**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

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| **KIM HOLLAND,** Insurance Commissioner, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. |
| | ) | #108519 |
| **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. | ) | |

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Brief of Petitioner, Kim Holland, Insurance Commissioner

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# BRIEF OF PETITIONER IN SUPPORT OF EMERGENCY EXPEDITED APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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July 20, 2010

## INDEX

Pursuant to Sup. Ct. R. 1.191(a), Petitioner, Kim Holland, Insurance Commissioner ("Insurance Commissioner") submits this Brief in support of her Emergency Expedited Application to Assume Original Jurisdiction and Petition for Declar atory Judgment and Injunctive Relief:

## STATEMENT OF FACTS AND THE RECORD

The text of Oklahoma House Bill 2437 ("HB 2437") that was ultimately signed into law is found in the Appendix A. The bill – minus its express effective date (Section 6) and emergency clause (Section 7) passed in the House on May 21st and in the Senate on May 24th. The 2010 Oklahoma legislative session ended May 28, 2010. On June 5, 2010, the Governor of the State of Oklahoma signed HB 2437. According to the Oklahoma Secretary of State's website, HB 2437 becomes effective on August 27, 2010. *See* www.sos.ok.gov/documents/Legislation/legeffmeasure2010pdf. The effective date was apparently calculated based on the provisions of Article 5, Section 58 of the Oklahoma Constitution. *See* Appendix B, Secretary of State Effective Dates by Measure: 2010 Regular Session. HB 2437 will be codified in the Insurance Code at 36 O.S. §§ 7300-7303.

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.* relating to the business of insurance in Oklahoma. 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. HB 2437 requires "access payments" of one percent of medical claims paid to be made by health carriers (as defined in bill) to the Insurance Commissioner to fund the Oklahoma Medicaid program which is administered by OHCA. *See* HB 2437 Sections 1(5) and 2(B) (C) and (D),

Appendix A.

HB 2437 causes the Insurance Commissioner to act as a conduit for the collection of funds that are then transferred through various state financial officers to OHCA. The funding and support of the state's federally subsidized Medicaid program has nothing to do with the Insurance Commissioner's power and authority under the Oklahoma Constitution and statutes as an insurance regulator. Commissioner Holland is also required to promulgate rules and procedures for the implementation of the duties imposed upon the OID by HB 2437. (HB 2437 Section 4(G), Appendix A). For the reasons stated above, OHCA has been joined as a necessary party. Because both the State Treasurer and the Office of State Finance have roles in the transfer of access funds collected by the Insurance Commissioner to OHCA, they are also named as necessary parties.

The sole purpose for passage of HB 2437 was to raise revenue for Oklahoma's Medicaid program. Article 5 § 33 of the Oklahoma Constitution requires that all revenue bills either pass with 3/4 approval from both houses of the legislature or be submitted to a vote of the people. HB 2437 failed to garner the required three-fourths majority from either house of the legislature, yet it is not slated for a popular vote. This same section of the Oklahoma Constitution also forbids the passage of revenue bills within the last five days of the legislative session, as was the case for HB 2437. Because the provisions of Article 5 § 33 of the Oklahoma Constitution were not followed in its enactment, HB 2437 is unconstitutional and the Insurance Commissioner cannot lawfully enforce it.

"Health carriers" subject to the "access payments" does not just mean insurance companies. In actuality, the majority of revenue that is projected to be raised pursuant to the new tax will be paid by or on behalf of self-funded or self-insured employee welfare benefit

plans, commonly known as "ERISA plans." State regulation of ERISA plans is generally preempted by federal law, as explained later in this brief.

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 both federal law and 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 and addressed by this Court in an extraordinary proceeding.

## SUMMARY OF THE ARGUMENT

### 1. The Insurance Commissioner Has Standing and Authority to Seek an Emergency Declaratory Judgment for the Public Good to Block an Unconstitutional Tax She Has no Authority to Collect or Administer

a. The Insurance Commissioner is "charged with the duty of administration and enforcement of the provisions of the Oklahoma Insurance Code". 36 O.S § 307. She has sworn 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."

b. The Insurance Commissioner has been presented with an intolerable conflict with that duty in the form of HB 2437. It is indisputable that the sole purpose for HB 2437 was to raise revenue for the state. The access payments to be levied and collected from health carriers provide general benefit to the operations of the state and can be used to make full use of any federal funds available to the state. According to guidance from this Court's previous decisions, the access payments to be levied and collected by the OID constitute a tax. HB 2437 is a revenue bill subject to Article 5 § 33 of the Oklahoma Constitution. Because the provisions of Article 5 § 33 of the Oklahoma Constitution were not followed in its enactment, HB 2437 is

unconstitutional and the Insurance Commissioner cannot lawfully enforce it.

c. Because the Insurance Commissioner has these concerns about HB 2437, she seeks emergency 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 before 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 of the Oklahoma Constitution -- is a matter of such weight, magnitude and public importance, it must be decided by this Court. Consequently, the Insurance Commissioner may properly seek extraordinary relief of a declaratory judgment from this Court.

**2. The Access Payments Established by HB 2437 Are a Tax Revenue Raising Measure, thus HB 2437 Is a Revenue Bill Subject to Article 5 § 33 of the Oklahoma Constitution.**

a. The access payments to be levied and collected from health carriers are based on the assumption they will generate an estimated $78 million in new revenue for the state coffers, plus three times that amount in federal matching funds. The additional revenue is not merely incidental to the legislation; it is the purpose of the legislation.

b. The access fees created by HB 2437 are a general tax. The Insurance Commissioner may not levy or administer fees or taxes which do not specifically relate to the business of insurance and the entities the Insurance Commissioner regulates. HB 2437 is for the purpose of funding general operations of the state or one of its agencies and was not enacted to fund matters which specifically relate to the business of insurance and the entities the Insurance Commissioner regulates.

c. Because HB 2437 is a revenue bill, it is proper to examine the timing of its passage. Article 5, Section 1 of the Oklahoma Constitution states in relevant part that: "the Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives . . ." Therefore, for a measure "to be passed" during a legislative session, both houses of the Legislature must approve the measure by the requisite number of votes. HB 2437 violates subsection B of Section 33 of Article 5 of the Oklahoma Constitution and should be held unconstitutional. It is a revenue generating measure not meeting the requirements of subsection B of Section 33 of Article 5, because it was passed in the last five days of the legislative session. Additionally, HB 2437 violates subsection C of Section 33 of Article

5 because it did not pass in the form of a measure that will be sent to a vote of the people of Oklahoma at the next general election. Nothing in the Enrolled version of HB 2437 suggests that the provisions of the bill will appear on a ballot – the measure does not contain language in the enacting clause or referral clause, nor does the bill contain a filing clause or ballot title to suggest that the voters of Oklahoma may approve the revenue bill.

d. Finally, the only exception in Section 33 of Article 5 of the Oklahoma Constitution to submitting a revenue bill to a vote of the people 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 D of Section 33 of Article 5. HB 2437 failed to receive the required super-majority vote in both of the houses of the Legislature.

**3. HB 2437 Is All or in Part Preempted and Unenforceable Pursuant to ERISA**

a. To the extent HB 2437 relates to employee benefit plans and its provisions are not "related to the business of insurance," the bill is pre-empted by the federal ERISA act.

## ARGUMENT AND AUTHORITY

## PROPOSITION I

## THE INSURANCE COMMISSIONER HAS STANDING AND AUTHORITY TO BRING THIS DECLARATORY JUDGMENT AND INJUNCTIVE ACTION FOR THE PUBLIC GOOD TO BLOCK AN UNCONSTITUTIONAL TAX SHE HAS NO AUTHORITY TO COLLECT OR ADMINISTER

The Oklahoma Constitution creates the Oklahoma Insurance Department and the office of Insurance Commissioner. Okla. Const. Article 6 §§ 22 and 23. The Insurance Department is "charged with the execution of all laws now in force, or which shall hereafter be passed, in relation to insurance and insurance companies doing business in the State." Okla. Const. Article 6 §§ 22. The Insurance Commissioner is "charged with the duty of administration and enforcement of the provisions of the Oklahoma Insurance Code". 36 O.S § 307. Additionally, the Commissioner, prior to assuming her office, swore an oath to support the Constitution and the laws of Oklahoma in the discharge of her office. 51 O.S. § 36.1, 36.2A. Because the Commissioner cannot administer and enforce the referenced

statutes without violating her sworn oath, she has the authority and responsibility to bring an original action in this Court challenging/questioning the constitutionality of HB 2437.

The Supreme Court has confirmed that it has the power, in exceptional cases, to grant declaratory relief in an original action. *Ethics Comm'n v. Cullison,* 1993 OK 37, 850 P.2d 1069,1073 ( providing declaratory relief to resolve claimed *intolerable conflict* between Ethics Commission and Legislature)(emphasis supplied); *Campbell v. White*, 1993 OK 89, 356 P.2d 255 (original action seeking declaratory relief by state representatives asserting invalidity of legislation under single subject rule). This is such an exceptional case. On the issue of state agency challenges to statutes impacting the discharge of agency constitutional duties, the *Cullison* court observed:

> The Commission attempts to invoke our original jurisdiction pursuant to Okla. Const. Art. 7 § 4 on the basis of this court's superintending control jurisdiction, on the doctrine of *publici juris,* and upon the circumstances of this dispute as being one between two powers of State government, each imbued with constitutionally vested authority. We find that the case before us presents one of those *rare* circumstances where this Court should grant a form of declaratory relief.
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> We have in the past provided a remedy when a branch of state government brings a legal claim alleging that an "intolerable conflict" exists with a co-ordinate branch of state government amounting to governmental gridlock. *Swezey v.Fisher,* 484 P.2d 501, 503 (Okla.1971). *See also Moore-Norman Area Vocational Tech. Sch. Dist. v. Board of Trustees,* 519 P.2d 497 (Okla.1974). We have further stated that a branch of government will not be permitted to destroy itself, and that this court must utilize an "appropriate remedy sufficient to preserve it." *Davis v. McCarty,* 388 P.2d 480, 488 (Okla.1964). The Commission claims that an intolerable conflict exists with the Legislature, and that the Commission's implementation of H.J.R. 1077 would effectively destroy the Commission. The requested relief is a claim that the *Commission is adversely affected* by the face of the statute, and that it need not first violate the law in order to obtain a declaration as to the validity of the law. Such a claim is proper for declaratory relief. *See Oklahoma Tax Commission v. Smith,* 610 P.2d 794, 801 (Okla.1980). We conclude that providing a form of declaratory relief to resolve a claimed intolerable conflict between the Ethics Commission and the Legislature is consistent with those situations where this court has provided a remedy to resolve inter-governmental legal claims within the discretionary superintending jurisdiction of this court.

1993 OK 37, 850 P.2d 1069, 1072-74.

Notably, in *Cullison* the Ethics Commission brought the original action in its own name and was represented by its own counsel. In this regard, *Cullison* reflected:

> The Attorney General is the Chief Law Officer of the State who appears on behalf of either the Legislature or Governor to prosecute or defend court actions where the State is an interested party. 74 O.S.Supp.1992 § 18b (3). Where the State is a party before this Court the Attorney General must ordinarily appear on the State's behalf. *State ex rel. Howard v. Oklahoma Corporation Commission*, 614 P.2d 45, 49 (Okla.1980). In actions to declare the unconstitutionality of a statute the Attorney General shall be served and is entitled to be heard. *Oklahoma Tax Commission v. Smith*, 610 P.2d at 803. *See* 12 O.S.1991 § 1653. The Court invited the Attorney General to appear herein, and on December 9, 1992, she filed her *amicus curiae* brief, challenging the jurisdiction of the Court. The interests of the State have clearly been represented in the present controversy where the Attorney General has made her objections known, and the Speaker of the House and President Pro Tempore of the Senate are before the Court in their official capacities without a challenge to the process by which they were hailed into this Court.

1993 OK 37, 850 P.2d 1069, 1074.

After carefully considering referral of this matter to the Attorney General, as the *Cullison* court alludes to above, the Insurance Commissioner, in consultation with her staff and legal division, decided that such a step was precluded by time sensitivity and need for finality. By the time the matter could be submitted to the Attorney General's office and vetted through its substantial review, research and evaluation procedures, the Insurance Department would, by necessity, have to implement, administer and enforce this infirm law. Even after an Attorney General Opinion might be drafted (an outcome not guaranteed), it is not clear whether a finding by the Attorney General that the statute is unconstitutional would have any effect on the Commissioner's responsibility to enforce it.

As the Oklahoma Supreme Court held in *State ex rel. York vs. Turpen*, 1984 OK 26, ¶ 12, 681 P.2d 763,

> the issuance of an [Attorney General's] opinion finding an act of the legislature unconstitutional is, as discussed, an unwarranted encroachment upon the power of the legislature and the unique duty of the courts. It is therefore determined, and this Court holds, an opinion of the Attorney General stating an act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state.

HB 2437 has an effective date of August 27, 2010. The only timely and final method to challenge and block the implementation of the unconstitutional statute is for the Commissioner to file the instant extraordinary jurisdiction application with this Court.

Finally, in the likely event this decision will come before a state and/or a federal court via litigation filed by parties other than the State, it is appropriate for the highest Court in Oklahoma to make decisions about the requirements placed on revenue raising measures by the Oklahoma Constitution.

## PROPOSITION II

### THE ACCESS PAYMENTS ESTABLISHED BY HB 2437 CONSTITUTE A TAX AND NOT A FEE, THUS HB 2437 IS A REVENUE BILL SUBJECT TO ARTICLE 5 § 33 OF THE OKLAHOMA CONSTITUTION.

Article 5, Section 33 of the Oklahoma Constitution provides:

A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.

B. No revenue bill shall be passed during the five last days of the session.

C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.

D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall

> not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

In *Anderson v. Ritterbusch*, 1908 OK 250, 98 P. 1002, 1006, the Oklahoma Supreme Court stated that "'the revenue laws are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise.'" (*quoting* The Nashville, 17 Fed. Cas. page 1176 (No. 10,023)). The Court continued by citing *United States v. Mayo*, 26 Fed. Cas. page 1230 (No. 15,754), wherein the *Mayo* Court stated that "'[t]he true meaning of revenue laws in this clause is such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government.'" *Id.* (quoting *Mayo*, 26 Fed. Cas. 1230). The *Anderson* ruling has been upheld numerous times over the years. *See Leveridge v. Oklahoma Tax Commission*, 1956 OK 77, 294 P.2d 809; *Pure Oil Co. v. Oklahoma Tax Commission*, 1936 OK 516,66 P.2d 1097; *Calvey v. Daxon*, 2000 OK 17, 997 P.2d 164.

In a case directly speaking to revenue issues before the Court, *Orthopedic Hospital of Oklahoma v. Oklahoma State Dept. of Health*, 2005 OK CIV APP 43, 118 P.3d 216 (Released for Publication by Order of the Court of Appeals), the court found that a statute assessing fees on hospitals that did not receive at least 30% of their gross income from Medicare, Medicaid, uncompensated care, and corporate tax contributions, and then authorizing distribution of collected fees among all hospitals which exceeded the 30% threshold, violated the Oklahoma Constitution as an unauthorized tax. As the court stated in finding that the "fee" was actually a tax:

> Article 10, § 14 of the Oklahoma Constitution requires in relevant part that "taxes shall be levied and collected by general laws, and for public purposes only . . . ." The first question is whether § 1-702b, which states it only imposes a "fee," is in fact a tax that is subject to the public purpose restriction of Art. 10, § 14. Citing 51 Am.Jur.,

Taxation, § 3, the Oklahoma Supreme Court defined a "tax" as follows:

> . . . *a forced burden, charge, exaction, imposition or contribution* assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction, to provide public revenue for the support of the government, the administration of the law, *or the payment of public expenses.*
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> *Olustee Co-op. Ass'n v. Oklahoma Wheat Utilization Research & Market Devel. Comm'n*, 1964 OK 81, ¶ 8, 391 P.2d 216, 218 (emphasis added) (holding a fee imposed on wheat growers of a certain portion of wheat per bushel was a tax).
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> The "fee" is assessed under the authority of the State of Oklahoma for the stated purpose of helping with the burden of paying the public expense of indigent care. .... The assessment under § 1-702b clearly falls within the definition of a tax, regardless of the name attached by the Legislature.

2005 OK CIV APP 43, ¶¶ 5-6, 118 P.3d 216, 21.

In the present case, the access payments to be levied and collected from health carriers have been estimated to generate $78 million in new revenue for the state coffers, plus three times that amount in federal matching funds. The additional revenue is not merely incidental to the legislation; it is the ***sole purpose*** of the legislation. The access payments of HB 2437 are a tax designed to fund government functions. *See* Appendix D, State Agency Appropriation Summary at page 3 (listing under "Additional Revenues" the 78 million dollars from "1% Health Care Access Payment to OHCA"); Appendix E, Bill Summary, Fiscal Analysis Section. Similarly, after passage of the bill the Oklahoma House of Representatives' Session Overview described HB 2437 as follows:

> In an effort to shore up the state's Medicaid program and head off severe cuts to hospitals and other health care providers due to the budget shortfall, the Legislature enacted HB 2437 which creates the Health Carrier Access Payment Revolving Fund and establishes a 1 percent access payment to be paid by health carriers on claims.

See Appendix F, 2010 Session Overview, at p. 6.

There is no doubt HB 2437 was passed for the purpose of raising revenue or "creating

and securing revenue or public funds for the service of the government." There is no doubt that the payments due pursuant to HB 2437 are "to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses." There is no doubt that the "access payments" are a tax and that HB 2437 is a revenue bill subject to the constraints of Article 5 § 33.

Because HB 2437 is a revenue bill, it is proper to examine the timing of its passage. Article 5, Section 1 of the Oklahoma Constitution states in relevant part that: "the Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives . . ." Therefore, for a measure "to be passed" during a legislative session, both houses of the Legislature must approve the measure by the requisite number of votes.

On Friday, May 21, 2010, the Oklahoma House of Representatives passed House Bill 2437. 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. Therefore, HB 2437 violates subsection B of Section 33 of Article 5 of the Oklahoma Constitution prohibiting passage of revenue bills within five days of the end of the session and should be held unconstitutional. (*See* Journal Record Bill Chronology, Appendix C). For a revenue generating measure to meet the requirements of subsection B of Section 33 of Article 5, the measure would have had to be passed by *both* houses of the Legislature by no later than Friday, May 21, 2010. (*See* Journal Record Bill Chronology, Appendix C).

Additionally, HB 2437 violates subsection C of Section 33 of Article 5 because it did not pass in the form of a measure that will be sent to a vote of the people of Oklahoma at the next general election. Nothing in the Enrolled version of HB 2437 suggests that the provisions of the bill will appear on a ballot – the measure does not contain language in the

enacting clause or referral clause, nor does the bill contain a filing clause or ballot title to suggest that the voters of Oklahoma may approve the revenue bill.

Finally, the only exception in Section 33 of Article 5 of the Oklahoma Constitution to submitting a revenue bill to a vote of the people 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 D of Section 33 of Article 5. The vote on passage to fourth reading 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. (*See* Journal Record Bill Chronology, Appendix C). 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 final passage of HB 2437 in the Senate was twenty-nine (29) aye votes and fourteen (14) nay votes with five (5) members absent. (*See* Journal Record Bill Chronology, Appendix C). To receive the constitutionally mandated three-fourths vote in the Senate, thirty-six (36) votes in favor of the measure are required. HB 2437 failed to receive the required super-majority vote in *both* of the houses of the Legislature. (*See* Journal Record Bill Chronology, Appendix C). HB 2437 did not pass by 3/4 or even 2/3 of the members. It did not even pass by 2/3 of the members present at the time of voting. (*See* Journal Record Bill Chronology Appendix C).

## PROPOSITION III

## HB 2437 IS ALL OR IN PART PREEMPTED AND UNENFORCEABLE PURSUANT TO ERISA

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. See e.g. *Hollaway, M.D. v. Unum Life Ins. Co. of America,* 2003 OK 90, 89 P.3d 1022 (noting that, subject to decisions of U.S. Supreme Court, the Oklahoma Supreme Court is free to promulgate judicial decisions grounded in its own interpretation of federal law: this Court held that a bad faith cause of action did not regulate insurance and is not saved from ERISA preemption). It is estimated that sixty percent of all medical payments made by so-called "health carriers" are made by or on behalf of self-funded employee welfare benefit plans. These plans, commonly known as "ERISA plans" are preempted from being regulated by the states as insurance companies. *See* § 514(b)(2)(B) of ERISA, 29 U.S.C.A. § 1144(b)(2)(B).

ERISA's definition of "employee welfare benefit plan" is broad and encompasses almost any health care benefit a person receives through employment. 29 U.S.C.A. 1001(b); *Peckham v. Gem State Mut. of Utah,* 964 F.2d 1043 (10th Cir. 1992). Under ERISA Section 514, 29 U.S.C.A. § 1144, ERISA preempts all state laws "relating to" an employee benefit plan, subject to certain exceptions. A law "relate[s] to" an employee benefit plan for purposes of § 514(a) if it (1) has a connection with or (2) reference to such a plan." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.,* 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997). Whether a state law has a forbidden "reference to" employee benefit plans subject to ERISA, and thus is within the scope of ERISA's preemption provision, depends on whether: (1) the law acts immediately and exclusively upon ERISA plans, or (2) the existence of ERISA plan is essential to the law's operation. ERISA § 514(a), 29 U.S.C.A. § 1144(a).

Subsection 514(b) contains several limits to ERISA's preemption power. 29 U.S.C.A.

§ 1144(b)(2). One of these limiting provisions, § 514(b)(2), contains what is commonly called the "Savings Clause." Under the Savings Clause, § 514(b)(2)(A) of ERISA, 29 U.S.C.A. § 1144(b)(2)(A), ERISA does not preempt any state law which "regulates insurance," recognizing the regulatory purview granted state officials such as the Insurance Commissioner when it comes to the business of insurance.

A two-part test for determining savings clause application was adopted and explained by the U.S. Supreme Court in *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003), where the Supreme Court held that the "Any Willing Provider" ("AWP") provision of Kentucky's Health Care Reform Act was saved from ERISA preemption. 538 U.S. at 339, 123 S.Ct. 1471. The petitioners, an association of health plans, argued that ERISA preempted the AWP law, and so the state insurance commissioner's enforcement of it was unconstitutional. *Id.* at 332-33, 123 S.Ct. 1471. The Supreme Court held that Kentucky's AWP laws were saved from ERISA preemption because they regulated insurance. *Id.* at 342, 123 S.Ct. 1471.

In reaching its conclusion, the Court clarified what constitutes a law that regulates insurance by formulating a new two-part test. *Id.* First, the state law must be specifically "directed toward entities engaged in insurance." Second, the state law must substantially affect the "risk pooling arrangement" between the insurer and the insured. *Id.* This test leaves room for state supervision of ERISA-related plans or issues in the course of the regulation of insurance as defined by the *Kentucky Ass'n* case.

Pursuant to HB 2437, Commissioner Holland is required to collect access payments from a wide array of health carriers as defined in the bill. (*See* HB 2437 Section 1(5), Appendix A). The definition of "health carriers" in HB 2437 includes employee welfare

benefit plans and several related entities. Then, the Insurance Commissioner must transfer those payments through the State Treasurer to OHCA for a purpose unrelated to the regulation of insurance; specifically, the funding and support of the state's federally subsidized Medicaid program as well as many other possible general funding purposes. (*See* HB 2437 Sections 1(5) and 2(B)(C) and (D), Appendix A; Appendix D, State Agency Appropriation Summary at page 3).

HB 2437 is not specifically directed toward entities engaged in insurance, nor does it affect the risk pooling arrangement between the insurer and the insured. To the extent that the legislation relates to employee benefit plans – which is the majority of its target -- the bill is pre-empted by ERISA.

## CONCLUSION

The Insurance Commissioner respectfully requests the Court to issue a judgment declaring HB 2437 unconstitutional, 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, to declare that HB 2437 is preempted by federal law, 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,

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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 26th day of July, 2010, to:

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