

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

DECLARATION OF ANDREW STOLFI

Pursuant to 28 U.S.C. § 1746, I, Andrew Stolfi, declare and state as follows:

1. I am over the age of 18 and competent to testify.
2. I am the Oregon Insurance Commissioner and the Administrator for the Division of Financial Regulation of the Oregon Department of Consumer and Business Services ("DCBS"). As such, I am responsible for enforcement of the Oregon Insurance Code, including regulation of insurance carrier licensing, solvency, and product offerings, review

and approval of rates and forms used by insurance carriers, and ensuring a fair insurance marketplace for Oregon consumers. These duties encompass the area of health insurance subject to regulation by the State of Oregon. I have personal knowledge of the matters stated herein.

3. The Affordable Care Act (ACA) increased access to affordable health insurance coverage in Oregon. Overall the number of individuals with insurance has increased. In Oregon, in 2017, 3,747,500 people had health insurance coverage (93.8%). In 2013 before ACA, 3,236,200 people in Oregon had health insurance coverage (85.5%). Approximately 500,000 people gained health coverage in Oregon between 2013 and 2017. The rate of uninsured in the state is now 6.2%. This is a decrease from 2013 when 14.5% of Oregonians were uninsured. DCBS is therefore very concerned about any action by the federal government that will

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contribute to undermining the ACA.

4. The Department of Labor's Final Rule reinterpreting ERISA's definition of "employer" ("Rule") to expand the availability of association health plans (AHPs) will have a negative impact on the Oregon individual and small group markets. This is because the Rule creates additional consumer confusion in the market as to the health coverages available under state law, particularly after the federal government has already, among other things, removed the individual mandate penalty, eliminated cost-sharing reduction payments to carriers, and expanded the benefit period on short-term, limited duration insurance. The consumer confusion caused by this Rule, along with the additional activities of the federal government to undermine the ACA, is likely to cause some individuals to forego insurance coverage altogether and others to purchase AHPs that violate Oregon law.

5. Coverage offered to individuals and small employers through an AI-IP may be less comprehensive than what would be required for those groups under the ACA. The Rule allows an AI-IP to be treated as a single (large) employer that sponsors a group health plan under ERISA. Importantly, coverage offered to large employers is not subject to essential health benefits (EHB) requirements under the ACA. Consequently, coverage offered to individuals and small employers through an AI-IP may be less comprehensive (and thus less expensive) than what must be offered under the ACA. Moreover, the ability for an AHP to exclude certain categories of coverage that are required under EI-IB may allow an AI-IP to attract healthier groups and individuals. For example, an AI-IP could potentially exclude coverage of maternity services and expensive prescription drugs.

6. The premiums charged for AI-IP coverage may be discriminatory and predatory. Health insurance coverage offered to large employers is not subject to ACA rating restrictions such as the single risk pool and allowed rating factors. This means that the rates charged for AHP coverage may be set in ways that would not be permitted, and that may be considered discriminatory, under the standards applicable to the ACA individual and small employer

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markets. In particular, nothing in the Rule prevents an AI-IP from offering premium rates to individuals and small employers that are specifically designed to undercut the rates that must be charged to younger enrollees under the ACA requirements.

7. The Rule allows some AHPs to begin offering coverage under the new standards as soon as September 1, 2018. As described above, that is the earliest date when AHPs could begin offering leaner, cheaper coverage to individuals and small employers under

the Rule. While this coverage may be less comprehensive, our experience has shown that many insurance purchasers will seek out the lowest cost coverage that is available to them.


8. To the extent that the Rule causes enrollees to move from ACA compliant coverage to AI-IP coverage, enrollment in the private ACA health insurance markets will shrink. The remaining enrollees in the ACA markets will likely have relatively higher average medical expenses than is the case today. This will cause premiums to rise in the ACA markets, meaning that fewer Oregonians will be expected to enroll. In the worst case scenario, the Rule could drive Oregon's ACA markets into a death spiral of ever-rising premiums and decreasing enrollment, eventually forcing insurers to stop offering products. The ACA markets, which remain available to everyone, could eventually collapse.

9. Consumer confusion created by the Rule will be amplified as insurance carriers, agents, and associations, unfamiliar or unconcerned with Oregon state law, offer AI-IP coverage to Oregon consumers. Although Oregon's strict regulation of AHPs may remain unchanged by the Rule, Oregon anticipates dedicating significant resources to ensuring that all health coverages are compliant with state law. Oregon expects to expend considerable enforcement resources due to AI-IP offerings that do not meet state law requirements. To date, DCBS has received a significant number of inquiries from carriers and fellow regulators regarding the formation of AI-IPs based upon the Rule. From these inquiries it is reasonable to conclude that carriers are currently planning product offerings based upon the Rule that will be introduced into the Oregon market in the near future, and that these offerings may not comply with state law.

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10. In addition, the Rule opens the door to fraud and insolvencies. The AI-IP market has a long history of attracting bad actors and being susceptible to fraud. DCBS will have to expend scarce state resources to try to police AI-IPs to protect the public from fraudulent promoters.

Executed on August 10, 2018 in Salem, Oregon.



Andrew Stolfi

Oregon Insurance Commissioner

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