HB 573: CLAIMS v. FACTS

Are Health Care Sharing Ministries Under Threat in Texas?

ALLIANCE of Health Care Sharing Ministries

CLAIM: HB 573 does not violate the 1st Amendment or otherwise restrict the speech of religious organizations.

FACTS:
HB 573 restricts or compels speech of Health Care Sharing Ministries in a number of impermissible ways:

- Requires ministries to lie to their members by informing them that they may be subject to the Affordable Care Act's individual mandate, even though the ACA explicitly exempts members of these ministries from the penalty.
  Sec. 113.106(d)(1): "A health care sharing ministry shall provide a written disclosure to a member at enrollment that states: (1) the member may not be exempt from Section 5000A(d)(2)(B) of the Internal Revenue Code."

- Requires ministries to scaremonger their members that they may be subject to a tax that Congress explicitly reduced to zero in 2017. Of course all Americans may be subject to new taxes imposed by Congress at any time. Other industries are not required to warn their consumers that Congress may one day tax their consumption, especially if Congress most recently explicitly zeroed out such a tax. Congress recently repealed the health insurance tax as well, but insurance consumers are not required to be warned by their carriers that Congress might one day change its mind and reinstate the HIT.
  Sec. 113.106(d)(2): "A health care sharing ministry shall provide a written disclosure to a member at enrollment that states:...(2) the member may be subject to a tax if Congress reinstates the tax."

- Requires ministries to re-design, reprint and re-negotiate with advertising distributors to accommodate the bill's imposition of a 10-point font, 14-line consumer notice, in a "prominent and conspicuous place" on all print ads, application materials and guidelines.
  Sec. 113.106(a)-(b): "(a) A health care sharing ministry shall provide written notice on or accompanying all applications, guideline materials, and written advertisements, including print and digital advertisements, distributed by or on behalf of the ministry. (b) The notice described by Subsection (a) must be in at least 10-point font, in a prominent and conspicuous place, and read as follows…"

- Consumes half of any 30-second audio or visual ad with a required verbal notice that takes 14-15 seconds to read (very quickly).
  Sec. 113.106(c): "A health care sharing ministry shall provide the following notice in any audio or visual advertisement clearly, conspicuously and in a manner that a listener would hear and understand:..."

- Bans ministries from telling members the truth about free health care services or services that are included with membership, such as telemedicine visits, or prescription drug or dental discounts.
  Sec. 113.102(a)(1)(B): "In all communications with the public, a health care sharing ministry may not… make a direct or indirect representation that… a health care service is free or included with membership.

- Prohibits ministries from using very common words, including any term that is "similar" to the enumerated words, except to explain the difference between themselves and insurance.
  Sec. 113.102(a)(2): "In all communications with the public, a health care sharing ministry may not: (2) include "premium," "copay," "deductible," "coverage," "network," "benefit plan," or a similar term in marketing except to explain the differences between health care sharing ministry and insurance."

- Subjects *truthful* statements in violation of these speech bans to current law's enforcement actions against false, misleading and deceptive statements or practices. The reason this is the case is that false, misleading or deceptive statements or practices are *already* subject to 17.46. HB 573 would prohibit certain truthful speech and subject it to 17.46.
  Sec. 113.102(b): "A violation of this section is a false, misleading, or deceptive act or practice in violation of Section 17.46."

CLAIM: Health Care Sharing Ministries are wrong when they say that HB 573 leaves for-profit, secular "bad actors" untouched, while targeting good-faith religious organizations, because the bill's application only to "faith-based" ministries will be interpreted under Texas law to mean "based on either a religious or ethical principle."

FACTS:
The most notorious actor that allegedly harmed consumers in Texas in the name of health care sharing is organized on *neither* a religious nor an ethical principle. It is a for-profit brokerage firm. It was stopped by the Texas AG, using current law, for being unlicensed insurance. The Oliverson bill, HB 573, does not change anything for such entities. It, along with current law, only applies to tax-exempt (c)(3) nonprofit organizations. HB 573 would not prevent such entities from operating or from harming consumers - current law does that. HB 573 would not provide the authority to shut down a for-profit bad actor for 2 years without proving it's insurance - the bill only provides such authority over nonprofit, faith-based ministries. The entities most affected by the changes in Oliverson's HB 573 are the good-faith ministries that did not harm consumers, the ministries who have been faithfully abiding by current law.

CLAIM: The Health Care Sharing Ministries are exaggerating how intrusive HB 573 is - the bill merely asks for some "light reporting" by sharing organizations as the price of exemption from the insurance code.

FACTS:
HB 573 lays out elaborate and unworkable requirements. On top of those requirements, the bill provides the Commissioner authority to require ***any additional information*** as part of an annual registration scheme. HB 573 requires these religious organizations to disclose to the state:

- ***All their privately-contracted vendors*** involved in enrolling members, negotiating member bills to reasonable prices, or the sharing of member medical needs. A conflicting provision occurring

in a subsequent section requires disclosure of the amounts collected from Texan members that were subsequently used by each vendor to serve Texans, which of course, is a complex and arbitrary analysis providing no meaningful information that would differentiate good actors from bad actors. A yet third provision in the bill would get at the same vendor payments but slightly differently, in the form of quarterly reports to members on administrative fees to third party vendors, only this time the amount is not required to be presented in a state-specific format.

(Sec. 113.051(b)(6): "a list of any third-party vendors acting on behalf of the ministry in this state for the purposes of: (A) enrolling members; (B) negotiating with health care providers after services are rendered; or (C) the financial sharing of member medical needs."
Sec. 113.052(b)(3)(E): "the total amount of administrative fees collected from members in this state, including amounts to each third-party vendor for services provided to members in this state."
Sec. 113.105(6)(C): "any third-party vendor to which the fee is paid;"

- ***Members' age and sex distribution***, even though such reporting on their own members would not somehow protect consumers, or help differentiate good-faith ministries from bad actors.
  (113.051(b)(8): "a report of the ministry's members in this state as of the date of the filing that includes the: (A) total number of enrolled members; (B) distribution of members by age; and (C) distribution of members by sex;")

- ***Vague, undefined numeric disclosures*** that will either a) require more extensive regulation by TDI to clarify, or b) lack all meaning because the ministries will be able to define the terms in whatever way makes them each look the most favorable, such that consumers won't be able to meaningfully compare between the numbers reported by each organization.
  Sec. 113.052(b)(3): "an organization financial report detailing the following for the prior registration period: (A) the total amount of money collected from members in this state, including contributions, administrative fees, or other funds; (B) the total number of sharing requests made by members in this state; (C) the total amount of money paid for health care services for members in this state; (D) the total number of sharing requests that were denied; (E) the total amount of administrative fees collected from members in this state, including amounts paid to each third-party vendor for services provided to members in this state; and (F) the total equivalent monetary amount of membership contributions waived for participants rewarded by referring others to a new member enrollment program;"

- ***A copy of an audit that is required under a federal law that only applies to older organizations*** rather than the newer organizations that allegedly harmed Texas consumers.
  Sec 113.052(b)(2): "A copy of the most recent annual audit required under 26 U.S.C. Section 5000A(d)(2)(B)."

- ***The number of complaints*** made by members in Texas, regardless of whether a ministry knows about the complaint, what sort of complaint, to whom the complaint was made, whether it was resolved satisfactorily;
  Section 113.052(b)(5)(C): "the number of complaints made by members in this state;"

- ***The monetary equivalent of waived member contributions*** for members who referred new members to the ministry, regardless of if ministries reward members who refer new members in a totally different manner. This particular approach is unique to one ministry in particular, the organization who helped develop HB 573 with the bill sponsor.

Section 113.052(b)(5)(F): "the total equivalent monetary amount of membership contributions waived for participants rewarded by referring others to a new member enrollment program."

CLAIM: HB 573 does not seek to micromanage religious activity.

FACTS: HB 573 ***dictates internal compensation structures*** for these religious ministries, as a condition of operating in Texas, including prohibiting any ministry from:

- Rewarding internal, salaried employees with performance bonuses for enrolling new members that total more than five percent of a new member's annual contributions
  (Sec. 113.051(b)(9), requiring "a certification that the ministry does not compensate anyone to solicit or enroll members in this state based on the number of members solicited or enrolled or the amount of contributions received from enrolled members, including by commission, at a rate of more than five percent of the membership fee received in the first year of membership.")

- Providing any bonus to existing members as a reward for referring new members to the ministry, unless it is designed precisely the way only a minority of ministries carry out their own referral incentive program, one of which was the same organization that HB 573's bill sponsor publicly announced as the instigator of the bill.
  The prohibition in Sec. 113.051(b)(9) does not apply to "a new member referral program providing credit for membership for existing members of a health care sharing ministry who have referred new members only if the program is limited to credit for no more than 12 months of membership for the existing members annually."

CLAIM: The bill doesn't change the status quo for good-faith actors.

FACTS: The status quo is Chapter 1681 of the insurance code, which expressly *exempts* ministries from the authority of the Texas Department of Insurance (TDI). HB 573 turns this design on its head by explicitly granting unlimited regulatory authority to TDI to demand "all information required by the commissioner" in order "to operate as a health care sharing ministry in the state." The status quo imposes no obligations to the state on ministries at all, and only a few simple requirements if they further wish to be exempt from the insurance code. HB 573 allows the commissioner to determine whether or not a ministry is not only subject to the insurance code, but *also* whether and under what conditions it can operate at all. These same blanket obligations to submit to the Commissioner's requirements also are applied anew each year, allowing for those requirements to be changed and expanded over time.
Sec. 113.051(a): A person must file information described by Subsection (b) with the department in the form and manner prescribed by the commissioner to operate as a health care sharing ministry in this state.
Sec. 113.051(b): A person intending to operate a health care sharing ministry must include in the filing described by Subsection (a) all information required by the commissioner, including…"

CLAIM: HB 573 does not impose <u>costly</u> burdens on religious organizations.

FACTS:
The bill would increase the administrative costs of Health Care Sharing Ministries in a number of different ways. The bill would:

- Establish elaborate and frequent reporting requirements, and the stakes are high - ministries will be shut down and pursued as unlicensed insurance if their reports are deemed inadequate.
- Increase training costs to ensure staff do not use the prohibited words in the wrong context, nor talk about the free services available to members.
- Give rise to contract breach, renegotiation or termination costs for ministries that may have vendor contracts requiring confidentiality or commission payments.
- Increase the cost of future vendor contracts or require certain tasks to be done internally at a higher cost due to vendor reluctance to have proprietary fee schedules publicized.
- Increase marketing costs by requiring the purchase of more space or air time to include the required content.
- Increase overall staffing costs by requiring a higher base compensation regardless of performance, by preventing ministries from compensating staff with a lower base compensation plus performance bonuses.
- Make it more expensive, due to these increase costs, for Texas resident members of Health Care Sharing Ministries to participate in a health care solution that aligns with their religious beliefs,

CLAIM: HB 573 does not represent an "existential threat" to Health Care Sharing Ministries

FACTS:
If TDI or the AG deems that a ministry is not adequately complying with the bill's requirements - a scenario made more likely by the bill's poorly-drafted, undefined terms, unworkable provisions, or catch-all phrases such as "all information required by the commissioner"/"in the form and manner prescribed by the commissioner" - then the bill provides a number of enforcement actions, including existential threats to the ministries and their members, that can be imposed:

- Two-year ban on operations in Texas, leaving thousands of uninsured Texans without a health care solution.
  Sec. 113.053(b): "If a health care sharing ministry fails to submit a filing required by this subchapter within 90 days after the filing's deadline, the ministry may not operate as a health care sharing ministry for two years."

- Charges by the Commissioner of insurance that the ministry is "engaging in the business of insurance," with all the enforcement authority available to shut down unlicensed insurance.
  Sec. 113.002: "a health care sharing ministry that acts in accordance with this chapter is not considering to be engaging in the business of insurance."

- Emergency cease and desist orders by the Attorney General, in the case of "belief" in a public injury that is likely to occur at any moment, is incapable of being repaired or rectified, and has or is likely to have influence or effect (on what? HB 573 does not specify).
  Sec. 113.151(a), (c): "The attorney general ex parte may issue an emergency cease and desist order if the attorney general believes that: (1) a person is operating a health care sharing ministry in violation of this chapter; and… is causing or can be reasonably expected to cause public injury that: (1) is likely to occur at any moment; (ii) is incapable of being repaired or rectified; and (iii) has or is likely to have influence or effect."

- A slew of fines and civil penalties ranging from hundreds to tens of thousands of dollars.
  Sec. 113.053 re: Late Filing, 113.054 re: Filing Fees, Sec. 113.152 re: Civil Penalty, Sec. 17.62 re: Penalties

- Injunctions or "other relief" sought by the Attorney General in court.
  Sec. 113.153: "If the attorney general believes that a health care sharing ministry or another person is violating or has violated this chapte,r hte attorney general may bring an action in a Travis County district court to enjoin the violation, recover a civil penalty under Section 113.152, order restitution, and obtain other reliev the court considers appropriate."

CLAIM: HB 573 is consistent with religious liberty protections found in federal and state law.

FACTS:
HB 573 directly regulates (burdens) the exercise of religion when it comes to Health Care Sharing Ministries, and as such, it must be narrowly tailored to serve a compelling state interest. This limitation is required by the First Amendment of the U.S. Constitution and Texas Religious Freedom Restoration Act (RFRA), under both U.S. and Texas Supreme Court precedents.

HB 573 requires religious ministries to make detailed disclosures to ministry members and to the public, ostensibly to protect against fraud and to provide information to state officials regarding population participation in this type of arrangement. Case law has held that similar disclosure schemes are overly intrusive into religious activity and determined that they were compelled speech, violative of speech protections. Case law also allows narrowly tailored laws, such as penal statutes against fraud, or disclosure regarding the nature and identity of the ministries, but not detailed financial and demographic disclosures or forced member communications (especially false ones, see below) such as those in HB 573. Moreover, HB 573 involves prior restraint of religious activity and free speech without constitutionally required procedures. When the government enacts a system of licensing religious activity or free speech, it is the government that has the burden of initiating court proceedings and demonstrating the propriety of such restraints before any such restraints may be applied. HB 573 permits cease and desist orders without such procedural protections. In sum, direct regulation of religious ministries by the government is a very sensitive area of policy that should be carefully reviewed for constitutional validity. There is no indication that HB 573 has been properly scrutinized, or that it would survive such scrutiny.