IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-1161-WJM-CBS

AMICA LIFE INSURANCE COMPANY,

Plaintiff,

v.

MICHAEL P. WERTZ,

Defendant.

INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Interstate Insurance Product Regulation Commission (the "Commission") respectfully moves this Court for leave to appear as *amicus curiae* and file the attached brief in connection with the above-captioned case. The position of the Commission is to support the Plaintiff Amica Life Insurance Company in the Supplemental Brief in support of its motion for summary judgment, the Supplemental Brief being submitted pursuant to the Court's October 3, 2017 Order requiring additional briefing on the ultimate question of whether the ITLIP two-year suicide exclusion controls when in conflict with Colorado Revised Statute § 10-7-109.

In support of this motion and in accordance with Section III.A of the Honorable William J. Martinez's Practice Standards, the Commission submits the following:

Certification Pursuant to D.COLO.LCivR 7.1(a). Counsel for *amicus* consulted with counsel for the parties about their consent to the filing of the accompanying brief. Counsel for

the Plaintiff consented to the participation of *amicus* and counsel for the Defendant has stated that the Defendant takes no position on this motion for leave.

1. The Court has discretion to allow the Commission to appear as *amicus curiae*. Although no provision of the Federal Rules of Civil Procedure expressly governs appearances of friends of the court in district courts, district courts have the inherent authority to permit such appearances. *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006); *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500 (S.D. Fla 1991).

2. The role of *amici* is to assist the court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir. 1991) (internal quotation marks omitted).

3. Courts in the District of Colorado have frequently permitted appearance by *amici curiae*. *See, e.g.*, *Nakayama v. Sanders*, 2017 WL 2457883, at *1 (D. Colo. June 7, 2017); *Rocky Mountain Wild v. Walsh*, 216 F. Supp. 3d 1234, 1242 (D. Colo. 2016); *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109, 1112 (D. Colo. 2013); *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1122 (D. Colo. 2012).

4. The Commission's identity is the joint public agency created by the Insurance Compact. Through the Commission, state insurance regulators have collectively adopted more than 100 Uniform Standards such as the ITLIP Standards and the 21 other Uniform Standards that permit a two-year suicide exclusion period.

5. The Commission has a strong interest in appearing as *amicus curiae* in connection with the Plaintiff's Motion for Summary Judgment because, as the Court recognized in its September 11, 2017 Order, the ultimate question remaining in this matter has a direct impact on the validity of the Insurance Compact across the 44 member states and Puerto Rico that have adopted the Insurance Compact and have a vested interest in judicial interpretations of the Insurance Compact.

6. The Commission's interest in judicial interpretations of the Insurance Compact extends to the validity of the legally binding approval it has granted to more than 6,100 products, 78% of which have included Colorado. The more than 250 insurance companies and fraternal benefit organizations that have availed themselves of the uniformity and efficiency promised by the Insurance Compact represent more than 80% of the nationwide premium volume in the lines of business subject to the Insurance Compact, and they rely on the validity of the Insurance Compact in designing, filing, offering, and administering their portfolios.

7. Accordingly, the Commission has a strong interest in participating in litigation involving application of the Insurance Compact and seeks to assist the Court in understanding the principles of compact law as applied to the ultimate question the Court identified in its October 3, 2017 Order.

8. An *amicus curiae* brief from the Commission is desirable because, as the administrator of the Insurance Compact, the Commission is uniquely positioned to illustrate how the Insurance Compact functions as a binding, legal contract among the Compacting States within the principles of compact law.

9. The matters asserted in this motion and the accompanying *amicus* brief are relevant to the disposition of the case because the Court's September 11, 2017 Order describes and concludes that the validity of the Insurance Compact adopted by the Colorado Legislature and the legislatures of 44 other U.S. jurisdictions is the remaining matter of law in the case.

10. For the foregoing reasons, the Commission requests that this Court exercise its broad discretion and inherent authority and grant the Commission's motion for leave to file the accompanying *amicus curiae* brief.

Respectfully submitted this 27th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2017, a true and correct copy of the foregoing **INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF** was electronically filed using the CM/ECF system which will send notification of such filing to the following:

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***AMICUS CURIAE* BRIEF OF**
INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION

I. INTRODUCTION

The Interstate Insurance Product Regulation Commission (the "Commission") submits this *amicus curiae* brief in support of the Supplemental Brief filed by Plaintiff Amica Life Insurance Company addressing the Court's September 11th, 2017 Order (the "Order"). The Court's observation that compacts operate in a different dimension is valid. As explained herein, it is the dual statutory and contractual nature of an interstate compact that allows the states as parties to a compact to achieve enforceable uniformity among all member states, while preserving their individual and collective sovereignty. "In effect, compacts create a third tier of governing authority that occupies the space between the federal government and individual states." Michael L. Buenger *et al.*, *The Evolving Law and Use of Interstate Compacts*, § 1.2.1 at 14 (2d ed. 2016). Compacts represent sub-federal and supra-state solutions to interstate problems. *Id*. "By entering into a compact, the member states contractually agree on certain principles and rules concerning the exercise of joint governing authority for the subject matter of

the compact and 'this may limit the agreeing States in the exercise of their respective powers.'" *Id*. at 51 (quoting *United States v. Bekins*, 304 U.S. 27, 52 (1938)).

The contract among the 45 jurisdictions of the Interstate Insurance Product Regulation Compact (the "Insurance Compact" or "Compact") occupies a sub-federal and supra-state space in that it creates an alternate statutory system of asset-based insurance product filing, review, and approval that mirrors, and in certain instances supplants, conflicting single-state law. The Colorado Legislature has made extensive use of the compact mechanism, having enacted approximately 46 interstate compacts, at least 21 of which do not appear to require the consent of Congress. Fifteen of the 46 involve the exercise of collective administrative policy or regulatory authority.[1]

The Court risks destabilizing other compacts the Colorado Legislature has joined if it finds that the Colorado Legislature acted outside of its constitutional authority. Specific to the Insurance Compact, if the Court invalidates the applicability of the ITLIP Standards and by extension this state-based solution, it will take the regulation of asset-based insurance products back to the early 2000s and the very real threat of federal preemption, which introduces a possible loss of premium taxes and other regulatory fees—one of the state government's key revenue streams from the business of insurance.[2]

[1] *See* Interstate Compact on Juveniles, Colo. Rev. Stat. §§ 24-60-701 to -708; Nonresident Violator Compact, Colo. Rev. Stat. §§ 24-60-2101 to -2104; Interstate Compact on Educational Opportunity for Military Children, Colo. Rev. Stat. §§ 24-60-3401, -3402; and Interstate Medical Licensure Compact, Colo. Rev. Stat. §§ 24-60-3601, -3602.

[2] According to the NAIC, taxes paid by insurers, inclusive of premium, retaliatory, franchise, and income tax, accounted for 95% of Colorado's state revenue attributable to the business of insurance in the 2016 fiscal year. 1 NAIC, *Insurance Department Resources Report* 27, 32 (2017), http://www.naic.org/prod_serv/STA-BB-16-01.pdf.

Additionally, a ruling that destabilizes the Insurance Compact calls into question a significant portion of in-force policies held by citizens of Colorado. The insurance policy issued in this case is approved for use in 45 other states. As of the end of September 2017, the Commission has approved more than 6,100 insurance products—78% of which were approved for use in Colorado—since it became operational in 2007. Insurance companies using the Commission represent more than 80% of the national market in the asset-based product lines. The success of the Insurance Compact relies on the Uniform Standards having the force and effect of law, with the result that the insurance products it has approved are enforceable as written. This brief focuses primarily on how the structure, operations, and terms of the contract formed by the Insurance Compact and its Commission properly exercise limited regulatory authority delegated in accordance with the terms of the Insurance Compact entered into by the Colorado Legislature and its sister states.

II. ARGUMENT

A. THE COLORADO LEGISLATURE PROPERLY DELEGATED LIMITED REGULATORY AUTHORITY TO THE INSURANCE COMPACT.

The seminal case on legislative delegation to interstate compacts is *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). In *Dyer*, the U.S. Supreme Court considered the validity of the Ohio River Valley Compact Water Sanitation Commission, an entity created by an interstate compact. Specifically, the Court examined whether the West Virginia legislature had the authority under its constitution to delegate power to an interstate agency. Framing the issue as "the conventional grant of legislative power," the Court found "nothing in that to indicate that West Virginia may not solve a problem … by compact and by the delegation, if such it be, necessary to effectuate such solution by compact." *Id.* at 31.

The compact at issue in *Dyer* required and received Congressional consent. In its Order, the Court acknowledged that the Insurance Compact likely need not require Congressional consent because the McCarran-Ferguson Act delegated and consented to states the broad responsibility to regulate the business of insurance, as recognized in contemporaneous case law. (*See* ECF No. 73 at 16); *see also Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429–30 (1946). The purposes and powers of the Insurance Compact are squarely within the regulation of the business of insurance. This is unquestionable because each of the 45 jurisdictions that have adopted the Compact (the "Compacting States")[3] maintains separate asset-based insurance product requirements and oversight regimes—the precise circumstance that led to the development of the Insurance Compact.

1. Well-settled compact law calls for the Court to apply the terms of the Insurance Compact without reference to its potential for conflict with Colorado-specific insurance product requirements.

Regardless of the status of the Insurance Compact with regard to Congressional consent, the proper focus when determining the constitutionality of a compact is whether the compact's express statutory terms comply with the well-established measure of a compact's constitutional validity under separation of powers principles. In *Dyer*, the U.S. Supreme Court upheld the Ohio River Valley Water Sanitation Compact as a valid legislative delegation under West Virginia's constitution because it involved "a reasonable and carefully limited delegation of power to an interstate agency." *See* 341 U.S. at 31.

The *Dyer* Court reversed the West Virginia Supreme Court's ruling that the legislature's enactment of the Sanitation Compact was unconstitutional because it delegated West Virginia's

[3] The jurisdictions include 44 states and Puerto Rico. For efficiency, this brief refers to the Compacting States inclusive of Puerto Rico.

police power to other states and the federal government and purported to bind future legislatures to make appropriations to the Sanitation Compact Commission. To determine the type of authority delegated by the member states, the Court looked to the Sanitation Compact as it "is after all a legal document." *Id.* at 28. The Court recognized "[t]hat a legislature may delegate to an administrative body the power to make rules and decide particular cases"—a power that "is one of the axioms of modern government." *Id.* at 31. It found that the enactment of the Sanitation Compact was a conventional grant of legislative power, such that West Virginia under its state constitution could bind itself to control pollution by a more effective means of an agreement with other states. *Id.*

The fundamental nature of compacts is that by agreeing to enter into a compact, member states contractually cede a portion of their individual jurisdiction and authority over the subject matter of the compact in favor of governing principles that apply collectively to all member states. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994). In other words, where the subject matter of a compact is an area within each state's sovereign authority, the terms agreed to by the respective states are to be given meaning provided they meet the principle expressed in *Dyer*.

In this case, the Court distinguished the cases cited by Plaintiff because they do not address "whether the Colorado Constitution allows the Colorado legislature to adopt the *kind* of compact at issue here." (ECF No. 73 at 27.) The Commission knows of no case law limiting the kind, purpose, or scope of a compact or its administrative framework under state constitutional or any other grounds other than the federal Compact Clause at Article I, Section 10 of the U.S. Constitution, which the Court already granted is not applicable to the Insurance Compact. As the Court suggested in its third argument favoring the Insurance Compact's validity, the joint

agreement of the Compacting States to subordinate a mutual amount of authority creates a distinct yet shared jurisdiction for the Commission as specified by the terms of the Insurance Compact. As one case noted, *Dyer* held that "a state legislature by a compact with other states may delegate to an administrative body certain governmental powers although that body is outside the state." *See Application of Waterfront Comm'n of N.Y. Harbor*, 120 A.2d 504, 509 (N.J. Super. Ct. Law Div. 1956). The case went on to quote from an early treatise on interstate compact law—and the excerpt addresses this Court's question:

> The powers of a state commission are fixed by state law; those of a compact commission are fixed by the compact which is state law in each of the jurisdictions party to the agreement. The territorial jurisdiction of a state commission is that fixed by the state law; the territorial jurisdiction of an interstate compact commission is that fixed by the compact. Of course, this means that the compact commission almost always will operate in two or more states. But this should present no difficulty because, so long as the interstate agency does not presume to take jurisdiction over an area beyond the borders of a compacting state, the commission's actions are buttressed by the powers conferred upon it by the compacting state in which the particular act is done.

Id. (quoting Frederick Zimmerman & Mitchell Wendell, *The Interstate Compact Since 1925* 54 (1951)). This Court is bound to consider the terms of the Compact in determining the validity of the Commission's exercise of its powers because such powers are fixed by the Insurance Compact as enacted by the Compacting States.

2. It is constitutional for the Colorado Legislature to afford the Insurance Compact authority in a parallel system to Colorado's insurance product requirement regime.

Though it expresses thorough understanding of the role, structure, and effect of the Commission in its Order, the Court questions whether the Colorado Legislature acted within its authority in 2004 as the first state to enact the Insurance Compact. The specific concern stated is whether the Colorado Legislature delegated authority to the Commission that it could not

delegate to a Colorado administrative agency—the authority to approve insurance products that conflict with a previously enacted Colorado statute. Given that this appears to be the Court's only open question regarding the enforceability of the Compact, the Commission will address it even though it is not necessary to analyze under *Dyer* because *Dyer* looks only at the terms of the Compact, not its result as compared to a specific state's law.

The Colorado Legislature's action to enact the Compact and the terms of the Compact itself must be considered more broadly than the isolated Uniform Standards requirement raised in this case. The Court acknowledged the possibility that the Compacting States acting through the Commission might adopt a Uniform Standard requirement that conflicts with one or more states' existing statutes.[4] Testimony from the Colorado Senate's consideration of the bill to enact the Insurance Compact confirms that the Colorado Legislature understood the potential for Uniform Standards to differ from and overlay Colorado insurance product requirements for purposes of the Compact. Senator Dave Owen said:

> What it would do is to bypass our state law on these three [sic] products that we discussed earlier: disability, long–term care, and life insurance, annuities that have one central approving authority rather than all 50 states and what the Compact would do would allow, as I said, the insurers to bypass our laws and would still preserve state authority to decide whether to accept a national standard. If a uniform standard for a specific product line fails to measure up, a state could opt-out through legislation or regulation.

Hearing on SB 04-022 Before the S. Comm. on Business Affairs and Labor, 64th Leg., 2d Reg. Sess. (Colo. 2004).

[4] The Uniform Standards provision permitting limiting the suicide exclusion period to two years from the date of policy issue is consistent with the vast majority of state law on this point. Only Colorado and two other states limit the suicide exclusion period to one year. *See* Mo. Rev. Stat. § 376.620; N.D. Cent. Code § 26.1-33-37.

This Court should not be expected to identify and assign weight to each Uniform Standards requirement's consistency with Colorado's insurance product content requirements before determining that the Colorado Constitution empowers the Colorado Legislature to enter into the Compact. Taking this notion to its logical extreme would reach a result that is irreconcilable with the Colorado Legislature's intended purpose.[5] If it were necessary to compare each provision of the Uniform Standards to other state content laws and only give effect to Uniform Standards requirements that match each specific state's law, then it would thwart the stated legislative intent to provide a legal mechanism to create and apply uniform product requirements.

The proper question is whether it was constitutional for the Colorado Legislature to delegate to the Commission the entire scope of authority it granted in the Insurance Compact. "The constitutional question raised is whether, in delegating such authority, the legislature completed its job of making the law by establishing a definite plan or framework for the law's operation. The legislature does not abdicate its function when it describes what job must be done, who must do it, and the scope of his authority." *Swisher v. Brown*, 402 P.2d 621, 626 (Colo. 1965). As discussed *infra*, the Colorado Legislature adhered to the applicable constitutional limits in enacting the Compact.

As illustrated by *Amicus* NAIC, providing a legally binding method to afford speed-to-market and uniformity was the overriding purpose of the NAIC in developing the Compact to avoid the threat of federal preemption of the regulation of asset-based insurance products. The

[5] Without the ability to contravene existing statutes, any state seeking to enter a compact would have to first repeal all laws that might be construed as interfering with the compact's activities. And that state would have to constantly police its statutes for additional repeal if the compact's role expanded.

binding nature of a compact is what distinguished the Insurance Compact from previous NAIC initiatives to improve speed-to-market in the review and approval of insurance products. However, the Uniform Standards are binding only with respect to products submitted to the Commission for review, and filing insurance products for Commission review and approval is voluntary to insurers licensed to do business in any Compacting State. The Insurance Compact provides, "Nothing herein shall prohibit an insurer from filing its product to any state wherein the insurer is licensed to conduct the business of insurance; and any such filing shall be subject to the laws of the state where filed"; it further provides, "it is not intended for the Commission to be the exclusive entity for receipt and review of insurance product filings." *See* Colo. Rev. Stat. § 24-60-3001, art. III § 1. An insurer may file products that are subject to Commission review and approval with the individual Compacting States, and such products are "subject to the laws of those States." *See id.* art. XVI § 1c. The statutory provisions and legislative history of the Insurance Compact confirm that the Colorado Legislature intended to establish a parallel, not conflicting, insurance product review and approval system to the insurance rate and form filing regime carried out by the Colorado Division of Insurance.

3. The Colorado Legislature does not encroach upon the executive branch's authority by creating an administrative body with the power to create rules that can supersede a conflicting Colorado statute.

In its Order, the Court specifically questioned the delegation of authority to the Commission to establish a Uniform Standards requirement that conflicts with a state statute—a power that the Colorado Division of Insurance would not have.[6] Regardless of the source of state

[6] It bears mention that in the field of insurance product regulation, many product content guarantees are established in statute—the suicide provision in the ITLIP Standards is not unique in this respect. Colo. Rev. Stat. § 10-7-102 contains a list of required life insurance policy provisions including a clause stating that the policy shall generally be incontestable after being in

law potentially supplanted by the activities of an interstate compact, the very nature of the Insurance Compact is that Uniform Standards would govern as binding law, implicating the type of conflict that concerns the Court not only in Colorado but in all of the Compacting States. This was understood and accepted by the drafters—both state legislators and state regulators—of the Insurance Compact as detailed by *amicus* NAIC and certainly understood by the Colorado Legislature, which itself had created the Colorado requirements applicable to insurance products subject to Colorado law.

This Court is bound to construe the Insurance Compact pursuant to the expressed intent of the Colorado Legislature and without disturbing Colorado's insurance code because of the presumption that "the legislature is aware of its own enactments and existing case law precedent." *LaFond v. Sweeney*, 343 P.3d 939, 943 (Colo. 2015). Courts construing Colorado statutes follow these rules of construction:

> (1) It is the legislative intention, as expressed in the statute, which the court must ascertain and declare; and (2) it must be assumed that the legislature acted with full knowledge of relevent [sic] constitutional provisions, inherent judicial powers existing, and of previous legislation and decisional law on the subject; that it did not intend to create a situation amounting to a departure from the general concept of democratic government; and that it sought to recognize and confirm inherent powers.

Smith v. Miller, 384 P.2d 738, 740 (Colo. 1963).

The Tenth Circuit case *Biodiversity Associates v. Cables*, 357 F.3d 1152 (10th Cir. 2004), is relevant to the Court's question about the Colorado Legislature's authority to delegate promulgation of a Uniform Standards requirement that conflicts with a Colorado statute. In *Biodiversity Associates*, the court considered the constitutionality of specific legislation that

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force for two years, a clause addressing if the insured's age is misstated on the application for the policy, and a clause providing a grace period of at least thirty days for late payment of premium.

displaced the carrying out of an executive function required under certain previously-enacted environmental laws prohibiting logging in an undeveloped portion of the Black Hills National Forest in South Dakota. The Tenth Circuit upheld Congress's later-enacted measure allowing logging in the area even though it interfered with the Forest Service's delegated authority to execute law enacted by Congress. The Court observed, "Congress has influenced the execution of the law here only 'indirectly—by passing new legislation.'" *Id*. at 1164 (citing *Bowsher v. Synar*, 478 U.S. 714, 734 (1986)). The Court further found, "To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive, it is merely to reclaim the formerly delegated authority." *Id.* at 1162.

Under the reasoning of *Biodiversity Associates*, it does not violate separation of powers for a state legislature to enact legislation reaching the opposite result as would apply under a previous delegation to the executive branch to apply state-specific insurance requirements. Similarly, it does not violate separation of powers for the Colorado Legislature to enact an interstate compact whose actions may reach the opposite result from previous enactments. The Uniform Standards apply to an insurance product within the authority of the Insurance Compact under Colo. Rev. Stat. § 24-60-3001, whereas the one-year suicide exclusion limit under Colo. Rev. Stat. § 10-7-109 applies to insurance forms within the product content authority of the Colorado Division of Insurance. The Insurance Compact should be viewed as an additional delegation, not a delegation that is incompatible with or unconstitutionally encroaching upon the authority delegated to the Colorado insurance regulator.

B. THE INSURANCE COMPACT IS A REASONABLE AND CAREFULLY LIMITED DELEGATION OF POWER TO AN INTERSTATE AGENCY.

Whether the Court applies the body of compact law or the body of law permitting delegation to an administrative agency to determine whether the Compact is a valid delegation of authority, it is bound to consider the Compact more broadly than the specific conflict at issue in this case. The Court is obliged to consider both the authority granted as well as the limitations applied to that authority. As cited above, the classic test of delegation to a compact requires that it be reasonable and carefully limited. *See Dyer*, 341 U.S. at 31.

The Court correctly theorized that the test of delegation to a state administrative agency in *Cottrell v. City & Cnty. of Denver*, 636 P.2d 703 (Colo. 1981) applies to interstate compacts, namely "the totality of protection provided by standards procedural safeguards at both the statutory and administrative levels." (*See* ECF No. 73 at 28–29.) Additionally, *Mistretta v. United States*, which upheld Congress's delegation of authority to promulgate sentencing guidelines to the U.S. Sentencing Commission, looked at whether Congress's delegation of authority to the Sentencing Commission was "sufficiently specific and detailed to meet constitutional requirements." 488 U.S. 361, 374 (1989).

1. The Insurance Compact contains carefully limited and detailed standards.

Under *Dyer*, *Cottrell*, and *Mistretta*, several provisions of the Insurance Compact illustrate that the Commission is governed by carefully limited and detailed statutory and administrative standards and safeguards in its exercise of delegated regulatory authority.

Three purposes of the Insurance Compact set forth by the Colorado legislature are directly relevant to the Commission's development and application of Uniform Standards applicable to insurance products filed with the Commission:

- To develop uniform standards for insurance products covered under the Compact;
- To establish a central clearinghouse to receive and provide prompt review of insurance products covered under the Compact and, in certain cases, advertisements related thereto, submitted by insurers authorized to do business in one or more Compacting States; and
- To give appropriate regulatory approval to those product filings and advertisements satisfying the applicable uniform standard.

Colo. Rev. Stat. § 24-60-3001, art. I §§ 2–4. These directives are intelligible principles that limit the Commission's authority.

The purposes correspond to specific powers of the Commission: (1) the power to promulgate rules with the force and effect of law that are binding on the Compacting States and (2) the power to exercise its rule-making authority and establish reasonable Uniform Standards for products covered under the Insurance Compact. *Id.* art. IV §§ 1–2. The Insurance Compact provides state legislatures with two powerful statutory checks on the Commission's rulemaking powers. First, a Compacting State may withdraw from the Insurance Compact by enacting a statute specifically repealing the statute by which it joined.[7] *Id.* art. XIV § 1. Second, as discussed *infra*, short of withdrawing from the Compact entirely, a Compacting State retains the unique and unfettered sovereign authority to opt out of a Uniform Standard, which avoids the applicability of the Uniform Standard in the state but preserves the state's participation in the remaining Uniform Standards. *Id*. art. VII §§ 3–6. This right to opt out safeguards the Colorado Legislature's expressed intent to provide an alternate statutory system of asset-based insurance

[7] The Insurance Compact defers to the withdrawing state's legislature in that the effective date of a state's withdrawal is the effective date of the repealing statute. Colo. Rev. Stat. § 24-60-3001, art. XIV § 1b. In contrast, other compacts that Colorado has joined postpone the effectiveness of withdrawal until the withdrawing state has taken further steps such as notifying other member states (*see* Interstate Compact for Education, Colo. Rev. Stat. § 24-60-1201, art. VIII § b) or until a specified period of time has elapsed after the repealing statute is enacted, before which the withdrawing state must continue to perform some functions under the compact (*see* Rocky Mountain Low-Level Radioactive Waste Compact, § 24-60-2200, art. 8 § D).

product filing, review, and approval, and only to the extent that it best protects the collective interests of the citizens of Colorado.

Additional statutory safeguards in Colo. Rev. Stat. § 24-60-3001 specific to the development of Uniform Standards are as follows, in the order they appear within the statute:

- A Uniform Standard is defined to be "construed, whether express or implied, to prohibit the use of any inconsistent, misleading or ambiguous provisions in a product and the form of the product made available to the public shall not be unfair, inequitable or against public policy as determined by the Commission." *Id.* art. II § 15.
- The Uniform Standards must be reasonable. *Id.* art. IV § 2; art. VII § 1.
- Uniform Standards for long-term care insurance products are specifically required to provide "the same or greater protections for consumers as, but shall not provide less than, those protections set forth in [the respective NAIC model act and model regulation on long-term care products]." *Id.* art. IV § 2.
- Promulgation of a uniform standard requires the support of a two-thirds supermajority of both the Commission and its Management Committee. *Id.* art. V §§ 1, 2.
- If the Commission exceeds its specific rulemaking authority, the Insurance Compact directs that "such an action by the Commission shall be invalid and have no force and effect." *Id.* art. VII § 1.
- Before adopting a uniform standard, the Commission is required to provide written notice of its intent to the relevant state legislative committees in each Compact Member State. *Id.* art. VII § 2.

The Compact meets and exceeds the criteria in *Dyer*, *Cottrell*, and *Mistretta* for reasonable, limited, adequate, and specific limits on the authority delegated in the Insurance Compact, and the Commission's exercise of that authority is subject to adequate statutory and procedural safeguards.

Colorado has joined several interstate compacts that contain specific provisions addressing the superseding effect of the compact's authority. The Interstate Medical Licensure Compact (IMLC) enacted in 2016 provides:

> (a) Nothing herein prevents the enforcement of any other law of a member state that is not inconsistent with the Compact.

(b) All laws in a member state in conflict with the Compact are superseded to the extent of the conflict. [8]

Colo. Rev. Stat. § 24-60-3602, § 24; *see also* Physical Therapy Licensure Compact, Colo. Rev. Stat. § 24-60-3701 *and* Compact for the Supervision of Adult Offenders, Colo. Rev. Stat. § 24-60- 2802. The IMLC was developed to provide an additional, expedited pathway to licensure for physicians. *See* http://www.imlcc.org/facts-about-the-imlcc/. The Colorado Legislature specifically authorized the IMLC to supersede conflicting state law, some of which would presumably be derived from statute such as the qualification for licensure section at Colo. Rev. Stat. § 12-36-107, which contains a different statutory regime for reciprocal licensure by endorsement for licensees of other jurisdictions. This information shows that the Colorado Legislature understands the effect of its enactments and of compacts that overlay state-specific regulatory regimes. *See Sweeney*, 343 P.3d at 943.

2. The Insurance Compact specifically defines the Commission's authority in the broader context of state regulation of the business of insurance.

In addition to the reasonable and carefully limited substantive and procedural standards binding the Commission's actions, the Insurance Compact addresses the limits of the Commission's authority in relation to other facets of state-based insurance regulation and to general state consumer protection responsibilities. These provisions further support the Insurance Compact's validity under the *Dyer*, *Cottrell*, and *Mistretta* cases because they further limit the Commission's scope of authority in relation to the Compact Member States' authority, both within and beyond the respective insurance regulatory agencies.

[8] The Insurance Compact contains a similar provision stating that nothing in its terms prevents the enforcement of any other law of a Compacting State and that the Uniform Standards, and only the Uniform Standards, apply to the content of insurance products filed with the Commission. Colo. Rev. Stat. § 24-60-3001, art. XVI ¶ 1b.

The cornerstone of the Commission's authority is this provision: "For any Product approved or certified to the Commission, the Rules, Uniform Standards and any other requirements of the Commission shall constitute the exclusive provision applicable to the content, approval and certification of such Products." Colo. Rev. Stat. § 24-60-3001, art. XVI § 1b. This and a companion provision in the same paragraph regarding the content of advertisements are the basis for giving the Uniform Standards the force and effect of law to be binding in the Compacting States for purposes of products filed with the Commission. *Id*. art. IV § 1. The binding effect of the Uniform Standards is what enables a product approved by the Commission to be sold or otherwise issued in the Compacting States in which the insurer is authorized to do business. *Id*. art. X § 3.

Specific authority of the Compacting States to regulate insurance products in the marketplace—those facets outside of the product content—are preserved as follows:

> The Commissioner of any State in which an Insurer is authorized to do business or is conducting the business of insurance, shall continue to exercise his or her authority to oversee the market regulation of the activities of the Insurer in accordance with the provisions of the State's law.

Id. art. VIII § 4. Article XVI addresses other laws of the Compacting States: "Nothing herein prevents the enforcement of any other law of a Compacting State." *Id*. art. XVI. In the sphere of insurance regulation, this provision preserves the Compacting States' authority to oversee an insurer's financial condition and corporate organization as well as the licensing of insurance agents and consumer education and assistance, among many other responsibilities while embracing binding national uniform product standards.

With regard to the scope of the Insurance Compact in the context of state laws outside of insurance regulation, there is specific preservation of several aspects of consumer protection, including state law remedies and tenets of construction of insurance contracts:

> Notwithstanding the foregoing, no action taken by the Commission shall abrogate or restrict: (i) the access of any person to state courts; (ii) remedies available under state law related to breach of contract, tort, or other laws not specifically directed to the content of the Product; (iii) state law relating to the construction of insurance contracts; or (iv) the authority of the attorney general of the state, including but not limited to maintaining any actions or proceedings, as authorized by law.

Id. art. XVI § 1b. This provision is explained by a lengthy drafting note addressing its meaning and intended effect. *Id*. The provision is the result of the extensive collaboration with state legislative and governmental organizations detailed in NAIC's *Amicus* Brief.

The provisions identified above show that the preemptive effect of the Uniform Standards with regard to products filed with the Commission were well understood and planned for by the Colorado Legislature, its counterparts in other states, state insurance regulators acting through the NAIC, and other state officials involved in developing the Compact.

3. Colorado's legislative opt out right under the Compact preserves an additional level of state-specific protection and is unfettered.

Perhaps the strongest indication that the Colorado Legislature understood the potential effect of duly adopted Uniform Standards is that it retains the sovereign right to opt out of a Uniform Standard. The Court's Order suggested this right is highly relevant to its question, along with the mandatory notice to state legislatures before the adoption of any Uniform Standard noted above. To the Commission's knowledge, the opt-out right is unique among compacts that

exercise regulatory authority.[9] The Insurance Compact affords each Compacting State the sovereign right to decline to participate in, or opt out of, a Uniform Standard for an insurance product as defined in the Insurance Compact either by legislation or regulation duly enacted under the individual state's rulemaking process. Colo. Rev. Stat. § 24-60-3001 art. VII §§ 3–6. In other words, in addition to the procedural safeguards applied to the development and enforceability of Uniform Standards specified in its terms, the Insurance Compact provides each Compacting State with the ability to determine independently which Uniform Standards it will participate in on a prospective basis.[10] A state legislature can enact a law to opt out of a duly adopted Uniform Standard at any time, for any reason. A Uniform Standard that has been opted out of "shall have no further force and effect in that State unless and until the legislation or regulation implementing the opt out is repealed or otherwise becomes ineffective under the laws of the State." *Id*. art. VII § 5. This right alone is a material illustration of the limited authority provided to the Commission because it prevents the Commission from unilaterally imposing a Uniform Standard for a specific insurance product.

The Commission is also required to provide a Compacting State specific notice and a period of time after the open and participatory development of a Uniform Standard to inform the Commission that it intends to opt out by regulation promulgated under the Compacting State's administrative procedure act. *Id*. art. VII § 4. Additional deference is provided to the wishes of

[9] Colorado has joined interstate compacts that recognize a majority-based rejection of an adopted rule, causing the rule to have no further force and effect. *E.g.*, Interstate Physical Therapy Licensure Compact, Colo. Rev. Stat. § 24-60- 3701, § 9B; Interstate Compact on Juveniles, Colo. Rev. Stat. § 24-60-701, § 6E.

[10] Upon joining the Insurance Compact, a state also has the right to opt out of uniform standards adopted by the Commission before the state becomes a member of the Commission.

the Compacting State in the corollary right to request a stay of the applicable Uniform Standard while the state perfects its opt-out under the Compact's terms. *Id*. art. VII § 6.

The Commission has a track record of assisting Compacting States with accomplishing an opt-out and enforcing an opt-out once accomplished. There are several examples in the Commission's ten-year history of Compacting States exercising this sovereign right. Indiana and Hawaii opted out of the individual long-term care insurance Uniform Standards upon their adoption. Arizona, Connecticut, Montana, Nevada and New Jersey opted out of the long-term care insurance Uniform Standards when enacting the Compact. Nevada later opted back in via legislation. Additional opt-outs by regulation have been pursued and accomplished, with the Commission granting a stay of the applicable Uniform Standard in each case to limit the effectiveness of the Uniform Standard in the respective states until the state completed or discontinued its promulgation of a regulation to opt out. The Commission has carried out the language of the Insurance Compact as a binding contract entered by the Compacting States.[11]

The Court would be second-guessing the legislature's decision to enter the Compact and its determination not to opt out of any of the 22 Uniform Standards with the same suicide

[11] The Commission has addressed a state legislature's action to add new or different terms and conditions in the Insurance Compact when Florida enacted the Insurance Compact with additional provisions that had the practical effect of changing the binding effect and exclusive nature of the Uniform Standards on products approved by the Commission and issued in Florida. Fla. Stat. § 626.9931-9934. After a lengthy and transparent process, the members of the Commission concluded that Florida's enactment contained several material variances from the Insurance Compact adopted by 44 Compacting States at that time and that Florida's Compact law did not appear to constitute an acceptance to enact and join this Compact. Even though there is a law on the books in Florida titled the Interstate Insurance Product Regulation Compact, Florida is not a member of the Commission under the well-settled rules of Compact law. *See* Commission Report and Recommendation regarding Florida's Insurance Compact Enactment, About the IIPRC (Aug. 25, 2014), http://www.insurancecompact.org/documents/about_mccarty_letter_140825.pdf.

exclusion provision[12] to find that Colorado's suicide exclusion statute applies instead of the Uniform Standards. "The general principle is that a state may not impose its own law on a compact unless that law is specifically preserved in the compact." *Seattle Master Builders Ass'n v. Pacific Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986). The Compact is not silent on this point or on the applicability of the body of state insurance law surrounding the product content requirements. By applying Colo. Rev. Stat. § 10-7-109 as the substantive content requirement for the life insurance contract approved by the Commission and issued in Colorado without evidence of a legislative or regulatory opt out, the Court would be substantively altering the terms of the Insurance Compact codified by the legislature in Colo. Rev. Stat. § 24-60-3001, having the effect of judicially amending several provisions of the Insurance Compact, including Article XVI § 1b and, as the Court acknowledges, possibly invalidating it as it applies to Colorado. As discussed *supra*, the Insurance Compact contains checks on its powers the Colorado Legislature could have exercised and did not. Therefore the Court must apply the terms of the Insurance Compact as having the force and effect of law and being binding upon the Compacting States.

III. CONCLUSION

For the above reasons, the Court should enter summary judgment as a matter of law for Amica Life Insurance Company on the ultimate question of whether the ITLIP Standard's two-year suicide exclusion controls when in conflict with Colo. Rev. Stat. § 10-7-109.

[12] *See* ECF No. 67-1, ¶ 45.

Respectfully submitted this 27th day of October, 2017.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-1161-WJM-CBS

AMICA LIFE INSURANCE COMPANY,

Plaintiff

v.

MICHAEL P. WERTZ,

Defendant.

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION

With the Court's permission, the Interstate Insurance Product Regulation Commission (the "Commission") respectfully submits a supplemental brief to address the questions set forth in the Court's June 7 Order for Further Briefing. The Commission remains in support of Plaintiff Amica Life Insurance Company's motion for summary judgment.

The delegation of authority at issue is granted through an interstate compact agreement enacted by the Colorado Legislature, and by legislatures from 43 sister states and jurisdictions.[1] The Court asks the parties and the *amici* to focus on whether a delegation would pass muster under the Colorado Constitution if it were made through a statutory provision in the insurance code authorizing the insurance commissioner to develop and apply enforceable standards through regulation, some conflicting with Colorado statutory law, to achieve interstate

[1] As in its initial *amicus curiae* brief, for efficiency the Commission refers to the 44 states and Puerto Rico as the "Compacting States."

uniformity. The Court's analogy of the delegation at issue fundamentally shifts the legal analysis away from long-standing legal principles of interstate agreements and the sovereign, constitutional right of state legislatures to compact with their sister states to cooperatively solve issues that transcend state borders, an accepted legislative power under the separation-of-powers doctrine. The element of a binding contract between sovereign states, duly enacted into statute by each party, makes this case fundamentally different from the pure administrative law question of whether a state administrative agency can be given the power by the Colorado Legislature to promulgate regulations that may have the effect of conflicting with or repealing statutory law.

The grant of authority to the Commission is necessarily distinct from the grant of authority to a state administrative agency because of the fundamental nature of an interstate compact.[2] As the Commission stated in its initial *amicus curiae* brief, interstate compacts occupy a different position of governing authority than a state administrative agency and are subject to a body of federal and state law specific to their dual statutory and contractual nature. (ECF No. 80-1 at 1.) As compacts are a legally binding method of uniformly settling interstate questions already within each compacting state's scope of authority, it follows that the joint undertaking has the potential to conflict with the individual member states' independent approaches. And it follows that a specialized body of law has developed to circumscribe a state legislature's adoption of and shared delegation of power to an interstate compact agency formed with sister

[2] The Commission respectfully disagrees with the Court's premise that the issue before the Court amounts to a delegation to the Commission, or by analogy to the Colorado Insurance Commissioner, to repeal a statute. The Colorado Legislature, not the Commission and not the Colorado Insurance Commissioner, already expressly determined through legislative enactment of the Interstate Insurance Product Regulation Compact that its requirements would not apply to the content of insurance products approved by the Commission pursuant to Uniform Standards, unless the state chose to opt out of the applicable Uniform Standards. Furthermore, the Uniform Standard allowing for a two-year suicide exclusion does not repeal Colo. Rev. Stat. § 10-7-109 for purposes of products issued in Colorado not submitted to the Commission.

states. *See West Virginia ex rel. Dyer vs. Sims*, 341 U.S. 22 (1951); *U.S. Steel Corp. vs. Multistate Tax Comm'n*, 434 U.S. 452 (1978); *Cuyler vs. Adams*, 449 U.S. 433 (1981).

The dual statutory and contractual nature of an interstate compact was noted in the earliest Compact case. *Green v. Biddle*, 21 U.S. 1, 92 (1823).[3] Beginning in the 1960s, courts used terms based in analysis of commercial contracts—offer, acceptance, consideration and "meeting of the minds"—to review interstate compacts. Michael L. Buenger et al., *The Evolving Law and Use of Interstate Compacts* 43 (2d ed. 2016). The consideration for the compact contract is a state's agreement to share a degree of its sovereignty with the party states and with the interstate agency, as to the subject matter of the compact. *Id*. at 51.

In striking down a challenge to a compact between Maryland and Virginia relating to the Potomac River, the Maryland Court of Appeals held:

> It cannot be doubted that the power to make a contract by statute, that is to say, a compact, with a sister state, is a power inherent in sovereignty limited only by the requirement of Congressional consent under Art. I, Sec. 10, of the Constitution of the United States. … The use of a compact for the execution of governmental functions is not an abdication but an exercise of government. 'The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations.'

Dutton v. Tawes, 171 A.2d 688, 696–97 (Md. 1961) (quoting *Hinderlider v. La Plata River &*

[3] The Court distinguished *Green* in its earlier summary judgment order on the basis that it shows only that legislation contradicting a previously enacted interstate compact cannot affect the compact. The Commission again notes that a legislature is presumed to be aware of its own enactments. *LaFond v. Sweeney*, 343 P.3d 939, 943 (Colo. 2015). The Commission is not aware of precedent stating that the enactment of an interstate compact is not entitled to the benefit of this presumption with regard to statutes passed prior to a compact enactment. There is no dispute that the Colorado General Assembly was well aware that the Interstate Compact could develop Uniform Standards requirements that could vary from Colorado's statutory product content requirements. (ECF No. 80-1 at 7.)

Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938) (internal citations omitted)).[4]

In addition,

> [a]n interstate compact functions as a contract "that takes precedence over statutory law in member states." *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir.1991); *see* Regulations Manual Commentary to Section 1–101 ("The law of interstate compact as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes….") "Having entered into a contract, a participant state may not unilaterally change its terms. *Id.*

Doe v. Ward, 124 F. Supp. 2d 900, 914–15 (W.D. Pa. 2000).

The Contract Clause of the U.S. Constitution[5] prohibits the impairment of contracts, and that prohibition extends to contracts formed by interstate compacts. *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 628 (2013) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). States enacting a compact form a contractual relationship and are restricted by the Contract Clause of the U.S. Constitution and analogous provisions of the respective state constitutions[6] from enacting laws that may impair the obligation of the parties to the interstate compact. *Dyer*, 341 U.S. at 23, 28; *Texas*, 482 U.S. at 128.

Applying Colo. Rev. Stat. § 10-7-109 to products submitted to the Commission is prohibited because the federal and state contract clauses do not permit the contract among Compacting States to be impaired by the application of substantive state law to the internal workings of a compact entity. *See Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth.*, 689 F.

[4] The Court has previously acknowledged that the Insurance Compact likely did not need Congressional consent. (ECF No. 73at 16.) The McCarran-Ferguson Act delegated and consented to states the broad responsibility to regulate the business of insurance, which presumably includes the power to do so by interstate agreement. (*See* ECF No. 79 at 9–12.)

[5] U.S. Const. art. I, § 10, cl. 1 ("No state shall … pass any … Law impairing the Obligation of Contracts.").

[6] Colorado's Contract Clause is found in Colo. Const. art. 2, § 11 ("No ex post facto law, nor law impairing the obligation of contracts … shall be passed by the general assembly.").

Supp. 2d 483 (W.D.N.Y. 2010). To do so asserts the sovereignty of one compact member above that of the shared sovereignty a compact represents. *See* Buenger, *supra,* at 52.

Justice Scalia's dissent in *New Jersey v. Delaware*, 552 U.S. 597 (2008), properly frames how to consider a compacting state's delegation to the contract formed by a compact. Applying the 1905 Compact between Delaware and New Jersey managing the Delaware River to the control of riparian improvements, Justice Scalia addresses the presumption against defeating a state's title to inland submerged lands:

> It has no application here, however, because the whole purpose of the 1905 Compact was precisely to come to a compromise agreement on the exercise of the two States' sovereign powers. … There is no way the Compact can be interpreted *other than* as a yielding by both States of what they claimed to be their sovereign powers. The only issue is *what* sovereign powers were yielded, and that is best determined from the language of the Compact, with no thumb on the scales.

Id. at 629–30 (emphasis in original). "The basic question before the Court is thus one of 'the fair intendment of the contract itself.'" *Kansas v. Colorado*, 533 U.S. 1, 21 (2001) (quoting *Virginia v. West Virginia*, 238 U.S. 202, 233 (1915)).

The subject matter of the Interstate Insurance Product Regulation Compact (the "Insurance Compact") is the development and enforcement of uniform product content requirements that states have traditionally expressed in both statute and regulation.[7] This subject matter falls squarely within each Compacting State's sovereign authority, and the Court is bound to apply the language of the Insurance Compact to determine this case, without assigning greater value to Colorado's one-year suicide exclusion limitation than to nearly every other Compacting

[7] *See* Colo. Code Regs. § 702-4:4-1-4, § 7 (providing a 30-day period during which the owner of a life insurance policy that replaces a previously owned life insurance policy may return a life insurance policy and receive a refund).

State's two-year suicide exclusion limitation.[8]

McComb v. Wambaugh involved the Interstate Compact on Placement of Children, which, like the Insurance Compact, does not express federal law because it did not require or receive Congressional consent. *See* 934 F.2d 474, 479 (3d Cir. 1991). Both Plaintiff Amica and *amicus curiae* NAIC have urged the Court to rely on the general principles in *McComb* that "[h]aving entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states." *Id*.

In its previous order on summary judgment (the "Order"), the Court distinguishes *McComb* first by denying that a ruling in favor of Wertz would change the terms of the Insurance Compact. (ECF No. 73 at 22–23.) To the contrary, by applying a state-specific product content requirement not recognized by the Uniform Standards, a ruling in favor of Wertz would render meaningless key provisions of the Insurance Compact.[9] Under the Court's reasoning, the Uniform Standards would only apply to the extent they comport with state-specific requirements. This amounts to withdrawing from the Insurance Compact outside of legislation enacted for that purpose, which the Court terms "invalidat[ing] the Compact as it applies in Colorado." (*Id.* at 23.) Respectfully, the way to invalidate the Insurance Compact in Colorado is to repeal Colo. Rev. Stat. § 24-60-3001 legislatively, rather than piecemeal to the extent a Colorado-specific product content requirement diverges from the Uniform Standards.

Next in its Order, the Court distinguishes *McComb* by denying that the dispute between

[8] *See* ECF No. 80-1 at 7 n.4.

[9] *See* Article X, Paragraph 3 of the Interstate Compact, which provides, "Any Product approved by the Commission may be sold or otherwise issued in those Compacting States for which the Insurer is legally authorized to do business," and Article XVI, Paragraph 1b, which provides, "For any Product approved or certified to the Commission, the Uniform Standards and any other requirements of the Commission constitute the exclusive provisions applicable to the content, approval and certification of such Products."

Amica and Wertz is a conflict of statutes. (ECF No. 73 at 23–24.) This line of reasoning takes the same path as the question the Court posed in its June 7 Order—that the conflict in this case is between a preexisting Colorado statute and the Insurance Compact as authorizing the Uniform Standards as a type of administrative regulation promulgated by an interstate agency. Again, the Commission respectfully requests the Court to view the Insurance Compact as a statute representing a contract among the Compacting States, representing the exercise of a different type of governing authority than state-specific statute or regulation.

Since Plaintiff Amica's Motion for Summary Judgment has been pending, the State of Colorado has approved and ratified at least one more interstate compact, the Physical Therapy Compact (the "PT Compact"), joining with at least 21 of its sister states to date for the purpose of facilitating the interstate practice of physical therapy. Colo. Rev. Stat. § 24-60-3702 (effective May 2017). In a similar manner as the Insurance Compact, the PT Compact creates an alternative regulatory system for granting authority to an out-of-state resident to practice as a licensed physical therapist in Colorado. To be eligible under the PT Compact to practice outside of his or her home state, a licensee must hold an unencumbered license in the licensee's home state. *Id*. at § 3.A; PT Compact Commission Rule 3.3.[10]

In 1991, the Colorado Legislature enacted the Physical Therapy Licensing Act, at Colo. Rev. Stat. §§ 12-41-10 to 12-41-130, setting out the requirements for obtaining a license within Colorado for engaging in the practice of physical therapy, including specific licensing requirements for applicants possessing a valid license in good standing from another state or territory of the United States. *See* Colo. Rev. Stat. § 12-41-109. The Department of Regulatory

[10] http://ptcompact.org/Portals/0/Images/PTCompactRules20180605.pdf.

Agencies promulgated a regulation "to delineate the requirements for licensure by endorsement for Physical Therapists under [Colo. Rev. Stat.] § 12-41-109." 4 Colo. Code Regs. § 732-1:206.[11]

The PT Compact Commission has the authority to "[p]romulgate uniform rules to facilitate and coordinate implementation and administration of this Compact. The rules shall have the force and effect of law and shall be binding in all member states." Colo. Rev. Stat. § 24-60-3702, § 7.C.5. Under the PT Compact, there could be a scenario where an out-of-state physical therapist is granted a license through the PT Compact but has not met any of the out-of-state qualifying standards enumerated in Colo. Rev. Stat. § 12-41-109.

The Commission urges the Court to focus on the tests of constitutional delegation to interstate compacts outlined in previous briefing in this case. As explained in those briefs, the Insurance Compact contains carefully limited and detailed safeguards for Compacting States to continually monitor and manage their participation in this interstate agreement, including the regulatory and statutory opt-out rights of Uniform Standards. (ECF No. 80-1 at 12–15, 17–19.) The opt-out mechanism in the Insurance Compact that the legislature or the state insurance department can exercise is a safety measure states can use to avoid a Uniform Standard independent of reciprocal action by other Compacting States[12] or having to withdraw completely from the Insurance Compact.

The Insurance Compact further contains several indicia that the Colorado Legislature

[11] This regulation may fit the model the Court is looking for, where state agencies operate under a broad delegation to modify, waive, or even supersede state law requirements, because it provides sole discretion to the State Physical Therapy Board to grant a license to an out-of-state applicant on a case-by-case basis when the applicant is unable to meet the competency requirements, provided the Board considers public safety, the particular circumstances and hardships faced by the applicant, and such other factors as the Board deems appropriate. By contrast, the statute implemented by the regulation, Colo. Rev. Stat. § 12-41-109, does not provide the Board this discretionary authority.

[12] *See* ECF No. 80-1 at 7 n.9.

exercises direct authority in the shared sovereignty of the Commission. The Commission is required to give the legislature special notice of rulemaking activities, to give a seat to the Commission member designated by the legislature, and to maintain a standing committee to represent legislative interests and provide feedback on the operations of the Commission. *See* Colo. Rev. Stat. § 24-60-3001, art. VII, § 2; art. V, § 1; art. V, § 3.a. Most importantly, the legislature retains authority to exempt Colorado from an adopted Uniform Standard at any time and for any reason. *Id.* at art. VII, § 3–5. The Insurance Compact contains no limitation on the legislature's right to opt out of an adopted Uniform Standard.

In its June 7 Order, the Court questions whether "acquiescence to regulatory action" is a sufficient safeguard. The Commission urges the Court not to adopt Defendant Wertz's unsupported assertion that the opt-out right lacks meaning because the Commission can conduct rulemaking outside of a single state's legislative session. To reserve the finality of a Commission rulemaking proceeding until each state has concluded a legislative session, or to deny applicability in any one state until its legislature has acted would thwart several of the purposes for which the Compacting States voluntarily joined the Insurance Compact. The unrestricted right of a state legislature to opt out of an adopted Uniform Standard is the safeguard for the purported timing concern.

In posing the issue before it as a question of administrative law rather than compact jurisprudence,[13] the Court risks handcuffing the Colorado Legislature with regard to all manner of compacts and grants of regulatory authority and may go so far as to limit the scope of

[13] *See* note 11, *supra* (providing an example of a regulation expanding, modifying, or conflicting with a state statute).

authority of state administrative agencies under a pure administrative law analysis to operate within the statutory standards.

Despite earnest effort to certify the state constitutional question pursued by Defendant Wertz to the Colorado Supreme Court, conclusive guidance was not forthcoming. This alone should be a sufficient basis for upholding Colorado's Compact Statute, because statutes are presumed to be constitutional, *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 511 (Colo. 2018), and the Colorado Supreme Court has declined the invitation to take action that would overcome this presumption. In the absence of any action by the state courts, the Court is best positioned to find that the Insurance Compact's Uniform Standards apply to the policy in this case as a matter of law, because the terms of the contract entered by the Compacting States require it.

For the above reasons, the Court should enter summary judgment as a matter of law for Plaintiff Amica Life Insurance Company on the ultimate question of whether the Uniform Standards' two-year suicide exclusion applies for purposes of products filed with the Commission.

Respectfully submitted on June 29, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2018, a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* - INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION** was electronically filed using the CM/ECF system which will send notification of such filing to the following:

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