs. Specifically, under state law, if a group of employers were to join together to self-fund the health care coverage they provide to their employees without first securing a license, it would be considered unlicensed insurance activity and a violation of state law. This regulatory approach is for the benefit of the employees who would purportedly be covered by the self-funded scheme.

The Current Landscape of Health Insurance Coverage in Pennsylvania

22. Pennsylvania has a significant regulatory construct for assuring that health insurance sold in the Commonwealth provides significant benefits, properly discloses to the purchaser and user the coverage provided, and is rated accurately.

23. The Affordable Care Act (“ACA”) has improved the quality of and access to health care for small employers and individuals in Pennsylvania.

24. The ACA expanded the protections available to those insured by small group and individual coverage, by requiring that small group and individual insurance coverage includes additional protections, such as coverage for essential health benefits (e.g. maternity services, mental health and substance use disorder services, and prescription drugs) and preventing insurance policies from excluding individuals based on age, occupation, health condition, or claims experience.

25. However, only some of the ACA’s consumer protections apply to self-funded group health plans and large group insured plans, leaving employees covered by those plans exposed to the possibility that their plans will not provide coverage for the essential health benefits outlined in the ACA, and therefore may not cover benefits such as maternity services, mental health and substance use disorder services, and prescription drugs.

Impact of the Association Health Plan (“AHPs”) Final Rule in Pennsylvania

26. If implementation of the AHP Final Rule is not enjoined, the AHP Final Rule, which reinterprets ERISA’s definition of “employer”, will jeopardize Pennsylvania’s individual and small group insurance markets and negatively impact Pennsylvanian insurance consumers in three key ways.

27. First, if AHPs are permitted to operate as envisioned by the AHP Final Rule, the Department anticipates a substantial increase in the marketing and promotion of association health plans that fail to comply with Pennsylvania laws.

28. The AHP Final Rule allows associations to be formed for the primary purpose of purchasing insurance or providing self-funded coverage, and does not require associations to be in existence for any length of time before offering coverage; both of these provisions are in violation of Pennsylvania law.⁴ These requirements are for the protection of persons receiving health care coverage through the association, as they guard against entities that, for example, may be sham organizations or may not have an administrative structure that can properly manage the business of the health care coverage.

29. Moreover, the AHP Final's Rule's metro area commonality requirement allows cross-state insurance sales. This creates an opportunity for Pennsylvania residents to have insurance plans outside of the regulatory reach of the Department. Should problems arise with coverage provided to a Pennsylvania resident through an association formed, marketed and sold in another state, the Department would not have jurisdiction to require the association to remedy its wrongs.

30. Second, if AHPs are permitted to operate as envisioned by the AHP Final Rule, the Department anticipates that enrollment in individual and small group insurance markets will decrease, and premiums in those markets may concomitantly increase.

31. In spite of the uncertainties in the ACA market, the health insurance marketplace has been stabilizing in Pennsylvania. Based on filings made to the Department for the 2019 plan year, it appears that all of the health insurers selling plans in Pennsylvania's individual market in 2018 will stay in the market in 2019, while collectively requesting aggregate statewide increases of a modest 0.7% for 2019. Insurers selling plans in Pennsylvania's small group market filed plans requesting aggregate statewide increases of only 2.9%.

⁴ See 40 P.S. §756.2(a)(2).

32. If healthy sole proprietors and small groups are able to migrate from traditional insurance plans to AHPs as a result of the AHP Final Rule, this may, as explained by the American Academy of Actuaries, “result in market segmentation that could threaten non-AHP viability and make it more difficult for high-cost individuals and groups to obtain coverage.”⁵

33. Finally, the Department anticipates that if AHPs are permitted to operate as contemplated by the Final Rule, and if state law is preempted, those AHPs will result in harm to Pennsylvania residents, both financial and health-related, and will require significant enforcement efforts by the Department.

34. Small groups and individuals who leave comprehensive insured coverage as required by the ACA will have inferior insurance to that which they would have obtained if they had remained in the small group and individual markets. AHPs that are marketed and promoted to small groups and individuals likely will not offer the comprehensive and essential benefits that are required of small groups and individual policies pursuant to the ACA and Pennsylvania law, including coverage for pregnancy and mental health treatment. What coverage enrollees do have may also be subject to limitations.

35. Even worse, for some enrollees the premiums they pay to enroll in an AHP will not be there to pay claims if the AHP is fraudulent or becomes insolvent. In those scenarios, the consumers will have illusory benefits, no coverage for claims that they do incur, and potentially significant massive medical debt. That is, the AHPs, as illegal MEWAs, are anticipated to trigger fraudulent or ill-advised arrangements such as those that the Department and the federal DOL

⁵ American Academy of Actuaries. *Issue Brief: Association Health Plans* (Feb. 2017) at <https://www.actuary.org/content/association-health-plans-0> (retrieved 7/5/18).

battled in years past, as described above, and which, as the United States General Accounting Office noted, as referenced above, resulted in significant unpaid claims.

36. Further, if the AHP Final Rule is not immediately halted and AHPs form and operate as contemplated by the AHP Final Rule, the Department anticipates that it will need to expend significant efforts to investigate consumer complaints. This type of case-by-case enforcement is a fact- and labor-intensive investigation that can span several months or even years, exposing consumers to considerable risk during the investigation until the case is resolved, and usually resulting in some unrecompensed harm due to the insolvency of the AHPs, whether from mismanagement or fraud.

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


CHRISTOPHER R. MONAHAN

Dated: 8/20/18

EXHIBIT A

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefits Administration



COMMONWEALTH OF PENNSYLVANIA
Insurance Department

April 24, 1992

INSURANCE DEPARTMENT NOTICE NO. 1992-2

SUBJECT: Joint State/Federal Statement
on Regulation of MEWAs

TO: All Pennsylvania Insurance Agents

FROM: U.S. Department of Labor
and
Pennsylvania Department of Insurance
Acting Commissioner Ronald Chronister

The Pennsylvania Department of Insurance has previously warned Pennsylvania agents of the penalties of selling for an unlicensed insurer, including personal liability for unpaid claims, license revocation, and monetary penalties. The Insurance Department has imposed penalties and brought civil litigation against agents for such activities. Despite this, Pennsylvania insurance agents have continued to market insurance products, primarily health benefit programs, on behalf of unauthorized insurers. These unauthorized insurers include operators of certain health benefit programs known as Multiple Employer Welfare Arrangements ("MEWAs") which conduct the business of insurance in Pennsylvania without a certificate of authority, in violation of 40 P.S. §46.

Pennsylvania insurance law, 40 P.S. §46, states that no person shall act as an insurer in Pennsylvania except as authorized by a certificate of authority issued to the insurer by the Pennsylvania Department of Insurance. This includes MEWAs which offer accident and health benefits to Pennsylvania participants.

You should be advised that on many occasions, these unauthorized insurers represent the programs as employee welfare benefit plans subject to only federal regulations, and therefore assert that Pennsylvania has no authority to enforce its insurance regulations.

Memo: All Insurance Agents
April 24, 1992
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The U.S. Department of Labor (the Department) joins in this bulletin to notify you that, in general, the federal law regulating employee benefit plans, the Employee Retirement Income Security Act ("ERISA"), will not interfere with the State's authority to enforce its own insurance regulations, including the State's authority to apply insurance licensing requirements to MEWAs under 40 P.S. §46. The Department notes that some operators may refer to a program of health benefits as "collectively-bargained" plans, or "employee-leasing" plans. A determination as to whether these particular programs may be regulated by the State usually may only be made on a case by case basis.

Accordingly, agents that market any insurance products, including any program of health benefits, or sell any such products, should examine carefully whether the insurer has been issued a certificate of authority by the State and whether the product has been approved for use.

For information regarding whether an entity has a Pennsylvania certificate of authority, call the Department of Insurance, 1-717-787-2735.

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