

STANDING COMMITTEE ON
GOVERNMENTAL AFFAIRS

CHAIR
Wm. T. Robinson III
wrobinson@fbtlaw.com

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

Robert N. Weiner, Board of Governors Liaison

Michael A. Bedke

Donald R. Dunner

Thomas A. Forbes

H. Russell Frisby, Jr.

Rosemary E. Ciulliano

Martin E. Lybecker

Richard M. Macias

Laura A. Miller

Janice F. Mulligan

Pauline A. Schneider

ABA DAY IN WASHINGTON
PLANNING COMMITTEE

Laurel G. Bellows, Chair
lbellows@bellowspsc.com

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR
Thomas M. Susman
(202) 662-1765
susmant@staff.abanet.org

DEPUTY DIRECTOR
Denise A. Cardman
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL
R. Larson Frisby
frisbyr@staff.abanet.org

Lillian B. Gaskin
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL
Ann Carmichael
carmicha@staff.abanet.org

Kristi Gaines
gainesk@staff.abanet.org

Kirra L. Jarratt
jarratk@staff.abanet.org

E. Bruce Nicholson
nicholsonb@staff.abanet.org

LEGISLATIVE COUNSEL/DIRECTOR
GRASSROOTS OPERATIONS
Julie M. Strandlie
jstrandlie@staff.abanet.org

LEGISLATIVE COUNSEL/
DIRECTOR OF STATE LEGISLATION
Kenneth J. Goldsmith
goldsmithk@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT
Hayden Gregory
gregoryh@staff.abanet.org

LEGISLATIVE COORDINATOR
Jared D. Hess
hessj@staff.abanet.org

December 3, 2009

The Honorable Harry Reid
Senate Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Chairman, House Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mitch McConnell
Senate Minority Leader
United States Senate
Washington, D.C. 20510

The Honorable John Boehner
House Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lamar Smith
House Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Re: Principles Regarding Formation of Interstate Health Insurance Compacts
Relating to H.R. 3962 and H.R. 3590

Dear Gentlemen and Speaker Pelosi:

On behalf of the American Bar Association, which has nearly 400,000 members, I write to alert you to the ABA's recent adoption of various principles dealing with the formation of interstate compacts that are directly relevant to your consideration of pending healthcare legislation.

At least two of the bills now pending before Congress—H.R. 3962, § 309 (the House bill) and H.R. 3590, § 1333 (the Senate bill)—contain provisions approving the formation of interstate health insurance compacts. Under the House bill, the Secretary of Health and Human Services (HHS) would consult with the National Association of Insurance Commissioners (NAIC), along with others, to develop model guidelines for the creation of such compacts. Under the Senate bill, the Secretary would consult with NAIC and issue regulations for the creation of such compacts. Both bills raise the possibility that the guidelines or regulations would approve the formation of a compact agency similar to the Interstate Insurance Product Regulation Commission (<http://www.insurancecompact.org/>).

At its annual meeting held in August 2008, the House of Delegates of the American Bar Association adopted a resolution stating that “Congress, when it

December 3, 2009

Page 2

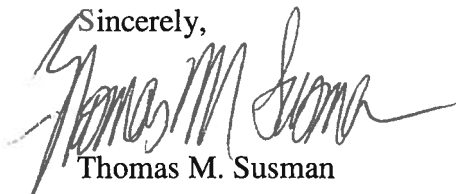
consents to the creation of an interstate compact agency under Article I, Section 10, clause 3 of the U. S. Constitution, [should] prescribe the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards of judicial review.” (A copy of ABA Resolution 111B and the related background report is enclosed.) In addition, the resolution adopted by the ABA urges that provisions concerning administrative procedure and judicial review for compact agencies should be consistent with the following fundamental administrative law norms:

1. In the case of adjudication, parties should be able to present their positions orally or in writing and challenge positions of opposing witnesses orally or in writing; the adjudicatory decision should be rendered by an impartial decision-maker; and, a statement of reasons should accompany each decision.
2. In the case of rulemaking, there should be an opportunity, following notice, for the public to comment on proposed regulations.
3. Statutory provisions relating to judicial review of agency decisions should assure that those adversely affected by an agency decision should receive an appropriate form of judicial review, and should specify standards of review that do not vary depending on the court that reviews an action of the compact agency.

The purpose of the various principles contained in our resolution is to ensure transparency, accountability, and fairness in the operation of entities created by interstate compacts authorized by Congress. That purpose is clearly relevant to the interstate compact entities envisioned by the pending healthcare legislation.

The ABA’s Section of Administrative Law and Regulatory Practice developed the principles contained in ABA Resolution 111B. The Section has considerable expertise regarding the formation and operation of interstate contacts as a mechanism for carrying out the purposes of federal regulatory legislation, and is particularly knowledgeable about administrative procedure issues unique to compact agencies. I would urge you to consult with the leaders of the Section as you consider the use of interstate compacts in the context of the current proposals for healthcare reform. If you have any questions regarding these issues, please contact James W. Conrad, Jr., Chair of the Section’s Legislation Committee, at 202-822-1970 and jamie@conradcounsel.com.

Sincerely,



Thomas M. Susman

Enclosure

cc: James W. Conrad, Jr.

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 11-12, 2008

RECOMMENDATION

RESOLVED, That the American Bar Association urges Congress, when it consents to the creation of an interstate compact agency under Article I, Section 10, clause 3 of the U. S. Constitution, to prescribe the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards of judicial review.

FURTHER RESOLVED, That the American Bar Association urges states and territories that are parties to an existing congressionally approved interstate compact to jointly review the administrative procedures employed by the agency created by the compact, if any, and, consistent with Congress's consent, enact necessary legislation to prescribe the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards of judicial review.

FURTHER RESOLVED, That the American Bar Association urges existing compact agencies, in the absence of procedures specified by Congress or the states and territories, to review their administrative procedures and adopt appropriate administrative procedures to govern their functions.

FURTHER RESOLVED, That the American Bar Association urges that provisions concerning administrative procedure and judicial review for compact agencies should be consistent with the following fundamental administrative law norms:

1. In the case of adjudication, parties should be able to present their positions orally or in writing and challenge positions of opposing witnesses orally or in writing; the adjudicatory decision should be rendered by an impartial decision-maker; and, a statement of reasons should accompany each decision.
2. In the case of rulemaking, there should be an opportunity, following notice, for the public to comment on proposed regulations.
3. Statutory provisions relating to judicial review of agency decisions should assure that those adversely affected by an agency decision should receive an appropriate form of judicial review, and should specify standards of review that do not vary depending on the court that reviews an action of the compact agency.

REPORT

I. Introduction

Congressionally approved interstate compact agencies operate in a no-man's land of administrative law, largely subject to neither the federal Administrative Procedure Act (APA) nor any state APA.

Compact agencies are not federal agencies within the meaning of the federal APA. Some state APAs define state agency broadly enough to cover congressionally approved compact agencies, but courts have consistently held that one signatory state may not unilaterally apply its own law to a compact agency absent express compact authorization. Many of the compacts that specify administrative procedures adopt some but not all provisions of one APA or another. Courts have struggled with this situation for years resulting in much inconsistency. This is remarkable when one considers that the purpose of a compact is to establish uniformity of law among two or more states.

The lack of clear standards for administrative procedure encourages compact agencies to employ only the procedures they find convenient and leaves to the courts the task of defining governing standards after the fact.

This report recommends that Congress, the states and territories, and existing congressionally approved compact agencies take steps to remedy this situation. Congress should make provision for administrative procedure and judicial review when it approves compact agencies. This would address the problem for the future. For existing congressionally approved compacts, states and territories should review the procedures employed by existing compact agencies and cooperatively make provision for appropriate standards of administrative procedure and judicial review. Until the states and territories act, existing congressionally approved compact agencies should adopt appropriate administrative procedures by regulation.

These statutes or regulations should adhere to fundamental principles of administrative procedure and judicial review.

II. Interstate Compacts Overview

Interstate compacts are an effective tool for structuring interstate relationships, regulating private activity that transcends state lines and furnishing government services on a regional basis. They offer an alternative to federal programs and regulation and are particularly appropriate for matters traditionally addressed by states, such as law enforcement and public health, safety and welfare.

Nearly 200 compacts are in place today covering a wide range of subjects, such as emergency assistance, human services, law enforcement, natural resources, energy, and transportation. These compacts may involve only two states or all 50 and some of the territories. Some include Canadian provinces and/or Mexican states, as well. With few exceptions, no two

111B

compacts or compact agencies are alike. Most of the compacts also create some type of agency to administer the compact.

Interstate compacts may be divided into two categories: those that have been approved by Congress pursuant to Article I, Section 10, Clause 3 of the U.S. Constitution, [the Compact Clause], and those that have not. The Compact Clause provides: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.” However, the Supreme Court has interpreted this clause so that not every interstate agreement requires congressional consent:

Where an agreement is not “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,” it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. But 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. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

Once consent is granted, case law suggests that it is permanent. *See Tobin v. United States*, 306 F.2d 270, 272–73 (D.C. Cir. 1962). Allowing Congress to amend, alter, or rescind its consent “would stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts. No doubt, the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts.” *Id.*

Whether approved by Congress or not, interstate compacts are not merely legislative acts, they are, in very important respects, contracts binding on the signatories. As the Supreme Court has noted: “It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.” *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Consequently, a state may not unilaterally modify or repeal its participation. *See, e.g., Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power & Cons. Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986)

III. Compacts and Administrative Law

Interstate compact administrative law is an unsettled field. The federal APA generally does not apply because an interstate compact agency is not an agency of the federal government. Some compacts specify applying the federal APA and some courts have found various rationales to make the federal APA apply or to make its federal common-law ancestor apply—but not always. State APAs generally do not apply to congressionally-approved compact agencies because of exclusions in state APAs and contract law principles. This lack of certainty and uniformity as to the rules governing compact agency action and review of compact agency action

has contributed to a diminished degree of compact agency transparency and accountability as compared to traditional federal and state agencies.

A. Federal APA

The federal APA defines agency in pertinent part as an “authority of the Government of the United States.” 5 U.S.C. § 551(1). Interstate compacts tend to characterize the agencies they create as units of the signatory states, or as “regional agencies”— not units of the federal government. Therefore, the federal APA should not apply to compact agencies absent some compact provision to the contrary, even though Congress has approved a particular compact. *Old Town Trolley Tours v. Wash. Metro. Area Transit Comm’n*, 129 F.3d 201, 204 (D.C. Cir. 1997).

Some courts, however, have been willing to inquire as to whether a particular compact agency is so endowed with a “federal interest” that it should be considered a “quasi-federal agency” subject to the federal APA or APA-type procedures. *See, e.g., Seal and Co., Inc. v. Washington Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1155 (E. D. Va. 1991). These courts consider such factors as whether the originating compact is governed, either explicitly or implicitly, by other federal regulations; the degree of federal participation as measured by the level of federal funding; whether Congress was a party to the original compact, as opposed to simply approving it; and whether the compact replaces a federal agency.

The D.C. Circuit took a different path but wound up at the same destination as the courts employing the quasi-federal agency analysis. The compact at issue in *Old Town Trolley Tours* provided for judicial review in the DC Circuit but did not specify the standard of review. The court adopted by reference the federal APA’s judicial review standards, 5 U.S.C. § 706(2)(a)-(d), in part because:

federal judicial review of agency action according to [those] standards . . . is so commonplace that . . . it would have been natural [for Congress and the signatories] to assume that courts would treat Commission decisions in the same manner. . . . [I]t is worth remembering that subsections (a) through (d) of APA § 706(2) contained no innovations. When signed into law in 1946, these provisions merely “restated the present law as to the scope of judicial review. *Old Town Trolley Tours*, 129 F.3d at 205.

B. State APAs

Some state APAs (such as Delaware and New York) expressly exclude interstate compact agencies from their purview. The District of Columbia’s APA has been held not to apply to interstate agencies. *KiSKA Construction Corporation-U.S.A. v. Wash. Metro Area Transit Auth.*, 167 F.3d 608 (D.C. Cir. 1999) (citing *Latimer v. Joint Committee on Landmarks of the National Capital*, 345 A.2d 484, 487 (D.C. 1975)). Conversely, some state APAs define the term “agency” broadly enough to encompass a compact agency.

111B

Principles of contract law bar the application of a single compact signatory's law in a manner that conflicts with or is inconsistent with the terms of a compact. This tends to render state APAs inoperative with respect to interstate compact agencies. Illustrative of this line of cases is the District Court decision in *C.T. Hellmuth & Assocs., Inc.*, holding that the Washington Metropolitan Area Transit Authority (WMATA) is not subject to the Maryland Public Information Act, because:

the mere fact that Virginia and the District have adopted freedom of information laws can hardly be taken as a tacit agreement on their part that WMATA should be governed by the Maryland law, particularly in view of the fact that Art. 76A was enacted subsequent to the Virginia and District of Columbia laws. . . . Regardless of how similar the laws may be, plainly Maryland may not impose its preferences in this regard upon Virginia and the District, for such an imposition, however minimal, is nonetheless an intrusion upon their interests and in derogation of the compact. 414 F. Supp. 408, 409-10.

Compact precedent thus leaves little room, and in most instances no room, for finding compact agencies subject to a state APA absent an express compact provision to the contrary.

C. Compact Directives

A compact may provide that an agency comply with one state APA or another. Indeed, some compacts require that the agency follow the APA of the state with the most restrictive provisions. For example, article III(d) of the Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233, 3237 (1980), provides that "all meetings shall be open to the public to the same extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirements, applicable to local governments at the time such meeting is held."

Some compacts require adherence to one section or another of the Federal APA. Article V, Section 11, of The Northeast Interstate Dairy Compact (available at <http://www.dairycompact.org/legis.htm>), and Article VIII of the Interstate Compact for Adult Offender Supervision (available at www.interstatecompact.org), for example, require that agency rulemaking conform to Federal APA standards in 5 USC § 553.

In some cases, Congress has taken pains to disavow the resulting entity as an agency of the federal government. This occurred when the United States became a signatory to the Delaware River Basin Compact. Section 15.1(m) was added to provide that the Delaware River Basin Commission "shall not be considered a Federal agency" for purposes of certain statutes, among which is the APA.

Some compact agencies have adopted Federal APA standards. Article IX of the now defunct Northeast Dairy Compact Commission's bylaws provides that "documents of the Compact Commission shall be available to the public in accordance with the federal Freedom of Information Act, 5 U.S.C. § 552." (Available at <http://www.dairycompact.org/bylaws.htm>). But the boundaries on agency discretion afforded by this reference to FOIA are compromised by the

caveat in Article IX that reads: “Except as otherwise provided by the Compact [or] these Bylaws.”

IV. Discussion of Recommendation

Congressionally approved interstate compact agencies differ from their federal and state counterparts in meaningful ways, but not in a way that should automatically exempt them from the normal rules governing agency action and judicial review of agency action that are the hallmark of the modern administrative state. On the contrary, the need for clear, firm standards is even greater when it comes to compact agencies. “An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to an agency the several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government.” M. Ridgeway, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 300 (1971). This diminished accountability calls for stronger, not weaker, administrative controls to offset the weaker political control.

A clear and comprehensive solution to this accountability problem will not arise from the patchwork of statutes and case law currently in place. It is not piecemeal adoption of a federal APA that was not designed with compact agencies in mind. It is not a piecemeal adoption of state APAs by asking which is the most restrictive. It is not the judicial crafting of a new category of quasi-federal agencies. And it is not asking the judiciary to reach into the pre-APA past for a common law remedy. The best long-term solution is for Congress to prescribe clearly the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards of judicial review.

Congress could potentially address the need for clear procedures by adopting an interstate compact APA. However, such an overarching compact APA is not likely to be adopted within the foreseeable future. Consequently, this recommendation calls for more modest but immediately feasible solutions.

First, when Congress consents to the creation of any new interstate compact agency in the future, it should prescribe the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards for judicial review. It should be part of the routine of considering and drafting a compact proposal that the details of administrative law and judicial review be covered along with the substantive material. This recommendation is for future compacts because of the potential problem with Congress amending its consent to existing compacts.

Second, states and territories should jointly review the procedures, if any, employed by existing compact agencies, and enact legislation to ensure the compact agency uses appropriate administrative procedures to carry out its functions. They should also adopt legislation to ensure that compact agencies actions are subject to judicial review. Obviously, such legislation would require a cooperative effort of several states (or of many or even all the states) for each compact, and would thus be difficult to achieve.

111B

Third, in the absence of Congress or the states and territories prescribing administrative procedures, existing congressionally approved compact agencies should adopt their own administrative procedures. If Congress or the states and territories have specified some administrative procedures, then the compact agencies' adoptions would need to be consistent with those procedures.

Fourth, the federal or state legislation or compact agency procedural regulations should be consistent with fundamental administrative law norms. These norms are derived from due process (in the case of adjudication) and from federal and state APAs (in the case of adjudication, rulemaking, and judicial review).

In the case of adjudication, parties should be able to present their positions orally or in writing and challenge positions of opposing witnesses orally or in writing. The adjudicatory decision should be rendered by an impartial decision-maker and include a statement of reasons. These adjudicatory norms are prescribed by procedural due process under the 5th and 14th amendments. The opportunity to make one's case, and the presence of an impartial decision maker, are necessary both to achieve accurate results and enhance public acceptability of administrative adjudicatory decisions.

In the case of rulemaking, there should be an opportunity for public comment. Provisions for public notice of proposed rulemaking and an opportunity for public comment were introduced by the federal APA and have been followed in every state. Notice and comment rulemaking allows for a form of democratic participation and is often considered to be one of the most important innovations in modern administrative law. Public input can help produce better rules and may help to increase public acceptance of the resulting rules.

Statutory provisions relating to judicial review of agency decisions should assure that those adversely affected by an agency decision receive an appropriate form of judicial review. Judicial review is a vitally necessary check on administrative agencies, particularly in the case of compact agencies that are not responsible to a single state. Statutes must prescribe the details of judicial review, such as the proper venue, the appropriate deadlines, the scope of judicial review, the standards for judicial review, and other necessary information. It is important that the rules of judicial review be fixed so that parties need not litigate the details. In this way, the reviewing courts can proceed expeditiously to the merits of the dispute, and the standards for judicial review will not vary depending on the court that reviews an action of the compact agency.

Respectfully submitted,

Michael Asimow
Chair, Section on Administrative
Law and Regulatory Practice

August 2008