

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
CIVIL COURT DIVISION**

**KEN SELZER, in his official capacity
as COMMISSIONER OF INSURANCE for
the STATE OF KANSAS,**

Plaintiff

v.

**STATE OF KANSAS, LARRY
CAMPBELL, in his official
capacity as the Director of Budget, JEFF
COLYER, in his official capacity as Governor
of the State of Kansas, SARAH L.
SHIPMAN, in her official capacity as
Secretary of the Department of
Administration,**

Defendants

**Case No.: 2018-CV-000540
Division 2**

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR TEMPORARY INJUNCTION**

COMES NOW Plaintiff Ken Selzer, in his official capacity as Commissioner of Insurance for the State of Kansas, on behalf of the Kansas Insurance Department (“KID”) by his attorneys, Diane Minear and Susan Ellmaker, pursuant to K.S.A. 60-901 and K.S.A. 60-902 and respectfully submits this Memorandum in Support of Plaintiff’s Motion for Temporary Injunction.

Introduction

The Kansas Insurance Department is a fee funded state agency aggrieved by the transfer of statutory fee funds from its segregated fee fund account into the State General Fund (“SGF”) pursuant to Substitute for Senate Bill 189 (Chapter 104, 2017 Session Laws of Kansas).

Statement of Facts

On May 24, 2017, the 2017 Legislature approved House Bill 2054 in response to a Kansas court case that challenged the sweeping of agency fee funds received by statute for a particular and specific purpose. *Kansas Bldg. Industry Workers Comp. Fund, et al. v. State*, 302 Kan. 656 (2015). Governor Sam Brownback signed House Bill 2054 amending K.S.A. 75-7036 in part:

(b) The following funds shall be used for the purposes set forth in the statutes concerning such funds and for no other governmental purposes. It is the intent of the legislature that the following funds and the moneys deposited in such funds shall remain intact and inviolate for the purposes set forth in the statutes concerning such funds . . . insurance department service regulation fund, K.S.A. 40-112, and amendments thereto

On June 26, 2017, Governor Sam Brownback signed Senate Substitute for House Bill 2002 authorizing an \$8,000,000 sweep of the Insurance Service Regulation Fund (“Insurance Regulation Fund”) into the SGF in FY2018 and an \$8,125,000 sweep of the Insurance Regulation Fund into the SGF in FY2019. The 2018 Legislature took appropriate action through Substitute for Senate Bill 189 (Chapter 104, 2017 Session Laws of Kansas) to remedy the unauthorized sweep for FY2019 when it approved an \$8,000,000 reduction of the sweep. On May 15, 2018, Governor Jeff Coyler vetoed the proposed reduction of the sweep from the Insurance Regulation Fund.

KID delivered letters to the Defendants on June 29, 2018, explaining that the sweeps were unauthorized and unconstitutional and demanding they be halted. On July 2, 2018, Kelly Alexander, Office of the Chief Financial Officer of the Kansas Department of Administration, requested legal advice from the Department of Administration's Chief Counsel John Yeary regarding KID's demand to halt the sweeps. Mr. Yeary's response was that, "absent a court order to the contrary the agency is required to follow the law and make the transfer."

KID filed a Petition on July 13, 2018 for declaratory relief pursuant to K.S.A. 60-1701 *et seq.*, injunctive relief pursuant to K.S.A. 60-901 *et seq.*, relief in *mandamus* pursuant to K.S.A. 60-801 *et seq.*, and a writ of *quo warranto* pursuant to K.S.A. 60-1201 *et seq.* The Petition alleges that the portion on Senate Substitute for House Bill 2002 that sweeps fee funds from the Insurance Regulation Fund is a revenue raising measure that takes property without due process and violates K.S.A. 75-3036, the taxing provisions in Article 11 §1 and 5 of the Kansas Constitution, the Commerce Clause, and the Fourteenth Amendment to the United States Constitution.

The Insurance Regulation Fund was established pursuant to K.S.A. 40-112, for the sole purpose of maintaining the insurance department and the payments of expenses incident thereto. Pursuant to K.S.A. 40-112(a), all expenditures of the Insurance Regulation Fund must be approved by the Commissioner. The money in the Insurance Regulation Fund includes all fees received by KID pursuant to any statute and 1% of premium taxes received pursuant to K.S.A. 40-252. The primary payers into the Insurance Regulation Fund are insurance companies, agencies, and agents. KID does not receive funding from the SGF. The SGF receives 99% of all premiums taxes collected by KID. Any unexpended balance in the Insurance Regulation Fund at

the close of the fiscal year must remain credited to the Insurance Regulation Fund for use in the next fiscal year to reduce future assessments and meet cash flow demands of KID.

Revenues for the Insurance Regulation Fund for FY2018 totaled \$17,956,372. The unauthorized sweep of over \$8,000,000 in FY2018 was greater than 47% of the FY2018 revenues in the Insurance Regulation Fund. The unauthorized sweep of \$8,125,000 in FY2019 would be greater than 44% of the FY2019 revenues in the Insurance Regulation Fund. Any services KID received from the state are *de minimis*. There were no hearings or evidence presented in support of the unauthorized sweep of the Insurance Regulation Fund into the SGF for FY2018 and FY2019.

It is a proper exercise of police power to assess fees, as long as the funds are segregated and used exclusively to regulate the business of insurance. Any transfer or sweep of money from the Insurance Regulation Fund into the SGF, over and above reasonable reimbursement of administration costs, constitutes an unauthorized and unconstitutional tax. *See Panhandle Eastern Pipeline Company v. Fadely, et al.*, 183 Kan. 803 (1958); *Kansas Bldg. Industry Workers Comp. Fund, et al. v. State*, 302 Kan. 656 (2015).

Legal Standard

The purpose of a temporary injunction is to prevent injury to a claimed right pending a final determination of the controversy on its merits. *See Idbeis v. Wichita Surgical Specialists, P.A.*, Kan. 485, 491 (2007). A movant is entitled to a temporary injunction upon establishing the following:

- (1) a substantial likelihood that the movant will prevail on the merits;
- (2) a showing that the movant will suffer irreparable injury unless the injunction issues;
- (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and
- (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Uarco Inc. v. Eastland, 584 F. Supp. 1259, 1261 (D. Kan. 1984).

Argument

1. KID has a likelihood of success on the merits.

KID will succeed on the merits because the sweep of funds from the Insurance Regulation Fund is an unauthorized transfer. Pursuant to K.S.A. 75-3036:

(a) The state general fund is exclusively defined as the fund into which shall be placed all public moneys and revenue coming into the state treasury not specifically authorized . . . to be placed in a separate fund. Moneys received . . . are to be kept as separate funds and shall not be placed in the general fund or ever become part of it.

(b) The following funds shall be used for the purposes set forth in the statutes concerning such funds and for no other governmental purposes . . . [the] insurance department service regulation fund, K.S.A. 40-112, and amendments thereto, of the insurance department.

The veto of Chapter 104 of Senate Substitute for Senate Bill 189 violated K.S.A. 75-3036 because it transferred funds into the SGF that were statutorily designated to the Insurance Regulation Fund pursuant to K.S.A. 40-112.

Additionally, KID will succeed on the merits because the transfer of funds violates Article 11, §§1 and 5 of the Kansas Constitution which states: “No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied.” Here, the taxes assessed by KID may only be used for the sole purpose of maintaining the insurance department and the payment of expenses incident thereto.

2. KID will suffer irreparable harm.

KID will suffer irreparable harm because it will be unable to perform statutory functions without operating funds. The Insurance Regulation Fund provides the funds for operating

expenditures such as: salaries and wages, contractual services, building maintenance, aid for local units of government, and other similar expenses. The sweeping of 47% of KID's funds in 2018 and 44% in 2019 would require KID to drastically reduce services or make new assessments. KID is on notice that if it levies additional fees, companies will pursue litigation against KID on the grounds that such action is an unauthorized tax and a revenue enhancement in violation of the Kansas Constitution. Funds assessed for a particular and specific purpose must be kept as separate funds and not transferred into the SGF. *Kansas Bldg. Industry Workers Comp. Fund, et al. v. State*, 302 Kan. 656 (2015).

3. The threatened injury to KID outweighs the damage caused by an injunction.

The threatened injury to KID outweighs the damage caused by an injunction. The State will not be harmed by requiring the money to remain in the Insurance Regulation Fund pending a decision on the merits. The FY2018 Governor's Budget Report indicates the SGF will take in \$6,478,400,000 in total revenue. An \$8,000,000 reduction in FY2018 would equate to a loss of only 0.00123%. The FY2019 Governor's Budget Report indicates the SGF will take in \$6,695,500,000 in total revenue. An \$8,125,000 reduction in FY2019 would equate to a loss of only 0.00121%. Granting the Temporary Injunction will not have a substantial effect on the State's operating budget.

4. A Temporary Injunction is in the public interest.

A Temporary Injunction is in the public interest because consumers will be harmed if insurance companies are forced to pass additional assessments on to them in increased premiums. In addition, the transfer of funds will create uncertainty in the insurance market. Companies depend on the statutory fee structure to build their business model.

They determine overhead and set premiums based on anticipated costs including anticipated fees for doing business.

The sweeps would force KID to impose additional assessments on regulated industry. Those assessments would be unconstitutional under the Commerce Clause and the Fourteenth Amendment of the United States Constitution. Further, these additional assessments would be inconsistent with KID's statutory duties.

Conclusion

For the foregoing reasons, the Court should issue a temporary injunction prohibiting Defendants, their agents, and their successors in office from enforcing the portion Senate Substitute for House Bill 2002 that sweeps fee funds from the Insurance Regulation Fund until the Court enters a final judgement in this case.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

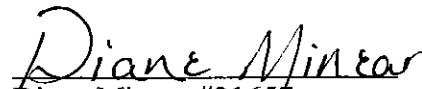
The undersigned hereby certifies that she served a true and correct copy of the above and foregoing document on this 19th day of July, 2018 by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

State of Kansas
c/o Kansas Attorney General Derek Schmidt
120 SW 10th Ave., Suite 2
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