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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