



POSITION STATEMENT 1-2022

At Issue: Has the US Congress given its consent to the Interstate Insurance Product Regulation Commission?

Issued by: Interstate Insurance Product Regulation Commission

Summary: The Interstate Insurance Product Regulation Commission recognizes the consent of Congress to the Compact and further that the Commission’s duly adopted Uniform Standards and other rules have the protection of the Supremacy Clause.

The Commission recognizes the implied consent of Congress was given in Public Law 109-356 (the “2006 DC ICC Approval”),¹ which authorized the District of Columbia to enter the Insurance Compact and, as part of that, approved the delegation of authority necessary for the Commission to achieve the purposes of the Compact. This public law was enacted with the signature of President George W. Bush in October 2006 in an omnibus authorization measure for the District of Columbia. The relevant portion provides as follows:

AUTHORITY TO ENTER INTO INTERSTATE INSURANCE PRODUCT REGULATION COMPACT.

(a) In General. The District of Columbia is authorized to enter into an interstate compact to establish a joint state commission as an instrumentality of the District of Columbia for the purpose of establishing uniform insurance product regulations among the participating States.

(b) Delegation. Any insurance product regulation compact that the Council of the District of Columbia authorizes the Mayor to execute on behalf of the District may contain provisions that delegate the requisite power and authority to the joint State commission to achieve the purposes for which the interstate compact is established.

This congressional action satisfies the legal test for implied congressional consent because it sanctions the objects of the Compact, aids in enforcing them by expressly approving delegation of authority to the Commission, and concerns subject matter that is appropriate for congressional legislation.

I. Background

The Interstate Insurance Product Regulation Compact (the “Compact”) brings states together to establish an interstate compact to regulate designated insurance products, specifically, individual and group annuity, life insurance, disability income insurance and long-term care insurance

¹ 2005 District of Columbia Omnibus Authorization Act, Pub. L. No. 109-356, § 104, 120 Stat. 2019, 2023 (2006).

products. This purpose is accomplished by the Commission’s development and adoption of Uniform Standards that are the exclusive provisions applicable to the content, approval and certification of products submitted to the Commission.² The Compact also creates a central office to receive and provide prompt review and approval of insurance products submitted to the Commission based on compliance with the Uniform Standards. The Compact provides this approval on behalf of the Compacting States, and, upon approval, the product may be issued in those states.³

As this process reflects, one of the principal reasons the Compact was developed was to provide a means by which to achieve uniform state regulation of certain insurance products. The States sought to emulate the federal efficiencies seen in the banking and securities sectors without compromising the long and successful history of state regulation of insurance. The Compact could then achieve uniformity of product requirements developed through state participation and enable simultaneous product approval in member states without removing life insurance from the state-based system of regulation.⁴

In its opinion in *Amica Life Insurance Company v. Wertz*, the Colorado Supreme Court held that, “in the context of an interstate compact that has not been approved by Congress, the General Assembly may not delegate to an interstate administrative agency the authority to adopt regulations that effectively override Colorado statutory law.”⁵ The Colorado Supreme Court recognized the validity of the Compact and its ability to approve insurance products on behalf of the Compacting States. The basis for the ruling was the non-delegation doctrine under the Colorado Constitution, which holds that “the legislature may not delegate its legislative power to another agency or person.”⁶ The Court framed the Uniform Standards as regulations and ruled that regulations cannot conflict with state statute on a product content requirement. This issue was before the Colorado Supreme Court on a certified question from the United States Court of Appeals for the Tenth Circuit. After the Colorado Supreme Court responded to the certified question, the parties before the Tenth Circuit settled on undisclosed terms and stipulated to dismissal of the appeal before the Tenth Circuit issued any opinion. As such, the Colorado Supreme Court opinion applies directly only to potential conflicts between the Uniform Standards and Colorado statutes. The *Wertz* opinion has no direct application to similar conflicts in other states, though there is a possibility it could be relied upon as persuasive authority in other jurisdictions.

The parties to the *Wertz* litigation did not meaningfully engage with the issue of whether the Commission operated under consent of Congress.⁷ The lack of a congressional consent analysis by the Court necessarily limits the applicability of the opinion, but it nonetheless exposes the

² INTERSTATE INSURANCE PRODUCT REGULATION COMPACT, Art. XVI, Sec. 1b (2005), available at https://insurancecompact.org/documents/compact_statute.pdf.

³ *Id.* at Art. X.

⁴ Joseph F. Zimmerman, Dual Insurance Regulation: Is It Desirable?, J. OF INS. REGUL., Fall 2008 at 3.

⁵ 462 P.3d 51, 58 (2020). *But see* Jeffrey B. Litwak and John Mayer, *Developments in Interstate Compact Law and Practice 2020*, The Urban Lawyer 51:1 (July 2021) (https://www.americanbar.org/groups/state_local_government/publications/urban_lawyer/2021/51-1/developments-interstate-compact-law-and-practice-2020/#ref102), which observes courts have concluded that compacts without consent also supersede conflicting state law, citing *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir 1991); *In re OM*, 565 A.2d 573, 579–80 (D.C. Ct. App. 1989).

⁶ *Id.* at 54.

⁷ The District Court in *Wertz* adopted Amica Life Insurance Company’s statement that Compact did not require congressional consent because Congress delegated regulation of the business of insurance to states in the McCarran-Ferguson Act. 15 U.S.C. §1101 *et seq.* Subsequent pleadings by Amica and the amici National Association of Insurance Commissioners and the Commission referred to the District Court’s statement.

Commission to erosion of its statutory purposes and authority in future challenges based on conflict between the Uniform Standards and state statute.

For these reasons, the Commission issues this position statement for the purpose of formally recognizing the applicability and implications of congressional consent to the Compact and, thus, the validity of Compact standards even when they conflict with state law. Congressional consent confers the status of federal law upon the Compact, with the result that its Uniform Standards prevail over conflicting state law. This is different than the appointment of a federal regulator of insurance because the recognition of congressional consent maintains the states' control of the Uniform Standards and their participation in the Uniform Standards—keeping in place the practical operations of the Compact.

A. Development of the Insurance Compact

The Compact was developed in an intentional and deliberative effort among state insurance regulators, state legislators, state governors and state attorneys general with input from industry and consumer representatives.⁸ It was a state-based response to Congress' scrutiny of the speed-to-market challenges facing life insurers competing against firms in other sectors of the financial services market following the enactment of the Gramm-Leach-Bliley Act.⁹ Congress considered preempting the regulation of insurance at the state level by creating a dual charter system for life insurers doing business across the states.

The Compact was developed and implemented on a platform of mutual agreement between the states. Developed in the early part of this century, it was designed as a legal mechanism for states to collaboratively and collectively set national Uniform Standards to apply as the product requirements for certain types of insurance products. These product lines were conducive to uniformity for the following reasons: 1) they were mobile, long-tailed insurance products a consumer purchases and keeps regardless of the state of residence; 2) they were based on mortality and morbidity risks that are not state-specific; and 3) they compete with federally regulated banking and securities products.

The powers delegated to the Compact are only those powers a state could lawfully exercise, i.e., the powers to adopt and apply product content requirements and to review and approve insurance products in the authorized product lines. The McCarran-Ferguson Act of 1945¹⁰ is federal law containing a broad delegation of insurance regulatory powers.

During the Compact's developmental stage leading up to its finalization in 2004, the need for express congressional consent was considered. At the time, the states did not seek explicit congressional consent, nor did they indicate they would oppose the grant of congressional consent.

⁸ Several organizations were involved in the development and support of the Insurance Compact including the National Association of Insurance Commissioners, National Conference of State Legislatures, National Council of Insurance Legislators, National Association of Attorneys General, and American Legislative Exchange Council.

⁹ Ernst Csiszar, *The NAIC's 2004 Agenda: A Changing of the Guard: Working to Implement Regulatory Modernization*, J. OF INS. REGUL., Spring 2004 at 3.

¹⁰ 15 U.S.C. §1101 *et seq.* The Act provides, "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Congress was kept informed of the states' progress to implement the Compact.¹¹ The general position was the Compact fell into the category of state-centric interstate compacts where congressional consent was not necessary based on United Supreme Court precedent, because the Compact did not alter the balance of power between the states and the federal government in light of the McCarran-Ferguson Act.

Before the Compact became operational, however, Congress did show its support. In 2006, Congress enacted Public Law 109-356 (the "2006 DC ICC Approval"), which authorized the District of Columbia to enter the Insurance Compact.¹²

B. Congressional Consent

Compacts are one of the oldest tools that states have used to exercise their sovereignty, originating before the United States Constitution was adopted.¹³ The United States Supreme Court has recognized states have the inherent authority to enter compacts through their status as quasi-sovereigns.¹⁴ As a result, compacts present state legislatures with a tool for governance, with congressional involvement unnecessary for the compacting state legislatures to create a given compact provided that the compact does not encroach upon federal power.¹⁵

Any compact that receives express or implied congressional consent automatically achieves the status of federal law.¹⁶ As a result, it can have particular import where a compact stands at odds with otherwise applicable state law, as the Supremacy Clause of the U.S. Constitution¹⁷ requires giving priority to the terms of a compact to which Congress has provided express or implied consent.

"[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."¹⁸ This

¹¹ "Due diligence to discover why more insurers have not chosen to use CARFRA led to the conclusion that the state law variations was the most significant stumbling block. Regulators now believe there is a way to develop a more efficient review process for life insurance and annuity products—one that will help insurers better compete in the marketplace while maintaining a high level of protection for insurance consumers." *Increasing the Effectiveness of State Consumer Protections, Before the Subcommittee on Oversight and Investigations, Committee on Financial Services United States House of Representatives*, 108th Congress 18-20 (2003) (testimony of Joel Ario, Secretary-Treasurer, National Association of Insurance Commissioners), http://www.naic.org/documents/testimony_0305_ario.pdf. See also *The State-Based System of Insurance Regulation, Before the Committee on Banking, Housing, and Urban Affairs*, 108th Congress 22-23 (2004) (testimony of Gregory Serio Chair, Government Affairs Task Force, National Association of Insurance Commissioners), <https://www.banking.senate.gov/imo/media/doc/serio.pdf>.

¹² 2005 District of Columbia Omnibus Authorization Act, Pub. L. No. 109-356, § 104, 120 Stat. 2019, 2023 (2006).

¹³ See generally Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71 (2003).

¹⁴ *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) ("That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government What is involved is a conventional grant of legislative power."); see Buenger, et. al., *The Evolving Law and Use of Interstate Compacts* (2nd Ed.) (2017) at 17 ("The authority of states to enter into compacts is, in the words of James Madison, so clearly evident that no further discussion is needed.") (citing Madison, *Federalist* 44 (1788)).

¹⁵ *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

¹⁶ *Cuyler v. Adams*, 449 U.S. 433, 440-41 (1981).

¹⁷ U.S. Const. Art. VI, Section 2 states, "This Constitution, and the laws of the United States which shall be made in pursuance thereof..., shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

¹⁸ *Cuyler*, 449 U.S. at 440.

transformation occurs automatically under federal law and does not require any request by the compacting states or work any change to the existing language of the compact.¹⁹

II. Governing Rules and Application

A. Implied Congressional Consent in General

Implied congressional consent is conferred by Congress taking action that demonstrates its approval of an interstate compact. *Green v. Biddle* succinctly articulated the standard for assessing the existence of implied congressional consent as follows:

Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. **The only question in cases which involve that point is, has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity?**²⁰

Green involved a compact between Kentucky and Virginia. The compact preserved Virginia's legal interest in land established before Kentucky became a state.²¹ The Court found that Congress consented to the compact when it referred to the compact, and Kentucky's acceptance of it, in a measure whose purpose was to recognize Kentucky as a state.²²

Green remains good law with respect to its finding on congressional consent. The handful of distinguishing cases pertain to issues other than congressional consent and other than compacts, in some instances. The U.S. Supreme Court cited it for the proposition that congressional consent can be implied in *U.S. Steel Corp. v. Multistate Tax Comm'n*.²³

Congressional consent can occur after a compact's formation. The fundamental compact case of *Virginia v. Tennessee* found congressional consent to a boundary between the party states had been established by the conduct of Congress in using the boundary line established by the prior-enacted compact for judicial, revenue, electoral and appointment purposes.²⁴ "The approval by Congress of the compact entered into between the states upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings."²⁵ The Court notes that the development of the basis for consent—the agreement among the states and the conduct agreed to under the agreement—may not reveal itself in the developmental phase of the agreement.²⁶ The Court said it found no reason why consent could not be subsequently given

¹⁹ *Id.*

²⁰ 21 U.S. 1, 85-86 (1823) (emphasis added).

²¹ The principal holding of *Green* is a Kentucky statute enacted subsequent to the compact could not preempt the contract formed by the compact between the states. The District Court in the *Wertz* litigation distinguished *Green* because it did not concern the effect of state constitutional non-delegation doctrines upon the authority of Kentucky and Virginia to enter the compact at issue. *Amica Life Ins. Co. v. Wertz*, 350 F. Supp. 3d 978 (D. Colo. 2018).

²² *Id.* at 86-87.

²³ 434 U.S. 452, n. 14 (1978).

²⁴ 148 U.S. 503 (1893).

²⁵ *Id.* at 521-522.

²⁶ *Id.* at 521.

“where the agreement relates to a matter which could not well be considered until its nature is fully developed.”²⁷

Despite its age, *Virginia v. Tennessee* provides one of the most potent explanations of how the Compact Clause regards consent. “The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied.”

Virginia v. Tennessee remains good law. It was cited with approval by the U.S. Supreme Court as recently as 1997 and 1994 in special master reports and by the Court itself in 1990. In 1987, Justice White in dissenting from *U.S. Steel Corp.* cited *Virginia* as the leading case for the notion that consent can be expressed in several ways, including inferred “from the congressional reaction.”²⁸

Implied congressional consent has the same legal effect as express congressional consent. A 1981 U.S. Supreme Court case cited above, *Cuyler v. Adams*, provides a two-prong test for whether a compact achieves the status of federal law, stating that “where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”²⁹ This is true even if the subject of the compact does not require consent under the Compact Clause. *Cuyler* involved the transfer of prisoners from Pennsylvania to New Jersey under the Interstate Agreement on Detainers (the “Agreement”). The Court found that Congress consented to the Agreement before the Agreement’s enactment by generally consenting to “agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies.”³⁰

Cuyler v. Adams remains good law for the propositions cited here. In 2015, the U.S. Supreme Court cited it for the proposition that “[C]ongressional consent transforms an interstate compact ... into a law of the United States.”³¹ It has been distinguished on the grounds it was not applicable to prisoner transfers that were not subject to the Agreement. In 1998, the Ninth Circuit Court of Appeals characterized the *Cuyler* factor whether a compact agreement is an appropriate subject for congressional legislation as “a cooperative effort touching a federal concern.”³²

B. Implied Consent and the Insurance Compact

The above caselaw providing criteria for the existence of implied consent is decisively in favor of implied congressional consent, which satisfies the first prong of the *Cuyler* test.

Under *Virginia v. Tennessee*, congressional consent for an interstate compact “is always to be implied when congress adopts the particular act by sanctioning its objects and aiding in enforcing

²⁷ *Id.*

²⁸ *U.S. Steel Corp.*, 434 U.S. at 486.

²⁹ *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). In illustrating subjects other than crime control that are an appropriate subject for federal legislation, the Court named pollution control in interstate streams and interstate commerce in navigable waters.

³⁰ *Id.* at 441.

³¹ *Kansas v. Nebraska*, 574 U.S. 445, 455 (2015).

³² *Ghana v. Pearce*, 159 F.3d 1206, 1208 (9th Cir. 1998).

them.”³³ The 2006 DC ICC Approval satisfies this standard. Again, the text of the 2006 DC ICC Approval provides as follows.

AUTHORITY TO ENTER INTO INTERSTATE INSURANCE PRODUCT REGULATION COMPACT.

(a) In General. The District of Columbia is authorized to enter into an interstate compact to establish a joint state commission as an instrumentality of the District of Columbia for the purpose of establishing uniform insurance product regulations among the participating States.

(b) Delegation. Any insurance product regulation compact that the Council of the District of Columbia authorizes the Mayor to execute on behalf of the District may contain provisions that delegate the requisite power and authority to the joint State commission to achieve the purposes for which the interstate compact is established.

In part (a), Congress sanctions the objects of the Compact in several ways. It identifies the Compact by its formal name in the title of Section 104, “Authority to Enter Into Interstate Insurance Product Regulation Compact.” It names the purpose of the Commission when authorizing the District of Columbia to join a compact (presumably the one just named in the title)—“establishing uniform insurance product regulations among the participating States.”³⁴ The purpose language in the 2006 DC ICC Approval is consistent with Article III, Section 1 of the Compact, which establishes a joint public agency with authority to perform the regulatory function of product review and approval, under duly promulgated Uniform Standards, on behalf of its member States.³⁵ It also uses the language in Article III, Section 2 of the Compact identifying the Commission as “an instrumentality of” its members.³⁶

In part (b), Congress sanctions the objects of the Compact and aids in enforcing them by specifically approving the delegation of power and authority necessary to achieve the purposes of an insurance product regulation compact that the D.C. Council may join. The language aids in enforcing the objects of the Compact because it specifically says the compact may “contain provisions” delegating the requisite authority to achieve the purpose of uniform insurance product regulations. This language reflects an understanding that the Commission established by the Compact will possess and exercise a portion of regulatory authority. In part (b) Congress aids the enforcement of the Compact’s purposes by consenting to their exercise, while in part (a) Congress sanctions the Compact’s purposes by supporting the entrance of the District of Columbia into the Compact.

Under *Green v. Biddle*, consent exists when Congress expresses it by “a positive act.”³⁷ The 2006 DC ICC Approval is unquestionably an act of Congress that expresses a positive statement about the Compact. It specifically refers to the Compact by its formal name and authorizes the District of Columbia to join it or a compact of like purpose.

³³ *Virginia v. Tennessee*, 148 U.S. at 521.

³⁴ 2005 District of Columbia Omnibus Authorization Act, Pub. L. No. 109-356, § 104, 120 Stat. 2019, 2023 (2006).

³⁵ Article III, Section 1 of the Compact provides, “The Compacting States hereby create and establish a joint public agency known as the “Interstate Insurance Product Regulation Commission.” Pursuant to Article IV, the Commission will have the power to develop Uniform Standards for Product lines, receive and provide prompt review of Products filed therewith, and give approval to those Product filings satisfying applicable Uniform Standards.”

³⁶ The Compact refers to the “Compacting States” in this provision. The 2006 DC ICC Approval refers to “a joint state commission as an instrumentality of the District of Columbia.”

³⁷ *Green* at 41.

Additionally, the timing of the positive act in *Green* in relation to the initiation of its compact corresponds to the sequence of events around the 2006 DC ICC Approval in relation to the Compact. In *Green*, Virginia enacted the compact language in 1789. Congress consented to the admission of Kentucky into the union in 1791. Kentucky included the compact language in its constitution and ratified it in its constitutional convention in 1792.

Similarly, the Compact came into being in 2004 with the mirror-image enactments of the Compact Statute by Colorado and Utah. On June 13, 2006, the Compact's Commission had its inaugural meeting, having met both threshold requirements of 40% of the national asset-based product premium volume or 26 states. The 2006 DC ICC Approval was enacted on October 16, 2006,³⁸ when the Compact was ramping up its governance structure and product filing operations and before the Commission adopted its first Uniform Standard or approved its first product filing. Thirteen years later, the District of Columbia followed through on the 2006 DC ICC Approval by entering the Compact on March 6, 2019.

The sequence of events relative to congressional consent under *Green* and the Compact illustrates that Congress's positive act sanctioning the respective compacts occurred between the conception of the compacts and their full realization or operation. Therefore, from a timing perspective, the 2006 DC ICC Approval establishes implied congressional consent to the Compact in its entirety and without limitation.

Furthermore, the 2006 DC ICC Approval signifies implied congressional consent even though it speaks to one jurisdiction's—the District of Columbia's—entry into the Compact. Courts have found consent in measures that are more indirect, generic, or limited than in the 2006 DC ICC Approval. The consent in *Green* was not the primary purpose of the congressional measure in which it appeared. The primary purpose was to recognize Kentucky as a state of the union.³⁹ Consent to the agreement between Virginia and Kentucky was secondary.

In *Cuyler*, consent is drawn from the Crime Control Consent Act of 1934. The compact in *Cuyler*, the Interstate Agreement on Detainers, is one of several compacts that take the Crime Control Consent Act of 1934 as express congressional consent.⁴⁰ The Crime Control Consent Act of 1934 is a generic statement of consent to collaboration among states to solve shared problems related to criminal activity.⁴¹ Some 47 years after the Crime Control Consent Act of 1934, *Cuyler* found the Detainer Agreement “within the scope” of the 1934 legislation; this constituted congressional consent to the Detainer Agreement.⁴²

³⁸ See <https://www.congress.gov/bill/109th-congress/house-bill/3508/actions>.

³⁹ *Green* at 86-87.

⁴⁰ Western Interstate Corrections Compact, ICAOS, Interstate Corrections Compact, the Interstate Compact for the Supervision of Parolees and Probationers, relied upon this 1934 statute. Likewise Congress gave its advance consent to states authorizing the development of interstate pilot banking programs for the financing of highway infrastructure, Pub. Law No. 104-59, Title III, Section 350, 109 Stat. 618 (1996); the development of radioactive waste disposal facilities, 42 U.S.C. § 2021d (2004); coordination of mass metropolitan transit systems, see Transportation Equity Act for the 21st Century, Pub. Law No. 105-178 (1998); and for the construction of deep water ports, see 33 U.S.C., § 1508(d) (2004).

⁴¹ 4 U.S.C.A. § 112 provides, “The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.”

⁴² *Cuyler* at 441 n.9.

The Crime Control Consent Act of 1934 signifying consent for a number of compacts corresponds to how Justice White described consent in his often-quoted dissent in *U.S. Steel*. Justice White recognized that consent is a political affirmation of the ability of states to collaborate to solve shared problems in ways they design. Consent can take several forms and can carry with it varying degrees of direction from Congress to a compact. White wrote:

Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement that Congress approve a compact is to obtain its political judgment: ... It comports with the purpose of seeking the political consent Congress affords that such consent may be expressed in ways as informal as tacit recognition or prior approval, that Congress be permitted to attach conditions upon its consent, and that congressional approval be a continuing requirement.⁴³

Applying this description to the question of implied congressional consent to the Compact, the 2006 DC ICC Approval expresses the political consent of Congress by naming the Compact, sanctions it by authorizing the District of Columbia to join it and recognizes the enforceability of its enumerated powers. This legislation was unconditional and did not seek to influence the substantive provisions of the Compact.⁴⁴

After congressional consent, the second prong of the *Cuyler* test for when a compact has the protection of the Supremacy Clause is whether the subject matter of the compact is “an appropriate subject for congressional legislation.”⁴⁵ As referenced above, the 1945 enactment of the McCarran-Ferguson Act is a broad delegation of insurance regulatory powers to the states. The ability of Congress to sanction state-based solutions to problems within the highly regulated business of insurance long predates the Compact.⁴⁶ Further, Congress has continued to legislate in the business of insurance in specific ways and with respect to specific products.⁴⁷ There is no question that the subject matter of the Compact is an appropriate subject for congressional legislation.

With regard to the 2006 DC ICC Approval being specific to the District of Columbia, there is a factual parallel to *Cuyler*. As referenced above, *Cuyler* held that 1934 legislation provided express congressional consent before the Detainer Agreement (the “Agreement”) was entered. In addition, the Court in *Cuyler* observed that Congress’s specific support for the entry of the District of Columbia into the Agreement in 1979⁴⁸ “implicitly reaffirmed” Congress’s consent to the

⁴³ *U. S. Steel Corp.* at 485–86 (internal citations omitted).

⁴⁴ In 2019, the District of Columbia acted on this congressional authorization by joining the Compact. D.C. Code §§ 31-1392.01-31-1392.02.

⁴⁵ *Cuyler* at 440.

⁴⁶ See generally Earl R. Pomeroy & Carol Olsen Gates, *State and Federal Regulation of the Business of Insurance*, J. OF INS. REGUL., Winter 2000 at 179.

⁴⁷ See, e.g., Financial Services Modernization Act of 1999 (Pub. L. 106-102) (directing states to implement either a uniform or a reciprocal licensing system by 2002 in order to avoid implementation of a federalized insurance producer licensing program); Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-505) (delegating authority to the NAIC to standardize the Medicare supplement insurance marketplace); and Employee Retirement and Income Security Act of 1974 (Pub. L. No. 93-406) (setting federal standards for the administration of employee welfare benefit plans and their fiduciaries, while saving certain activities regulated by states from preemption).

⁴⁸ Pub. L. 91–538

Agreement.⁴⁹ As such, there is precedent for the proposition that Congress’s authorization of the District of Columbia to enter an interstate compact constitutes the implicit consent of Congress to that interstate compact.

C. Insurance Compact Savings Clause and Consent

With this formal recognition of implied consent to the Compact, it becomes important to address the impact of congressional consent on Article XVI(2)(d) of the Compact Statute (the “Savings Clause”). The Savings Clause provides:

In the event any provision of this Compact exceeds the constitutional limits imposed on the legislature of any Compacting State, the obligations, duties, powers or jurisdiction sought to be conferred by that provision upon the Commission shall be ineffective as to that Compacting State, and those obligations, duties, powers or jurisdiction shall remain in the Compacting State and shall be exercised by the agency thereof to which those obligations, duties, powers or jurisdiction are delegated by law in effect at the time this Compact becomes effective.

The *Wertz* court concluded that “the General Assembly may not delegate to an interstate administrative agency the authority to adopt regulations that effectively override Colorado statutory law”.⁵⁰ However, the court specifically acknowledged that “federal preemption or supremacy clause principles” require the opposite conclusion in cases where a compact received congressional consent.⁵¹ Accordingly, with congressional consent to the Compact, any application of the Savings Clause to challenge the delegation of authority to the Compact would be unlikely to succeed.

Furthermore, interpreting and applying the Savings Clause in isolation, without consideration of the impact of congressional consent and without attention to whether the resulting construction is destructive of the purpose sought to be achieved by the Compact as a whole is not faithful to the text of the Compact. This has significance for application of principles of contract interpretation and statutory construction. An axiom of compact case law is that a compact is both a statute and a contract among the member states.⁵² “So, as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties.”⁵³ Likewise, from a statutory construction standpoint, an act cannot be held to destroy itself.⁵⁴ The United States Supreme Court observes that it “has repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.”⁵⁵

The Compact is unambiguous as to the object of the compacting parties. One of its central purposes is “[t]o develop uniform standards for insurance products covered under the Compact.”⁵⁶

⁴⁹ *Cuyler* at 441 n.9.

⁵⁰ *Wertz*, 462 P.3d at 58.

⁵¹ *Wertz*, 462 P.3d at 58.

⁵² *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013).

⁵³ *Herrmann*, 569 U.S. at 628 (internal citations omitted).

⁵⁴ *Tex. & Pac. R.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

⁵⁵ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (internal quotation omitted)

⁵⁶ Art. I(2); see also Art. I(5) (“To improve coordination of regulatory resources and expertise between state insurance departments regarding the setting of uniform standards and review of insurance products covered the Compact.”)

An interpretation of the Savings Clause that allowed a state's non-delegation doctrine to override the Commission's specific authority to promulgate Uniform Standards for covered insurance products would necessarily defeat the Compact's purposes. It would also run counter to Article XV(2), which directs that the Compact's provisions, including the Savings Clause, "shall be liberally construed to effectuate its purposes." An interpretation of the Savings Clause that impedes the promulgation of uniform product standards is irreconcilable with the primary function of the Compact.

Notably, the Savings Clause has meaning without overriding basic principles of statutory and contractual construction. For example, it preserves state constitutional due process protections against arbitrary and capricious government action in the determination of whether a product submitted to the Commission is entitled to approval.

III. Conclusion

The Compact does not intrude on fundamental state-federal relations, and thus does not require congressional consent. However, even if consent were required, this position statement demonstrates that the fundamental legal authorities on congressional consent support the conclusion that the 2006 DC ICC Approval establishes implied congressional consent to the terms of the Compact. As a result, the Compact enjoys the protection of the Supremacy Clause. As the opinion in *Amica Life Insurance Company v. Wertz* recognized, as a consequence of consent, federal law prevails over inconsistent state law pursuant to the Supremacy Clause.⁵⁷ Furthermore, well-established principles make clear that the Compact's savings clause does not invalidate the Compact's purpose and binding legal effect.

⁵⁷ *Wertz*, 462 P.3d at 58.