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 THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN FURTHER SUPPORT OF PLAINTIFF AMICA LIFE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

The National Association of Insurance Commissioners (the "NAIC"), as *amicus curiae*, submits the following supplemental brief in support of Plaintiff Amica Life Insurance Company's motion for summary judgment.

Argument

On June 7, 2018, this Court entered its order for further briefing (the "Order"), which permitted the NAIC, as *amicus curiae,* to file a supplemental brief. The Order states that "[t]he briefing thus far has proceeded under the assumption that the Colorado Legislature may not delegate to the Colorado insurance commissioner the sort of power the Legislature has delegated to the Interstate Commission." (ECF No. 89 at 1.) The Court then asked a fairly simple question, "Is this assumption correct?" (*Id.*) In short, the NAIC does not believe the briefing has proceeded based on this assumption, nor is the relevant question what authority may properly be delegated

to the Colorado insurance commissioner. Rather, the appropriate question is what authority did the Colorado legislature actually delegate to the Interstate Insurance Product Regulation Commission ("Commission") under the terms of the Compact legislation?

As the Compact explained in its initial brief, "[t]he contract among the 45 jurisdictions of the 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." (ECF No. 80-1 at 2.) As to products filed with the Commission, the Compact and Uniform Standards establish exclusive product content and approval requirements. *See* Colo. Rev. Stat. § 24-60-3001, art. XVI, § 1b. However, the Compact legislation clearly and unequivocally provides that nothing within the Compact Act prohibits any insurer from filing its product in any state wherein the insurer is licensed to conduct the business of insurance. *Id.*, art. III, § 1. Moreover, any such filing shall be subject to the laws of the State where filed. *Id.*, art. XVI, § 1c.

More importantly, and as previously detailed in the NAIC's initial brief (ECF No. 79-1), Colorado's one-year suicide exclusion provision (Colo. Rev. Stat. § 10-7-109) remains good law and continues to apply to any other life insurance policies sold in Colorado that are not submitted to the Commission for its review and approval. It must again be emphasized that the Commission simply provides an alternate path for an insurance company to take when selling certain insurance products in Colorado (and the other Compacting States) or, said another way, the Compact legislation makes clear that the uniform standards apply *only* to those products filed with the Commission, leaving insurers free to sell products governed by Colorado's requirements. By enacting the Compact legislation, the Colorado Legislature determined that the

uniform standards would apply to products filed under the Compact and did not leave the question open to the Commission or the Colorado insurance commissioner.

In addition to the initial question posed by the Court, the Order also identifies the Court's "major concern" that the Legislature has delegated to the Commission the discretion to override statutory standards which, as the Court states, effectively amounts to a delegation of the power to repeal a statute. (ECF No. 89 at 2.) Again, these are not the facts presently before the Court. Nowhere in the entirety of the Compact statute is the Commission granted such unwieldy power. Instead, the Compact is replete with safeguards which are specifically geared to prevent the very types of concerns raised by the Court.

In its Order, the Court explored two examples of federal statutes (the Federal Food, Drug and Cosmetic Act and the Controlled Substances Act) that seemingly provide certain federal authorities with a limited amount of delegation powers in order to repeal or modify federal law. While the NAIC appreciates the Court's comments that such statutes potentially indicate that, in some circumstances, a legislature may delegate the power to modify its own legislation, the Commission simply is not granted the authority to modify, alter, or otherwise rework already existing Colorado law. Colo. Rev. Stat. § 10-7-109 is—and remains—good law, and at no time has the Commission been empowered to repeal this statute. Instead, Colorado has joined with its sister states to provide the option of submitting uniform products to the Commission for review and approval under the ITLIP standards that were cooperatively developed and adopted.

It is worth repeating that, as previously explained in the NAIC's initial brief (ECF No. 79-1), the Compact was developed over a number of years after state insurance regulators and state legislators recognized the need to identify and make improvements in certain areas of state

insurance regulation, including the process for filing, reviewing, and approving insurance products. (*See* ECF No. 79-1 at 8–9.) NAIC members recognized that there was increased mobility of the population and a greater need for uniformity of some product lines. (*Id*. at 10.) "Consumers frequently moved from state to state, which resulted in people living in the same neighborhood owning insurance products that met different regulatory standards. State insurance regulators recognized that there needed to be greater uniformity for these product standards." (*Id*.) "State insurance regulators knew they needed a way to facilitate interstate cooperation and develop national uniform standards that would be applicable in multiple states. Over the course of three years of study, an interstate compact emerged as the best way to address this issue." (*Id*)

As the Compact was developed and introduced to the states for their consideration, including Colorado, a great deal of information was presented regarding the Compact, including the manner in which the Commission would function and how it would operate. In fact, the Colorado legislature received testimony from then Colorado Insurance Commissioner Doug Dean (among others) which clarified that the Compact is a joint public agency and instrumentality of the states, and that the Compact is intended to provide an optional filing process while continuing to recognize the rights of insurers to file with the Commission or individual states. (*Id*. at 23.) Commissioner Dean also represented that the "Compact replaces conflicting state law for products approved by the commission," but it must be acknowledged that the United States Supreme Court has long recognized that one of the axioms of modern government is that compacts may serve as the vehicle by which state legislatures delegate the power to make rules and decide particular cases to administrative bodies. (*Id*. at 17 (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951); *see also Mistretta v. United States*, 488

U.S. 361 (1989); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)).) This is particularly true when a compact, such as the one in this case, involves a reasonable and carefully limited delegation of power to an interstate agency which was drawn with great care. *See Dyer*, 341 U.S. at 31.

Ultimately the Compact was adopted by Colorado in 2004, became operational in 2006, and since that time the Compacting States, including Colorado, have retained full regulatory authority over individual and group life insurance, annuities, disability insurance, and long-term care insurance, except for the limited authorization provided to the Commission for those products submitted to it for its review and approval. More importantly, the Colorado legislature has not subordinated Colorado law with regard to *all* policies; rather, Colorado law, including Colo. Rev. Stat. § 10-7-109, remains in effect and still applies to policies not submitted to the Commission. (ECF No. 79-1 at 24.)

As the Court is well aware, the life insurance policy at issue, which is available for sale in 38 states (*id*. at 6), contained a suicide exclusion provision which provided, "Suicide of the insured, while sane or insane, within two (2) years from the Date of Issue is not covered under this policy." (*See* ECF No. 1-1 at 17.) Moreover, the policy itself also explained that it "is subject to the standards of the interstate insurance product regulation commission (IIPRC), as of the date the original application was signed." (*Id*.) This policy was submitted and approved for sale by the Commission leaving the decedent free to purchase an insurance policy with a one-year suicide exclusion had he so desired.

Finally, in answer to the Court's remaining questions as outlined in its Order, the NAIC is unaware of any Colorado administrative laws that operate as the Court posits on page 4 of its

Order. But, again, the Compact is not a Colorado administrative agency and the laws described by the Court are not how the Compact operates. As argued by the Compact in its supplemental brief, 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 how an interstate compact operates. In this particular case, the Commission's regulatory function is limited only to the specific insurance products submitted to it based on the Uniform Standards, and the fact remains that if an occasion ever arose wherein the Colorado insurance commissioner believed a standard submitted to the Commission for approval did not adequately protect Colorado consumers, the Compact allows the commissioner to opt out of that standard if adopted. Furthermore, the Compact also permits the state legislature to completely withdraw from the Compact if it was ever so inclined. At no time since entering the Compact has Colorado's insurance commissioner or the legislature exercised their right to opt out of a Compact Uniform Standard, and Colorado remains a full member of the Compact; accordingly, neither the commissioner nor the legislature share the concerns posed by the Court.

Conclusion

Based upon the above and foregoing, along with the arguments and authorities contained in its Brief of *Amicus Curiae* (ECF No. 79-1), the NAIC respectfully requests that this Court grant summary judgment in favor of Amica as a matter of law.

Respectfully submitted on June 29, 2018.

HUSCH BLACKWELL LLP

s/ Jeff M. Van der Veer
Jeff M. Van der Veer, #43837
1801 Wewatta Street, Suite 1000
Denver, CO 80202
Telephone: 303-749-7200
Facsimile: 303-749-7272
jeff.vanderveer@huschblackwell.com
Local Counsel for NAIC

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 THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN FURTHER SUPPORT OF PLAINTIFF AMICA LIFE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW** was electronically filed using the CM/ECF system which will send notification of such filing to the following:

Alex H. Hayden ahayden@cozen.com, alexhhayden@gmail.com

Gregory Paul Szewczyk szewczykg@ballardspahr.com, andersonre@ballardspahr.com, dethlefs@ballardspahr.com, DocketClerk_Denver@ballardspahr.com, gszewczyk@post.harvard.edu

Lisa D. Stern LStern@cozen.com, Christine.Sullivan@dbr.com

Michael John Miller MJMiller@cozen.com, diane.wynne@dbr.com

Ruth Hannah Summers ruthsummerslaw@gmail.com, ruthsummers2@gmail.com

s/ Mischelle Mayer
Legal Support Team Specialist