

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202 720-865-8301	DATE FILED: January 14, 2020 11:23 AM FILING ID: 9B2490B7FF7EB CASE NUMBER: 2020CV30151
Plaintiff: COLORADO HOSPITAL ASSOCIATION, a Colorado non-profit corporation, v. Defendants: COLORADO DIVISION OF INSURANCE; MICHAEL CONWAY, Colorado Insurance Commissioner, in his official capacity;	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<i>Counsel for Plaintiff Colorado Hospital Association:</i> Colin C. Deihl, #19737 Gerald A. Niederman, #12449 Jennifer L. Evans, #30117 Ann C. McCullough, #18919 POLSINELLI PC 1401 Lawrence St., Suite 2300 Denver, CO 80202 Phone Number: (303) 572-9300 Email: cdeihl@polsinelli.com gniederman@polsinelli.com jevans@polsinelli.com amccullough@polsinelli.com	Case No. Ctm:
COMPLAINT	

Plaintiff Colorado Hospital Association (“CHA”), through undersigned counsel, for its complaint against Defendants Colorado Division of Insurance and Michael Conway, Colorado Insurance Commissioner (collectively, the “Division”), states and asserts:

I. NATURE OF CASE

1. This case challenges Defendants' improper and illegal enactment of Emergency Regulation 20-E-01 (the "Emergency Regulation") which was promulgated on Christmas Day and became effective on New Year's Day, with no input or public comment in direct violation of the Colorado Administrative Procedure Act (the "APA") and the Colorado Reinsurance Program Act, C.R.S. § 10-16-1101 *et. seq.*, (the "Act.")

2. The Emergency Regulation requires all Colorado hospitals to elect a payment method by January 15, 2020 for each hospital's share of a \$40 million Special Fee assessment and to pay that Special Fee assessment by June 30, 2020, even though the Act only authorized the Commissioner to assess the Special Fee for fiscal years 2020-2021 and 2021-2022. The Emergency Regulation also purports to authorize the Division to revoke or suspend a hospital's license for non-compliance – authority never granted to Defendants under the Act or any other statute.

3. CHA seeks a declaration that the "Emergency Regulation" is invalid because it was enacted in violation of the APA and exceeds the authority granted under the Act. CHA also seeks a preliminary and permanent injunction preventing the Division from enforcing the "Emergency Regulation" against any hospital in Colorado.

II. PARTIES, JURISDICTION, AND VENUE

4. Plaintiff CHA is a Colorado non-profit corporation with a principal place of business at 7335 East Orchard Road, Greenwood Village, Colorado 80111. CHA serves as the leading voice of the Colorado hospital and health system community. CHA's members include over 100 hospitals and health systems in Colorado. It is CHA's members who will pay the Special Fee required by the Act and who are directly impacted by the Emergency Regulation.

5. Defendant Conway is the Commissioner of Insurance for the State of Colorado. The Commissioner's principal place of business is 1560 Broadway, Suite 850, Denver, Colorado 80202. The Commissioner is the chief executive of the Division and is responsible for the overall administration of the Division.

6. The Division of Insurance regulates the insurance industry in Colorado as a component of the Colorado Department of Regulatory Agencies. The Division's principal place of business is 1560 Broadway, Suite 850, Denver, Colorado 80202.

7. The Court has subject matter jurisdiction over this matter under Article 6, Section 9 of the Colorado Constitution.

8. Venue is proper in the City and County of Denver because both Defendants are located in Denver County and the actions leading to the claims arose in Denver.

III. FACTUAL ALLEGATIONS

The Colorado Reinsurance Act

9. In May 2019, Colorado enacted into law HB 19-1168, known as the Colorado Reinsurance Program Act, C.R.S. § 10-16-1101 *et. seq.* The Act directed the Commissioner to create a reinsurance program intended to reduce health insurance costs in Colorado.

10. To help pay for the program, the Act authorizes the Commissioner to assess “special fees” against hospitals not to exceed \$40 million per year for two calendar years. (the “Special Fee”). C.R.S. §§ 10-16-1104 (f) and 1108(1)(a)(I).

11. CHA member hospitals are required to pay the Special Fee from their general revenues and are prohibited from passing the Special Fee onto consumers in any manner. C.R.S. § 10-16-1108(3).

12. CHA member hospitals set their budgets and cash flow plans for 2020 well before the end of 2019. Some hospitals’ budgets are set by local governments in accordance with statutory time requirements and cannot be adjusted on short notice.

13. The Act specifically limits the Commissioner’s authority to assess the Special Fee to the 2020 and 2021 calendar years. C.R.S. § 10-16-1103(2) and 1108(1)(a)(I). This limitation is reflected in the final fiscal note to HB 19-1168, which confirms that the Special Fee will not take effect until state fiscal year 2020-2021, which begins on July 1, 2020. *See* Fiscal Note, attached as **Exhibit A**, at p.3, Table 2, (no money from special fee is included for state fiscal year 2019-2020.).

14. The Act grants the Division the authority to adopt rules to implement the Act in accordance with the APA and specifically requires the Division to establish a group of stakeholders who will be affected by the rule as required by C.R.S. § 24-4-103(2). *See* Act at C.R.S. § 10-16-1104(1)(i).

15. The Act authorizes the Division to enforce payment of the Special Fee by using powers conferred by the “insurance laws” of Colorado. C.R.S. §10-16-1108(5).

The Emergency Regulation

16. Shortly after the Act was signed by Governor Polis on May 17, 2019, the Colorado Hospital Association (“CHA”) and its member hospitals, as stakeholders, began requesting information from the Division about the Special Fee. CHA continued to request information and provide input throughout the summer and fall of 2019.

17. CHA member hospitals needed the requested information to plan for the Special Fee in setting their 2020 budgets and some hospitals needed approval from local governments to set those budgets.

18. Despite ongoing requests for information, the Division did not initiate any rulemaking under the APA, or constitute a stakeholder group as required by the Act, to determine how the Special Fee provision would be implemented.

19. Upon information and belief, late in the fall of 2019, the Division became concerned that the Special Fee might cause the state to violate the revenue cap contained in the Taxpayer Bill of Rights ("TABOR"), Colo. Const. art X, § 20(7)(a) and (d), which might potentially trigger a tax refund to Colorado taxpayers and otherwise have a negative impact on the program.

20. Upon information and belief, the Commissioner thereafter determined to collect the Special Fee in state fiscal year 2019- 2020, rather than waiting until the next year, as required by the Act.

21. On Christmas Day, 2019, the Division issued Emergency Regulation 20-E-01. Attached as **Exhibit B**.

22. The Emergency Regulation became effective on January 1, 2020, New Year's Day. **Exhibit B**, Emergency Regulation, Section 9.

23. The Emergency Regulation was enacted without compliance with the notice and comment rulemaking procedures in the APA, C.R.S. § 24-4-103.

24. On Christmas Day at 2:55 pm Mountain Time, the Division emailed CHA and other stakeholders requesting comments on the Emergency Regulation. That email stated that the comments were due by 5 p.m. on January 3, 2020--two days after the effective date of the Emergency Regulation. *See Exhibit C*, email.

25. The Emergency Regulation requires the Division to collect the Special Fee from hospitals in the amount of \$40 million by June 30, 2020. **Exhibit B**, Emergency Regulation, Section 5.A.

26. The Emergency Regulation also requires CHA member hospitals to select a payment method for each hospital's share of the \$40 million Special Fee assessment by January 15, 2020, despite the fact that each hospital's share of the Special Fee has not yet been calculated. **Exhibit B**, Emergency Regulation, Section 5.B.

27. The Emergency Regulation states that each hospital is to specify how it wants to pay for its share of the amounts "owed in 2019-2020," even though the Act only allow the Division to assess the Special Fee for the 2020 and 2021 calendar years. **Exhibit B**, Emergency Regulation, Section 5.B.

28. The Emergency Regulation authorizes the state to automatically deduct the Special Fee using the state's electronic fund payment system. **Exhibit B**, Emergency Regulation, Section 5.E.

29. Upon information and belief, the Division intends to start automatically deducting the Special Fee from hospitals in February 2020.

30. The Emergency Regulation states that a hospital's noncompliance with the Emergency Regulation may result in the "suspension or revocation of a hospital's license." Emergency Regulation, Section 8.

31. On information and belief, the Division enacted the Emergency Regulation in an improper and unlawful attempt to increase the Division's jurisdictional and enforcement authority over Colorado hospitals. The Division does not have, and has never been delegated by the Colorado legislature, the power to "suspend or revoke a hospital's license," yet the Emergency Regulation purports to authorize the Division the power to threaten a Hospital's license, and prevent a hospital from continuing to serve patients if that hospital fails to pay the Special Assessment or otherwise fails to comply with the Emergency Regulation.

32. On information and belief, the Emergency Regulation was promulgated on Christmas Day in an improper effort to force Colorado hospitals to pay the \$40 million Special Fee assessment for the 2019-2020 state fiscal year, even though the Act only authorizes the Commissioner to assess the Special Fee for the 2020 and 2021 calendar years.

33. On information and belief, the Division enacted the Emergency Regulation in an effort to avoid a potential violation of TABOR.

34. On information and belief, the Division adopted the Emergency Regulation in an improper effort to collect the Special Assessment during three state fiscal years instead of the two years authorized by the Act.

IV. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Violation of Colorado APA – Special Fee Payment)

35. CHA incorporates the foregoing allegations as if fully stated herein.

36. The Colorado Reinsurance Program Act authorizes the Division to assess up to \$40 million in Special Fees for the 2020 and 2021 calendar years for a total of up to \$80 million. C.R.S. § 10-16-1103(2) and 10-16-1108(1)(a)(I).

37. Reflecting legislative intent, the final fiscal note of HB 19-1168 included no revenue from the Special Fee for state fiscal year 2019-2020.

38. Despite this clearly limited statutory direction, the Emergency Regulation requires the state's hospitals to pay \$40 million dollars in the Special Fee for state fiscal year 2019-2020 by June 30, 2020.

39. As a result, CHA's hospital members will be required to pay \$40 million in state fiscal year 2019-2020, and then an additional \$40 million in state fiscal year 2020-2021, and another \$40 million in state fiscal year 2021- 2022, for a total of \$120 million.

40. The Emergency Regulation's requirement that the state's hospitals pay the Special Fee before June 30, 2020 exceeds the authority granted by the Act, is contrary to law, is arbitrary and capricious, and is an abuse of the Division's discretion.

41. The Emergency Regulation's related requirement that the state's hospitals select a payment schedule for each hospital's share of the Special Fee by January 15, 2020 without even knowing the amount of such payment is arbitrary and capricious, and an abuse of the Division's discretion.

**SECOND CLAIM FOR RELIEF
(Violation of APA – Enforcement Provision)**

42. CHA incorporates the foregoing allegations as if fully stated herein.

43. The Act grants the Division authority to use its powers under Colorado's insurance laws to enforce payment of the Special Fees in accordance with the time periods established by rule.

44. Colorado's insurance laws do not include the right to suspend or revoke a hospital's license, and the Division has no such enforcement authority.

45. The Emergency Regulation purports to provide that the Commissioner may impose "civil penalties, issuance of cease and desist orders and/or suspensions or revocations of license" against hospitals who fail to comply with the Emergency Regulation. **Exhibit B**, Emergency Regulation, Section 8.

46. The Emergency Regulation's enforcement provision is contrary to law, arbitrary and capricious, and an abuse of the Agency's discretion.

**THIRD CLAIM FOR RELIEF
(Violation of APA Emergency Rulemaking Provision,
C.R.S. § 24-4-103(6)(C))**

47. CHA incorporates the foregoing allegations as if fully stated herein.

48. The Act authorized the Division to adopt rules necessary to implement, administer and enforce the Act. In adopting those rules, the Division was required to comply with the APA, explicitly including "the requirement to establish a representative group of participants pursuant to Section 24-4-103(2)." C.R.S. § 10-16-1104(i).

49. C.R.S. § 24-4-103(2) mandates that the Division “establish a representative group of participants with an interest in the subject matter of the rulemaking to submit views ... on the proposed rules.”

50. Despite this statutory mandate in the Act, the Division did not seek input on the Emergency Regulation from stakeholders and instead enacted the Emergency Regulation on Christmas Day, a national holiday.

51. To justify its use of the Emergency Regulation, the Division found that “immediate adoption of this regulation is imperatively necessary for the preservation of public health, safety, or welfare,” and found that compliance with the rulemaking requirements of the APA, C.R.S. § 24-4-103, “would be contrary to the public interest.” **Exhibit B**, Emergency Regulation, Section 2. The Division supplied no basis to support these findings.

52. The Division’s use of emergency rulemaking threatens public health, safety and welfare. CHA member hospitals must comply with tight budgets while serving the health needs of the community. By requiring the state’s hospitals to budget and pay for the Special Fee within six months instead of a year, the Emergency Regulation threatens some hospitals’ ability to provide necessary emergency and other vital health services. CHA member hospitals’ budgets and cash flow plans for 2020 were set and approved months ago. The Emergency Regulation’s acceleration of the \$40 million Special Fee payment for the first six months of 2020 is particularly problematic for hospitals controlled by local governments who are often required to comply with statutory budgeting requirements that cannot be adjusted on short notice.

53. The Commissioner’s use of the emergency rulemaking authority under C.R.S. § 24-4-103(6)(a) is arbitrary and capricious; a denial of a statutory right; contrary to CHA’s members’ due process rights; in excess of the Commissioner’s statutory authority; not in accord with the requirements of the Act; an abuse or clearly unwarranted exercise of discretion; and otherwise contrary to law.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Colorado Hospital Association prays for judgment in its favor and against Defendants Colorado Division of Insurance and Michael Conway, Colorado Insurance Commissioner, as follows:

A) Finding that Division of Insurance Emergency Regulation 20-E-01 is unlawful, invalid and unenforceable;

B) Preliminarily and permanently enjoining the Division from enforcing the Emergency Regulation against any hospital in Colorado;

C) Declaring that the Colorado Reinsurance Program Act permits the Commissioner to assess the Special Fee only in state fiscal year 2020- 2021 and state fiscal year 2021- 2022;

D) Preliminarily and permanently enjoining the Division from collecting the Special Fee from hospitals until after June 30, 2020;

E) Declaring that the Division may not suspend or revoke the license of any hospital in the State of Colorado;

F) Preliminarily and permanently enjoining the Division from suspending or revoking the license of any hospital in the State of Colorado;

G) Ordering the Division to adopt rules implementing the Act in compliance with the Colorado Administrative Procedure Act, including establishment of a stakeholder group to participate in public rule-making proceedings on such proposed rules as required by C.R.S. § 24-4-103(2); and

H) Any further relief the Court deems just and appropriate.

Dated: January 14, 2020

POLSINELLI PC

s/ Colin C. Deihl _____

Colin C. Deihl

Counsel for Plaintiff

Plaintiff's Address:

7335 East Orchard Road
Greenwood Village, Colorado 80111

A copy of the foregoing Complaint, has been sent to:

Phil Weiser, Colorado Attorney General
1300 Broadway
Denver, CO 80203