

**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 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.:
Division

PETITION

COMES NOW Ken Selzer, in his official capacity as Commissioner of Insurance for the State of Kansas, by his attorneys, Diane Minear and Susan Ellmaker, and for his causes of action against the Defendants alleges and states as follows:

1. Ken Selzer brings this action on behalf of the Kansas Insurance Department (“KID”). KID 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).

2. KID petitions the Court 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.*
3. Service of process on the defendants is pursuant to K.S.A. 60-304(d) and may be effected by serving Kansas Attorney General, Derek Schmidt, or any assistant attorney general, Memorial Hall, Second Floor, 120 SW 10th Avenue, Topeka, Kansas 66612.
4. This Court has subject matter jurisdiction over the parties and venue is proper in Shawnee County, Kansas.
5. Under Kansas' traditional test for whether standing exists, the plaintiff must establish that he or she suffered a cognizable injury and that there is a causal connection between the injury and the defendant's conduct. *Gannon v. State*, 298 Kan. 1107 (2014); *Kansas Bldg. Industry Workers Comp. Fund, et al. v. State*, 302 Kan. 656 (2015).
6. KID has standing to bring this action because (1) it has been uniquely harmed and suffered a cognizable injury by the sweeping of the Insurance Regulation Fund and (2) the unconstitutional sweeping of statutorily protected funds by the 2017 Budget Bill is the causal connection between the injury and the challenged conduct.
7. 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.

8. A government official suffers a cognizable injury where he is unable to perform statutory functions and there is a threat of lawsuit by regulated industry. *Board of County Com'rs of Johnson County v. Jordan*, 303 Kan. 844 (2016).
9. Under K.S.A. 75-3036(d), KID has standing because, "moneys which are wrongfully or by mistake placed in the general fund shall constitute a proper charge against such general fund."
10. KID is not required to bring its claim under the Kansas Judicial Review Act ("KJRA") because the Defendants do not have authority under the KJRA to grant the relief sought by KID.
11. The Insurance Regulation Fund was established pursuant to K.S.A. 40-112, for the sole purpose of maintaining the insurance department and the payment of expenses incident thereto.
12. Pursuant to K.S.A. 40-112(a), all expenditures of the Insurance Regulation Fund must be approved by the Commissioner.
13. Under K.S.A. 40-112, 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.
14. KID does not receive funding from the SGF.
15. The SGF receives 99% of all premium taxes collected by KID.

16. Pursuant to K.S.A. 40-112, any unexpended balance in the Insurance Regulation Fund at the close of the fiscal year shall 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.
17. Revenues for the Insurance Regulation Fund for FY2018 totaled \$17,956,372.
18. 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).
19. On May 24, 2017, 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
20. On June 26, 2017, Governor Sam Brownback signed Senate Substitute for House Bill 2002 authorizing an \$8,000,000 sweep of the Insurance Regulation Fund into the SGF in FY2018 and an \$8,125,000 sweep of the Insurance Regulation Fund into the SGF in FY2019.
21. The 2018 Legislature took appropriate action to remedy the unauthorized sweep for FY2019 when it approved an \$8,000,000 reduction of the sweep.
22. On May 15, 2018, Governor Jeff Colyer vetoed the proposed reduction of the sweep from the Insurance Regulation Fund.

23. The unauthorized sweep of \$8,000,000 in FY2018 was greater than 47% of the FY2018 revenues in the Insurance Regulation Fund.
24. The unauthorized sweep of \$8,000,000 in FY2019 was greater than 44% of the FY2019 revenues in the Insurance Regulation Fund.
25. 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 administrative costs, constitutes an unauthorized and unconstitutional tax. *See Panhandle Eastern Pipeline Company v. Fadely, et al.*, 183 Kan. 803 (1958); *Kansas Building Industry Workers Compensation Fund, et al. v. State of Kansas*, 302 Kan. 656 (2015).
26. Any services KID receives from the state are *de minimis*.
27. 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.
28. Kansas law explicitly states that certain fee funds, including the Insurance Regulation Fund, shall not be swept into the SGF. K.S.A. 75-3036.
29. The portion of Senate Substitute for House Bill 2002 that sweeps fee funds from the Insurance Regulation Fund is in violation of K.S.A. 75-3036.
30. The transfer of Insurance Regulation Funds into the SGF is a revenue raising measure that takes property without due process and violates the taxing provisions in Article 11, §§1 and 5 of the Kansas Constitution.

31. The transfer of Insurance Regulation Funds into the SGF violates the Commerce Clause and the Fourteenth Amendment to the United States Constitution in that it requires additional assessments on regulated industry.
32. KID delivered letters to the Defendants on June 29, 2018, explaining that the sweeps were unauthorized and unconstitutional and demanded they be halted.
33. 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 D of A's response to the demand by KID to halt the sweeps.
34. 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."

PRAYER FOR RELIEF

WHEREFORE, the Kansas Insurance Department prays for judgment as follows:

35. Pursuant to K.S.A. 60-1701 *et seq.*, declaratory relief establishing that the sweep is a violation of K.S.A. 75-3036 and K.S.A. 40-112.
36. Pursuant to K.S.A. 60-901 *et seq.*, injunctive relief to stop future sweeping of the Insurance Regulation Fund for the remainder of FY2018.
37. Pursuant to K.S.A. 60-801 *et seq.*, relief in *mandamus* requiring the return of \$8,000,000 swept in FY2017 and \$2,000,000 swept in 2018 in FY2018.
38. Pursuant to K.S.A. 60-1201 *et seq.*, a writ of *quo warranto* directing the Defendants to show by what authority they have executed and will execute the fee sweeps.
39. For such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

Diane Minear #21657
Susan Ellmaker #09348
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612
T: (785) 296-3071
F: (785) 291-3673
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the above and foregoing Petition on this 13th 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 Avenue, Suite 2
Topeka, KS 66612

Governor Jeff Colyer
300 SW 10th Ave., Suite 241S
Topeka, KS 66612

Mr. Larry Campbell
Chief Budget Officer
900 SW Jackson, Suite 504-N
Topeka, KS 66612

Ms. Sarah L. Shipman
Secretary Department of Administration
1000 SW Jackson
Suite 500
Topeka, KS 66612

Diane Minear #21657