

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT  
INGHAM COUNTY

Attorney General Michael A. Cox, on behalf  
of the People of State of State of Michigan

Plaintiff

v

Blue Cross and Blue Shield of Michigan,

Defendant.

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Circuit Court No. 08-917-CZ

Honorable Paula J. M. Manderfield

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**Attorney General's Response in Opposition to Blue Cross' Motion to Dismiss**

The Attorney General's three-count complaint against Blue Cross Blue Shield of Michigan (Blue Cross or BCBSM) alleges unauthorized investments in, ownership of, and control of domestic, foreign, or alien insurance companies; use of Blue Cross funds to operate

and subsidize the Accident Fund in violation of Section 207(1)(x)(vi)<sup>1</sup>; and breach of an asset purchase agreement by making capital contributions in a form other than a surplus note. Blue Cross filed a motion to dismiss under MCR 2.116(C)(8) on all three counts and alternatively argued that Count II should be referred to the Commissioner of the Office of Insurance and Financial Regulation (Commissioner). As shown below, this Court should deny Blue Cross' motion to dismiss in its entirety.

### **I. Motion to Dismiss Standard**

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted."<sup>2</sup> In reviewing a motion under this court rule, a trial court must "accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party" and the motion "may only be granted 'where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'"<sup>3</sup>

In its motion, Blue Cross disputes the Attorney General's allegations in Count I that it has invested its funds in, owns, and/or controls CWI, Third Coast, and United Wisconsin. This Court, however, must presently assume the truth of these allegations for purposes of deciding Blue Cross' motion for summary disposition under MCR 2.116(C)(8). Assuming for purposes of Blue Cross' motion that Blue Cross has in fact invested its funds in, owns, and controls these

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<sup>1</sup> MCL 550.1207(1)(x)(vi). All section references are to the Nonprofit Health Care Corporation Reform Act, MCL 550.1101 et seq., hereinafter referred to as PA 350 or the Act, unless otherwise identified.

<sup>2</sup> *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 540-41; 688 NW2d 550 (2004) (citations omitted).

<sup>3</sup> *Hinojosa*, 263 Mich at 540-41.

companies, Count I states a viable claim that these activities violated PA 350, compelling the denial of Blue Cross' motion.<sup>4</sup>

To the extent that Blue Cross disputes that it has invested its funds in, owns, or controls these companies, this raises factual questions beyond the pleadings themselves. Under these circumstances, the appropriate basis for summary disposition is MCR 2.116(C)(10), not (C)(8). A (C)(10) motion cannot be granted, however, when genuine issues of material fact exist or, generally, until after the completion of discovery on disputed issues.<sup>5</sup> Summary disposition on this ground would therefore be premature and must also be denied.

As to Count II, Blue Cross does not dispute that it subsidized the Accident Fund when it provided the Accident Fund with a \$125 million capital contribution to help maintain the Accident Fund's AM Best rating. Instead, Blue Cross argues that Section 207(1)(x)(vi) only prohibits the subsidization of workers' compensation rates. As discussed below, the plain language of Section 207(1)(x)(vi) prohibits Blue Cross from using its funds to operate or subsidize **in any way** the Accident Fund. Thus, the Attorney General has clearly stated a claim upon which the Court may grant relief. Even assuming that Blue Cross' competing interpretation of Section 207(1)(x)(vi) has merit, which it does not, further factual development

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<sup>4</sup> Even at this early stage, there is ample evidence that Blue Cross has invested its funds in, owns, and controls the three named companies. Blue Cross is the sole shareholder of the Accident Fund, which is in turn the sole shareholder of CWI, Third Coast, and United Wisconsin. As such, Blue Cross ultimately controls these companies' Boards of Directors, the voting of their shares, their business decisions, and their operations. The Blue Cross Board of Directors expressly approved the Accident Fund's acquisition of CWI, and further discovery will undoubtedly establish that similar Blue Cross Board approval was given in connection with the acquisitions of Third Coast and United Wisconsin. In the case of CWI, Blue Cross directly invested its own funds to secure the company's acquisition, with its Board's approval. Moreover, Blue Cross' financial statements reflect and account for all of these companies as subsidiary investments.

<sup>5</sup> See *Department of Soc Serv v Aetna Cas & Sur Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989).

could show that the \$125 million capital contribution did in fact subsidize the Accident Fund's workers' compensation rates, compelling this Court to deny the motion. For example, further discovery or expert testimony may well show that if additional capital was truly necessary to maintain the Accident Fund's AM Best "A" rating, this capital should have been raised through an increase in the Accident Fund's premium rates. The contribution from Blue Cross thus averted an Accident Fund rate increase, at the expense of Blue Cross' subscribers. As explained in detail below, the Court should also deny Blue Cross' alternative relief to refer Count II to the Commissioner because it is inconsistent with the foregoing standards for summary disposition and the standards for applying the doctrine of primary jurisdiction.

With respect to Count III, because the contractual commitment between Blue Cross and the State of Michigan regarding capital contributions to the Accident Fund expired in 2001, Blue Cross can no longer use its funds to provide a capital contribution to the Accident Fund in the form of a surplus note, or as was done here, by gift of subscriber funds.

**II. Count I – Unauthorized Investments in, Ownership of, and Control of Domestic, Foreign, or Alien Insurance Companies.**

Blue Cross is a creature of statute formed under and subject to the provisions of PA 350. Unless PA 350 expressly authorizes Blue Cross to engage in an activity, it is prohibited from doing so. Section 207(1) of PA 350 enumerates the specific authorized activities in which Blue Cross may engage. Section 207(1)(o) generally authorizes Blue Cross, subject to Chapter 9 of the Insurance Code of 1956, MCL 500.100 – 500.8302 (Insurance Code), to invest and reinvest its funds in entities "other than domestic, foreign, or alien insurers." This provision, either expressly or by negative implication, flatly prohibits Blue Cross from investing its funds in domestic, foreign, or alien insurers unless otherwise authorized by the Act.

Section 207(1)(o) further provides the limited circumstances under which Blue Cross may invest its funds in domestic, foreign, or alien insurers<sup>6</sup>:

**However, [Blue Cross] may purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer,** or otherwise dispose of bonds or other obligations, shares, or other securities or interests issued by a domestic, foreign, or alien insurer, so long as the activity meets all of the following:

- (i) Is determined by the attorney general to be lawful under section 202.
- (ii) Is approved in writing by the commissioner [of the Office of Financial and Insurance Regulation] as being in the best interests of [Blue Cross] and its subscribers.
- (iii) For an activity that occurred before the effective date of the amendatory act that added subparagraph (iv), will not result in the health care corporation owning or controlling 10% or more of the voting securities of the insurer or will not otherwise result in the health care corporation having control of the insurer, either before or after the effective date of the amendatory act that added subparagraph (iv). As used in this subparagraph and subparagraph (iv), "control" means that term as defined in section 115 of the insurance code of 1956, 1956 PA 218, MCL 500.115.
- (iv) Subject to section 218 and beginning on the effective date of the amendatory act that added this subparagraph, will not result in the health care corporation owning or controlling part or all of the insurer unless the transaction satisfies chapter 13 of the insurance code of 1956, 1956 PA 218, MCL 500.1301 to 500.1379, and the insurer being acquired is only authorized to sell disability insurance as defined under section 606 of the insurance code of 1956, 1956 PA 218, MCL 500.606, or under a statute or regulation in the insurer's domiciliary jurisdiction that is substantially similar to section 606 of the insurance code of 1956, 1956 PA 218, MCL 500.606. (emphasis added).

The Attorney General alleges that "Blue Cross, through its wholly-owned subsidiary the Accident Fund, owns and controls 100% of the voting securities of United Wisconsin, CWI / CompWest, and Third Coast" and that "Blue Cross is not authorized to invest its funds in, own,

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<sup>6</sup> MCL 550.1207(1)(o)(emphasis added).

or control these companies under" Section 207(1)(o)(iii), (1)(o)(vi), and (1)(x).<sup>7</sup> In addition, the Attorney General alleges that "Blue Cross did not seek or obtain any determination from the Attorney General regarding the lawfulness of the acquisitions of United Wisconsin, CWI / CompWest, and Third Coast, as required by the Act" and, at least with respect to the CWI / CompWest acquisition, did not obtain prior written approval from OFIR that the acquisition is in the best interests of Blue Cross and its subscribers.<sup>8</sup>

Blue Cross' sole dispute with Count I concerns the Attorney General's factual allegation that Blue Cross invested its funds in, or otherwise acquired, owns, holds or controls United Wisconsin, CWI / CompWest, and Third Coast. Blue Cross claims that it "did not and has not purchased, taken, received, subscribed for or otherwise acquired, owned, held or voted the shares of those three companies."<sup>9</sup> Thus, Blue Cross' argument is that it can circumvent the statutory prohibitions above, as long as it indirectly performs the prohibited activity through its wholly-owned subsidiary, the Accident Fund. As discussed below, this argument is contrary to Section 207(1)(o) as well as contrary to the purposes and powers of Blue Cross as set forth in PA 350.

**A. Section 207(1)(o)**

As discussed above, the first sentence of Section 207(1)(o) permits Blue Cross to invest or otherwise acquire, own, hold interest in entities other than domestic, foreign, or alien insurers (United Wisconsin, CWI / CompWest, and Third Coast are foreign insurers). The second sentence of Section 207(1)(o), however, permits Blue Cross to purchase, take, receive, subscribe for, **or otherwise** acquire, own, hold, vote, employ, sell, lend, lease exchange, transfer interest in entities, such as United Wisconsin, CWI / CompWest, and Third Coast, if the activity meets all

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<sup>7</sup> Complaint ¶ 33.

<sup>8</sup> Complaint ¶¶ 36, 37.

<sup>9</sup> Blue Cross' Motion to Dismiss, p 7.

of the following: (1) the Attorney General determines the activity is lawful under Section 202; (2) the Commissioner approves the activity; (3) the activity does not result in Blue Cross owning or controlling, indirectly or directly, the entities; and (4) the activity does not result in Blue Cross owning or controlling an entity authorized to sell property or casualty insurance, such as United Wisconsin, CWI / CompWest, and Third Coast.<sup>10</sup>

Thus, Blue Cross is prohibited from investing its funds in United Wisconsin, CWI / CompWest, and Third Coast and is prohibited from otherwise acquiring, owning, or holding United Wisconsin, CWI / CompWest, and Third Coast unless the above four conditions are met. Blue Cross attempts to avoid these statutory prohibitions by stating that its subsidiary, the Accident Fund, engaged in the prohibited activity, not Blue Cross. There are several problems with this argument. Section 207(1)(o) is broadly written to prohibit Blue Cross from **otherwise** acquiring, owning, or holding, United Wisconsin, CWI / CompWest, and Third Coast. The language in Section 207(1)(o) "or otherwise" demonstrates that the legislature is prohibiting any possible transaction or arrangement through which Blue Cross acquires, owns, or holds these foreign insurers. The fact that Blue Cross structured the purchase of these foreign insurers through the Accident Fund does not insulate Blue Cross from the requirements of Section 207(1)(o). Blue Cross is the sole shareholder parent company of the Accident Fund and,

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<sup>10</sup> This section permits Blue Cross only to own and control an entity that is authorized to sell disability insurance, thus prohibiting Blue Cross from owning or controlling an entity authorized to sell property and casualty insurance.

consequently, has otherwise acquired, owns, and holds these foreign insurers.<sup>11</sup> Moreover, Blue Cross cannot use corporation law principles regarding subsidiaries to avoid this statutory prohibition, because Section 201(4) provides that Blue Cross "shall not be subject to the laws of this state with respect to corporations generally."

Second, Blue Cross's construction of Section 207(1)(o) renders nugatory<sup>12</sup> the control language in Section 207(1)(o)(iii) and (iv). Under Section 207(1)(o)(iii) and (iv), Blue Cross is prohibited from controlling a domestic, foreign, or alien insurer (unless it sells disability insurance). This section defines "control" to include direct or indirect control.<sup>13</sup> Under its construction of Section 207(1)(o), Blue Cross can avoid the prohibition against acquiring, owning, or holding United Wisconsin, CWI / CompWest, and Third Coast merely by acquiring them through its subsidiary. If Blue Cross' construction is correct, it can only violate Section 207(1)(o) by directly owning or acquiring United Wisconsin, CWI / CompWest, and Third Coast. This would render the control language surplusage, however, because if Blue Cross directly owns these insurers, it would also automatically control them.

## **B. Purpose and Power of Blue Cross**

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<sup>11</sup> In fact, as to CWI / CompWest, Blue Cross' Board of Directors expressly approved the acquisition of CWI / CompWest by the Accident Fund and simultaneously approved the \$125 million capital contribution to the Accident Fund. Exhibit A (Exhibit A contains the July 18, 2007 motion of the Blue Cross Executive Committee to approve the CWI purchase and accompanying capital contribution. Blue Cross claims the minutes of the August 4, 2007 Board approval of the motion are confidential under MCL 550.1304, despite language in the section 304 (3) that lifts the confidentiality upon completion of the sale. If the Court wishes to review the approval, the minutes of the Board action can be filed with the court under seal.)

<sup>12</sup> It is well established that a Court should avoid construing a statute in such a way that renders any part of it nugatory. *Omelenchuk v. City of Warren*, 466 Mich. 524, 528; 647 NW2d 493 (2002)("It is our duty to read the statute as a whole and to avoid a construction which renders meaningless provisions that clearly were to have effect."); *see also Apportionment of Wayne Co Bd of Comm'rs-1982*, 413 Mich 224, 259-60; 321 NW2d 615 (1982).

<sup>13</sup> Section 207(1)(o)(iii) cites MCL 500.115(b), which provides the definition of "control."

Blue Cross' argument that it can perform the prohibited activity under 207(1)(o) through its wholly-owned subsidiary, the Accident Fund, is also contrary to its statutory purpose and essentially the entire Act. Blue Cross, by legislative declaration, is a nonprofit, tax exempt, charitable and benevolent institution.<sup>14</sup> As such, "the Michigan Legislature created a charitable trust for the benefit of Michigan's citizens" and "[t]his trust may not be compromised by the diversion of Blue Cross' charitable assets that are intended to benefit Michigan's citizens."<sup>15</sup> Section 206 provides that Blue Cross' funds and property "shall be acquired, held, and disposed of only for the lawful purposes of the corporation and for the benefit of the subscribers of the corporation as a whole." This Section further provides that Blue Cross "shall only transact business, receive, collect, and disburse money, and acquire, hold, protect, and convey property, that is properly within the scope of the purposes of the corporation as specifically set forth in section 202(1)(d), for the benefit of the subscribers of the corporation as a whole, and consistent with this act." Thus, Blue Cross may acquire, hold, and dispose of its funds and property only within the scope of its lawful purposes, consistent with the Act, and for the benefit of the subscribers as a whole.

Under Blue Cross' argument in its motion, it can transact business, receive collect, and disburse money, and acquire, hold, protect, and convey property outside the scope of its purposes, not for the benefit of subscribers, and beyond the specific statutory powers listed in Section 207 as long as the activity is accomplished through a subsidiary, such as the Accident

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<sup>14</sup> Sections 102 and 201.

<sup>15</sup> OAG, 2001-2002, No. 7115, p 107 (July 30, 2007) (citing the Supervision of Trustees for Charitable Purposes Act, 1961 PA 101, MCL 14.251 et seq., which confers on the Attorney General both the authority and the duty of overseeing Michigan charitable trusts for the purposes of representing the citizens of Michigan, protecting the trust corpus, and ensuring that the beneficiaries of the trust are the people of the State of Michigan).

Fund. In fact, the logical extension of Blue Cross' argument—that it can perform the prohibited activity under Section 207(1)(o) through its subsidiary—is that Blue Cross can operate as a commercial insurance company, avoid all the statutory limitations of PA 350, and keep its tax-exempt status by simply conducting all of its activity through its subsidiaries. Clearly, Blue Cross' argument conflicts with its statutory purposes and power.

Blue Cross' argument that it can perform the prohibited activity under Section 207(1)(o) through its subsidiary is also contrary to case law concerning the limited power of statutorily-created entities. In *Sebewaing Industries, Inc v Village of Sebewaing*, the Michigan Supreme Court addressed whether powers not having been expressly granted nor prohibited were nevertheless to be implied from others that were conferred by statute.<sup>16</sup> There, the Court ruled that<sup>17</sup>:

When a statute creates an entity, grants it powers and prescribes the mode of their exercise, that mode must be followed and none other. When powers are granted by statute to its creature the enumeration thereof in a particular field must be deemed to exclude all others of a similar nature in that same field. So held in *Bank of Michigan v. Niles*, 1 Doug (Mich) 401 (41 Am Dec 575), in which this Court, in considering powers conferred upon a bank by its charter, said:

"The very grant of specified powers under restrictions, is an exclusion of other powers in reference to the same subject matter, not granted by the charter."

The Court held that no express power existed and none could be implied for the Village of Sebewaing to borrow money and to assume an obligation for the purpose of acquiring a city hall. Similarly, Blue Cross cannot take actions that are not specifically permitted in the Act. As a

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<sup>16</sup> *Sebewaing Indus Inc v Village of Sebewaing*, 337 Mich 530, 545-47; 60 NW2d 444 (1953).

<sup>17</sup> *Sebewaing Indus Inc*, 337 Mich at 545-47 (citations omitted).

creation of the Legislature, Blue Cross possesses only that authority specifically granted by statute.<sup>18</sup>

With one specific exception, there is no statutory basis in PA 350 for Blue Cross to operate a commercial property and casualty insurance company through a wholly-owned subsidiary. The legislature would not have conferred statutory preferential status upon Blue Cross if it had intended to authorize Blue Cross to broadly engage in commercial insurance through the vehicle of a wholly-owned subsidiary.<sup>19</sup> The only exception to the rule that Blue Cross cannot own or control a property and casualty insurance company arose in 1994, when Blue Cross sought to acquire the State Accident Fund, a state agency selling workers' compensation insurance. The Legislature added MCL 550.1207(1)(x) to allow Blue Cross to "establish, own, and operate" a domestic stock insurance company, which turned out to be the Blue Cross subsidiary company now known as the "Accident Fund Insurance Company of America," "**only** for the purpose of acquiring, owning, and operating the state accident fund."<sup>20</sup> Thus, while the Accident Fund might under its statutory powers buy other insurers, by allowing the Accident Fund to acquire United Wisconsin, CWI / CompWest, and Third Coast, Blue Cross

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<sup>18</sup> See *Booth v Consumers Power Co*, 226 Mich App 368, 373; 573 NW2d 333 (1997).

<sup>19</sup> An effort by Blue Cross in 1980 to set up a wholly-owned subsidiary corporation to acquire a malpractice insurer was deemed illegal by the Attorney General, concluding that "there is no statutory basis . . . for [Blue Cross] to operate a commercial insurance company through a wholly owned subsidiary." OAG, 1979-1980, No 5761, p 78 (August 21, 1980). The opinions of the Attorney General in such instances are not gratuitous, as the Legislature has required the Attorney General to pass on the legality of any BCBSM acquisition of an interest in an insurer. MCL 550.1207(1)(o); 550.1207 (1)(x).

<sup>20</sup> MCL 550.1207(1)(x)(emphasis added).

violated its clear statutory duty to operate only one property and casualty subsidiary for the sole purpose of acquiring, owning, and operating the State Accident Fund.<sup>21</sup>

**C. The Attorney General has standing to pursue this Court's adjudication of Count I of the Complaint.**

The Attorney General's standing to bring this action and to seek the relief contained in Count I of the Complaint cannot reasonably be disputed. Section 619(1) confers standing upon the Attorney General to "bring an action, or apply to the circuit court for a court order, to enjoin [Blue Cross] from transacting business . . . or acquiring, holding, protecting, or conveying property if that corporate activity is not authorized under this act." Section 619(2) broadly permits the Attorney General to "apply to the circuit court for a court order enjoining an alleged violation of this act or other equitable or extraordinary relief to enforce this act." In addition, Section 207(3)(c) grants the Attorney General the authority to commence "an action or special proceeding . . . to enjoin [Blue Cross] from the transacting of unauthorized business, to set aside an unauthorized transaction, or to obtain other equitable relief."

The Complaint, including Count I, seeks declaratory and injunctive relief against Blue Cross, not the Accident Fund, based upon allegations that Blue Cross has violated various provisions of its enabling act (PA 350) by engaging in activities and transactions not authorized by the Act. Specifically, Count I alleges that Blue Cross has invested its funds in, owns, and

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<sup>21</sup> This single purpose limitation is also important in that it acted to minimize the value of the state accident fund to the State of Michigan at the time of the sale. Had the Legislature intended to maximize the return on the sale of the state accident fund, and thereby increase its value to Blue Cross, it would have greatly expanded the powers of Blue Cross to use the Accident Fund to venture into other lines of insurance and to acquire other insurers. Instead, the Legislature traded a reduced return for maintaining, with the only exception of the Accident Fund, the traditional charitable non-profit mission of Blue Cross. It is noteworthy that in attempting to justify the acquisition of the three foreign insurers by its Accident Fund subsidiary, Blue Cross quotes MCL 550.1207(1)(x) but intentionally omits the controlling words "only for the purpose of acquiring, owning, and operating the state accident fund." Blue Cross' Motion to Dismiss, p8.

controls CWI /CompWest, Third Coast, and United Wisconsin and that these activities and transactions violate PA 350 because they exceed Blue Cross' powers and the activities in which it may engage under the Act. Based upon these violations, the Complaint requests this Court to set aside Blue Cross' unlawful activities and transactions, as well as enjoin Blue Cross from engaging in such unlawful activities and transactions in the future. The Count I allegations and requested relief fall squarely within the standing statutes cited above. Accordingly, Blue Cross' request to dismiss Count I based upon the Attorney General's "lack of standing" must be denied.

**III. Count II – Use of Blue Cross Funds to Operate and Subsidize the Accident Fund in Violation of Section 207(1)(x)(vi).**

In Count II of the Complaint, the Attorney General alleges that Blue Cross made a \$125 million capital contribution to the Accident Fund and that the capital contribution constituted a grant or gift of money having no repayment obligation. As such, Blue Cross used company funds to operate or subsidize the Accident Fund in violation of Section 207(1)(x)(vi), which prohibits Blue Cross from using its funds to "operate or subsidize in any way the insurer [Accident Fund] including the use of such funds to subsidize contracts for goods and services."

In its motion to dismiss, Blue Cross admits that "[o]n or about November 13, 2007, BCBSM transferred \$125 million in cash to the Accident Fund (the 'capital contribution')" and that the "Accident Fund identified the \$125 million cash transfer as a 'capital contribution' in both the 'Form D' filed with Office of Financial and Insurance Regulation ('OFIR') and the 'Form A' filed with California Department of Insurance in connection with the CWI acquisition."<sup>22</sup> In fact, Blue Cross admits that Blue Cross approved the \$125 capital contribution to the Accident Fund "to insure the collective workers' compensation companies are able to maintain an 'A'

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<sup>22</sup> Blue Cross' Motion to Dismiss, p 5.

insurance rating."<sup>23</sup> Thus, Blue Cross does not dispute that the \$125 million is a capital contribution versus an arms-length loan.<sup>24</sup>

Instead of disputing the \$125 million capital contribution to the Accident Fund, Blue Cross argues that such a capital contribution is not prohibited under Section 207(1)(x)(vi) because this section "was enacted for the sole purpose of preventing BCBSM from using its funds to subsidize the Accident Fund's workers' compensation insurance rates."<sup>25</sup> Even though Section 207(1)(x)(vi) does not contain the word "rates" and expressly provides that Blue Cross funds cannot be used "to operate or subsidize **in any way**" the Accident Fund, Blue Cross nevertheless argues that there can be no violation of Section 207(1)(x)(vi) unless Blue Cross subsidized the Accident Fund's workers' compensation rates. Thus, the entire basis of Blue Cross' motion to dismiss Count II is a statutory misconstruction that rewrites Section 207(1)(x)(vi) to include the word "rates" following the prohibition against using Blue Cross funds to operate or subsidize in any way the Accident Fund.

**A. Plain Language of Section 207(1)(x)(v) and (vi)**

When construing the provisions of a statute, this Court's task is to discern and give effect to the intent of the Legislature as reflected in the statute's plain language. As stated by our Supreme Court<sup>26</sup>:

When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. Because

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<sup>23</sup> Blue Cross' Motion to Dismiss, p 4.

<sup>24</sup> Page 4 of the "Form D" expressly provides that the \$125 million capital contribution is not a loan, extension of credit, or a guarantee. A copy of the Form D, without exhibits, is attached as Exhibit B.

<sup>25</sup> Blue Cross' Motion to Dismiss, p 12.

<sup>26</sup> *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002)(citations omitted).

the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.

Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. Further, we give undefined statutory terms their plain and ordinary meanings. In those situations, we may consult dictionary definitions.

Several other Supreme Court decisions have similarly explained that "[a] bedrock principle of statutory construction is that a 'clear and unambiguous statute leaves no room for judicial construction or interpretation'"<sup>27</sup>; that the "primary rule of statutory construction is to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, it is generally applied as written"<sup>28</sup>; and that "[t]he first criterion in determining intent is the specific language of the statute."<sup>29</sup>

Section 207(1)(x) authorizes Blue Cross to form the Accident Fund only for the purpose of acquiring, owning, and operating the State Accident Fund. This express grant of statutory authority, however, is subject to certain restrictions. One such restriction is Section 207(1)(x)(v):

(v) Health care corporation and subscriber funds are used only for the acquisition from the state of Michigan of the assets and liabilities of the state accident fund.

Similarly, Section 207(1)(x)(vi) provides:

(vi) Health care corporation and subscriber funds are not used to operate or subsidize in any way the insurer including the use of such funds to subsidize contracts for goods and services. This subparagraph does not prohibit joint undertakings between the health care corporation and the insurer to take advantage of economies of scale or arm's-length loans or other financial transactions between the health care corporation and the insurer.

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<sup>27</sup> *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003).

<sup>28</sup> *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 482; 673 NW2d 739 (2003).

<sup>29</sup> *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

The plain and unambiguous language of the statute provides that in connection with its purchase of the State Accident Fund, Blue Cross cannot use its funds for anything other than purchasing the State Accident Fund's assets and liabilities and that after the purchase, Blue Cross cannot use its funds "to operate or subsidize in any way" the newly formed Accident Fund.

Standing alone, Section 207(1)(x)(v) strictly limits Blue Cross to using its funds only to purchase the State Accident Fund. Section 207(1)(x)(vi) provides additional restrictions on the post-purchase use of Blue Cross funds, although the words "operate" and "subsidize" are not defined in the Act. Under these circumstances, the Court must give these terms their plain and ordinary meaning and may refer to a dictionary to do so.<sup>30</sup> The word "operate" is defined as "to perform a function: exert power or influence."<sup>31</sup> The word "subsidize" means "to furnish a subsidy" and the word "subsidy" is defined as "a grant or gift of money."<sup>32</sup> Thus, Blue Cross cannot use its funds to operate/perform a managerial function or give/grant its funds to the Accident Fund **in any way**.

Although the first sentence of Section 207(1)(x)(vi) prohibits Blue Cross from using its funds to operate or subsidize the Accident Fund in any way, the second sentence of Section 207(1)(x)(vi) permits Blue Cross to engage in certain non-subsidy, non-operational financial transactions with the Accident Fund, such as joint undertakings, arm's-length loans, and "other

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<sup>30</sup> *State Defender Union Employees v Legal Aid & Defender Ass'n of Detroit*, 230 Mich App 426, 432; 584 NW2d 359 (1998)(explaining that "[b]ecause it is not defined in the statute we must give the term "funded" its plain and ordinary meaning" and that "[r]eference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is"); *see also Woodward v University of Michigan Med Ctr*, 476 Mich 545, 561; 719 NW2d 842 (2006).

<sup>31</sup> *Merriam-Webster's Collegiate Dictionary*, Eleventh Edition, 2006, p 869. Blue Cross appears to ignore the word "operate" in Section 207(1)(x)(vi). Blue Cross' \$125 million capital contribution to the Accident Fund to maintain the Accident Funds "A" rating could also be viewed as performing a managerial function or exerting power or influence over the Accident Fund's operations.

<sup>32</sup> *Merriam-Webster's Collegiate Dictionary*, Eleventh Edition, 2006, p 1245.

financial transactions." In other words, arm's-length financial transactions supported by adequate and fair consideration provided by both Blue Cross and the Accident Fund. Contrary to Blue Cross' argument in its motion to dismiss, "other financial transactions" cannot be construed so broadly as to "swallow" and negate the express prohibition against using Blue Cross company and subscriber funds to operate or subsidize the Accident Fund. As stated by our Supreme Court, "every word of a statute should be given meaning" and "no word should be treated as surplusage or made nugatory."<sup>33</sup> Accordingly, the "other financial transactions" language in the second sentence cannot be read to allow grants or gifts of money from Blue Cross to the Accident Fund because such a reading is directly opposite to and would negate the express prohibition that precedes it.

In fact, the doctrine of *ejusdem generis* requires that "where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.'"<sup>34</sup> In *Neal v Wilkes*, the Supreme Court applied the doctrine of *ejusdem generis* in reading the recreational land use act (RUA). The RUA provides, in pertinent part, that an owner of land is not liable to a person who injures himself on the owner's land if that person has not paid for the use of the land and that person is using the land "for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use. . ."<sup>35</sup> The Supreme Court explained that the language "'other outdoor recreational use' must be interpreted to include only

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<sup>33</sup> *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

<sup>34</sup> *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004).

<sup>35</sup> *Neal*, 470 Mich at 664.

those outdoor recreational uses 'of the same kind, class, character, or nature,' as 'fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, [and] snowmobiling.'"<sup>36</sup>

Similarly, the language "other financial transactions" in the second sentence of Section 207(1)(x)(vi) must be interpreted to include only those financial transactions of the same kind, class, character, or nature as joint undertakings and arm's-length loans. This analysis fits within the plain language of the statute and does not negate Sections 207(1)(x)(v) and (vi), which prohibit Blue Cross from giving subscriber funds to the Accident Fund or using its funds to operate or subsidize the Accident Fund.

### **B. "Legislative History"**

Blue Cross attempts to avoid the plain language of Section 207(1)(x)(vi) by arguing that the legislative history of this section shows that the subsidy language "prohibits only the use of BCBSM funds to 'subsidize' the Accident Fund's worker's compensation rates."<sup>37</sup> Not only do legislative bill analyses generally state "[t]his analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent,"<sup>38</sup> but our Supreme Court has also held that "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction."<sup>39</sup> In fact, the Supreme Court explained that<sup>40</sup>:

The problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator. Rather, they are prepared by House and

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<sup>36</sup> *Neal*, 470 Mich 661 at 669-70 (citations omitted).

<sup>37</sup> Blue Cross' Motion to Dismiss, pp 15-16.

<sup>38</sup> Senate Bill Analysis, SB 48-52, 346 & 568, August 18, 1994, p 10 (dealing with Section 207(1)(x)(vi) and the purchase of the Accident Fund by Blue Cross).

<sup>39</sup> *Lynch & Co v Flex Tech, Inc.*, 463 Mich 578, 587-88; 624 NW2d 180 (2001).

<sup>40</sup> *Lynch*, 463 Mich at 588 n 7.

Senate staff. Indeed, the analyses themselves note that they do not constitute an official statement of legislative intent.

Thus, Blue Cross' reliance on legislative history to overcome the plain language of the statute is misplaced.

Blue Cross' argument is even less persuasive because it relies not upon the Senate Bill analysis' discussion of Section 207(1)(x)(vi), but rather the "For" and "Against" portion of the bill analysis, which only provides the position of some opponents and proponents of the bill.<sup>41</sup> These "position statements" hardly provide a definitive, much less any, indication of the legislative intent behind the bills. Moreover, the discussion cited by Blue Cross in the "For" and "Against" portion of the bill analysis does not state that the subsidy language in Section 207(1)(x)(vi) "prohibits **only** the use of BCBSM funds to 'subsidize' the Accident Fund's workers' compensation rates." Instead, the discussion is simply a response to a specific question on subsidizing rates and, consequently, does not provide a definitive statement on the extent of subsidization prohibited under Section 207(1)(x)(vi).

### **C. The Doctrine of "*in pari materia*"**

Blue Cross also attempts to engraft the word "rates" into the first sentence of Section 207(1)(x)(vi) by arguing that the legislative bills dealing with the purchase of the State Accident Fund must be read *in pari materia*.<sup>42</sup> Blue Cross claims that even though Senate Bill 568, which dealt with Section 207(1)(x)(vi), does not expressly use the word "rates," the word "rates" must

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<sup>41</sup> Blue Cross fails to provide a page citation for its two quotes from the Senate Bill Analysis. A review of the September 15, 1993 Senate Bill Analysis, however, demonstrates that Blue Cross is citing to page 10 in the "For" and "Against" section.

<sup>42</sup> The purpose of the rule *in pari materia* "is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject." *Apsey*, 477 Mich at 129 n 4.

be read into the section because Senate Bill 568 is "*in pari materia*" with Senate Bill 346, which dealt with rates under the Insurance Code.<sup>43</sup> This argument is unfounded.

First, Senate Bill 346 does not expressly deal with rates but rather with the transfer of the Accident Fund to a domestic stock insurer. Second, and more importantly, this argument fails for the same reason that all of Blue Cross' arguments on this issue fail—the plain language of the statute controls. Our Supreme Court has held that "the interpretive aid of the doctrine of *in pari materia* can only be utilized in a situation where the section of the statute under examination is itself ambiguous." Here, neither Blue Cross nor the Attorney General have asserted that Section 207(1)(x)(vi) is ambiguous because the statute is in fact unambiguous. Rather, Blue Cross simply argues that this Court should not read Section 207(1)(x)(vi) as it is written. The plain language of Section 207(1)(x)(vi) prohibits Blue Cross from operating or subsidizing in any way the Accident Fund. As noted above, subsidy is defined as a grant or gift of money. Thus, Blue Cross' grant of \$125 million to the Accident Fund by way of a capital contribution violates Section 207(1)(x)(vi).

In addition to its "*in pari materia*" argument, Blue Cross argues that "the Accident Fund is regulated under Chapter 13 of the Insurance Code" and "it must be presumed that in enacting Section 207(1)(x)(vi), the Legislature was aware of the nature of financial transactions in which the Accident Fund was and is able to participate with BCBSM was governed by Chapter 13, and was further aware that nothing in Chapter 13 of the Insurance Code limited the right to make capital contributions to the insurance subsidiary" and thus "the second sentence of Section 207(1)(x)(vi), which expressly permits 'other financial transactions' between BCBSM and the

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<sup>43</sup> Blue Cross' Motion to Dismiss, pp 15-16.

Accident Fund, must be construed as embracing all financial transactions permissible under Chapter 13 – including the making of capital contributions."<sup>44</sup>

There are a number of problems with Blue Cross' argument. First, Chapter 13 of the insurance code does not even contain a definition of "other financial transactions." Blue Cross' argument is simply that nothing in Chapter 13 prohibits an insurance company formed under, operating under, and regulated by the Insurance Code from making capital contributions to its subsidiaries. However, Blue Cross is formed under, operates under, and is regulated by PA 350, not the Insurance Code, and PA 350 clearly provides that Blue Cross is not and cannot be an insurance company.<sup>45</sup> Moreover, Section 201(4) expressly states that Blue Cross "shall not be subject to the laws of this state with respect to insurance corporations, except as provided in this act." Thus, Chapter 13 of the insurance code does not apply to Blue Cross unless specifically provided for in PA 350, and Blue Cross has not argued, nor could it, that Section 207(1)(x)(vi) references Chapter 13.

Blue Cross again attempts to avoid the plain language of PA 350 and Section 207(1)(x)(vi) by employing the doctrine of *in pari materia*. Absent a finding that this section is ambiguous, the court should not employ the *in pari materia* doctrine. Even assuming the doctrine could be applied to Section 207(1)(x)(vi), Chapter 13 is not *in pari materia* with Section 207(1)(x)(vi). As stated by our Supreme Court "[s]tatutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a

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<sup>44</sup> Blue Cross' Motion to Dismiss, p 17.

<sup>45</sup> Section 201(5) provides that Blue Cross is a "charitable and benevolent institution." MCL Section 202(1)(c) provides that Blue Cross' corporate name "shall not include the words insurance, casualty, surety, health and accident, mutual, or other words descriptive of the insurance or surety business . . . ."

common purpose."<sup>46</sup> Chapter 13 deals with the Insurance Code. Section 207(1)(1)(x)(vi) is part of the Non Profit Health Care Corporation Reform Act and deals solely with Blue Cross. By statute, Blue Cross is not an insurance company, but rather a charitable benevolent institution.<sup>47</sup> Thus, Chapter 13 and Section 207(1)(x)(vi) do not relate to the same person or thing, or the same class of persons or things, or which have a common purpose.

Moreover, even assuming that Chapter 13 and Section 207(1)(x)(vi) were *in pari materia* and Section 207(1)(x)(vi) was ambiguous, Blue Cross is an entity of limited powers and the lack of prohibition against capital contributions to subsidiaries in the insurance code does not create a power for Blue Cross under PA 350 to subsidize its subsidiaries.<sup>48</sup>

And finally, the express prohibition in Section 207(1)(x)(vi) against Blue Cross subsidizing the Accident Fund through grants or gifts of money makes sense with the statutory purpose of Blue Cross. Blue Cross, by legislative declaration, is a nonprofit, tax exempt, charitable benevolent institution. As such, "the Michigan Legislature created a charitable trust for the benefit of Michigan's citizens" and thus "[t]his trust may not be compromised by the diversion of BCBSM's charitable assets that are intended to benefit Michigan's citizens."<sup>49</sup> In addition, Section 206 provides that the "funds and property of a health care corporation [Blue Cross] shall be acquired, held, and disposed of only for the lawful purposes of the corporation and for the benefit of the subscribers of the corporation as a whole." The prohibition against Blue Cross granting or providing a gift of money to the Accident Fund protects the charitable

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<sup>46</sup> *Apsey*, 477 Mich at 129.

<sup>47</sup> MCL 550.1201(5).

<sup>48</sup> OAG, 2001-2002, No. 7115, p 107 (July 30, 2007) (stating "BCBSM cannot take actions that are not specifically permitted in the Act" and that as "a creature of the Legislature, BCBSM possesses only that authority specifically granted by statute.").

<sup>49</sup> OAG, 2001-2002, No. 7115, p 107 (July 30, 2007).

assets of Blue Cross and prevents Blue Cross from conducting a de facto conversion to a for-profit company.<sup>50</sup>

In summary, the plain language of Section 207(1)(x)(vi) prohibits Blue Cross from using its funds to operate or subsidize, **in any way**, the Accident Fund. Blue Cross' \$125 million capital contribution to the Accident Fund violates this prohibition. Under MCR 2.116(C)(8), this Court must accept all factual allegations by the Attorney General as true and construe them in the light most favorable to the Attorney General when determining whether he has stated a claim on which relief can be granted. Assuming the facts in the Attorney General's complaint as true, Section 207(1)(x)(vi) prohibits Blue Cross' \$125 million capital contribution to the Accident Fund. Thus, Blue Cross's motion to dismiss should be denied.

**D. The Court cannot, or alternatively should not, invoke the doctrine of primary jurisdiction.**

Blue Cross' seven-page exegesis on the doctrine of primary jurisdiction, while interesting, is entirely misplaced and has no application to this case. Among the reasons that the doctrine does not apply is:

- (1) PA 350 does not grant the Commissioner of the Office of Financial and Insurance Regulation ("Commissioner") concurrent original subject matter jurisdiction over actions brought by the Attorney General challenging Blue Cross' unauthorized activities and violations of the Act; and
- (2) The Commissioner has already publicly opined, albeit wrongly, that Blue Cross' \$125 million capital contribution was proper under PA 350.

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<sup>50</sup> MCL 550.1218, added in 2002, prohibits Blue Cross from changing its nonprofit status but a de facto conversion could occur if Blue Cross were to operate the parent company as a shell and dispose of its surplus through its subsidiaries. Thus, Blue Cross' argument, in a footnote, that its capital contribution did no harm since it only transferred assets to its subsidiary is specious. (Blue Cross Motion to Dismiss, p 18, n 13). Under Blue Cross' argument in its motion to dismiss, Blue Cross can transfer the majority of its surplus to the Accident Fund which could then evade all the protections and prohibitions under PA 350 that apply to Blue Cross.

For these and the other reasons set forth below, the Court cannot (or alternatively, should not) transfer Count II of the Complaint to the Commissioner based upon the doctrine of primary jurisdiction.

- 1. The Court cannot invoke the doctrine of primary jurisdiction because PA 350 only vests the circuit court, not the Commissioner, with original subject matter jurisdiction over actions by the Attorney General to enjoin Blue Cross' unauthorized activities and violations of the Act.**

As stated by the Michigan Supreme Court in *Rinaldo's Constr Co v Michigan Bell Tel Co*, a court of general jurisdiction may only consider the doctrine of primary jurisdiction "whenever there is *concurrent original subject matter jurisdiction* regarding a disputed issue in both a court and an administrative agency."<sup>51</sup> Here, concurrent original subject matter jurisdiction does not exist because PA 350 only vests the *circuit court* with subject matter jurisdiction over the Attorney General's Complaint.

Section 619 provides that the Attorney General may bring an action or apply to the circuit court for: (1) a court order enjoining any unauthorized corporate activities of Blue Cross or violations of PA 350, and (2) a court order for other equitable or extraordinary relief to enforce the Act. Conversely, neither Section 619 nor any other section of PA 350 vests the Commissioner with subject matter jurisdiction over actions brought by the Attorney General to

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<sup>51</sup> *Rinaldo's Constr Co v Michigan Bell Tel Co*, 454 Mich 65, 70; 559 NW2d 647 (1997) (emphasis added)(quoting LeDuc, Michigan Administrative Law, § 10:43, p 70).

enjoin Blue Cross' unauthorized activities or violations of PA 350.<sup>52</sup> In fact, Section 603(4) requires the Commissioner, upon discovering that Blue Cross has violated the Act or any other Michigan law, to *immediately report the violation to the Attorney General in writing*. This Section further provides that the *Attorney General* "shall then take action on the alleged violation, as the facts warrant."<sup>53</sup>

Applying the plain language of Section 603(4) and 619, it is clear that PA 350 vests the Attorney General with exclusive authority to pursue court action to address Blue Cross' violations of the Act and similarly vests this Court with exclusive jurisdiction over such actions. Absent any statutory grant of concurrent original subject matter jurisdiction to the

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<sup>52</sup> The distinction between MCL 550.1619, which grants this Court exclusive original subject matter jurisdiction over the Attorney General's Complaint, and other Blue Cross matters over which PA 350 grants the Commissioner concurrent (or even exclusive) original subject matter jurisdiction is best evidenced by the Act's provisions governing Blue Cross' rates. With respect to Blue Cross rate filings, the Act confers automatic standing upon the Attorney General to request a hearing before the Commissioner to contest the filing. MCL 550.1613(1)(c). The Act also provides the deadlines and procedures that apply to a rate hearing, *id.*, and vests with the Commissioner the initial decision whether to approve, approve with modifications, or disapprove Blue Cross' rate filing. MCL 550.1610(2)(a).

<sup>53</sup> Sections 603(4) and 619 are consistent with the other provisions of PA 350 establishing the Attorney General's role as the primary regulator of Blue Cross in matters involving the interpretation and enforcement of the Act's provisions, as well as his role as Michigan's chief law enforcement officer. For example, in addition to being solely responsible for prosecuting unauthorized activities and violations of the Act under MCL 550.1207(3)(c) and 1619, the Attorney General must: (a) certify that Blue Cross' original and amended Articles of Incorporation and Bylaws comply with the Act (MCL 550.1202(3), 1203, and 1302); and (b) give his prior determination as to the lawfulness of any transactions involving other insurance companies (MCL 550.1207(1)(o)(i)). In addition, any opinion of the Attorney General interpreting the provisions of PA 350 is binding upon the Commissioner. *Oakland County Prosecutor v Michigan Dept of Corrections*, 199 Mich App 681, 691; 503 NW2d 465 (1993). Because the Attorney General's authority with respect to interpreting and enforcing PA 350 is superior to that of the Commissioner, his Complaint cannot be subject to the Commissioner's review. Only this Court possesses authority greater than the Attorney General regarding the proper interpretation and application of PA 350, and, consequently, only this Court can decide the issues raised by Count II of the Attorney General's Complaint.

Commissioner, the doctrine of primary jurisdiction cannot be invoked.<sup>54</sup> The Court cannot forego its clear statutory obligation to adjudicate the Attorney General's claims by first sending them to an agency having no jurisdiction. Blue Cross' request to transfer Count II of the Complaint to the Commissioner must therefore be denied.

**2. Even assuming the existence of concurrent original subject matter jurisdiction, the doctrine of primary jurisdiction does not apply because the Commissioner has already provided an opinion on the issues raised by Count II of the Complaint.**

Assuming *arguendo* that the Commissioner possesses jurisdiction over the claims contained in Count II, the primary jurisdiction doctrine is inapplicable because the Commissioner has already opined on the propriety of Blue Cross' \$125 million capital contribution. Attached as Exhibit C is the Commissioner's letter dated May 22, 2008, in which he states in response to Representatives Smith and Hune's question regarding whether Blue Cross' \$125 million capital contribution complies with Section 207(1)(x)(vi) of PA 350 — "the answer is 'Yes'." Notwithstanding the conclusory nature and dearth of support for his opinion, the fact remains that the Commissioner has already rendered an opinion on this issue.<sup>55</sup>

In *Attorney General v Raguckas*,<sup>56</sup> the Attorney General commenced an action in Ingham County Circuit Court seeking to enjoin the licensed chiropractor defendants from dispensing drugs and using acupuncture because these acts were beyond the scope of the Michigan Chiropractic Act. On defendants' appeal from the circuit court's order permanently enjoining

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<sup>54</sup> See *Cotter v Blue Cross & Blue Shield of Michigan*, 94 Mich App 129, 134-35; 288 NW2d 594 (1979) ("The doctrine of primary jurisdiction is invoked where the regulatory agency has been authorized by statute to determine factual issues raised in the pleadings.").

<sup>55</sup> Blue Cross therefore inaccurately asserts on page 24 of its Motion to Dismiss that the Commissioner "has been provided with no opportunity to render a determination" on the issues raised by Count II of the Complaint.

<sup>56</sup> *Attorney General v Raguckas*, 84 Mich App 618; 270 NW2d 665 (1978).

defendants from performing these acts, the defendants argued that the primary jurisdiction doctrine prevented the Attorney General from maintaining the circuit court action until the proper administrative agency (the State Board of Chiropractic Examiners, or "Board") had reviewed the matter. Rejecting defendants' argument, the Court of Court of Appeals first noted that the doctrine of primary jurisdiction "is a flexible doctrine whose invocation is largely discretionary with the trial judge."<sup>57</sup> The court then explained the rationale for its conclusion that that the Attorney General's action was properly commenced in circuit court and that the primary jurisdiction doctrine did not apply<sup>58</sup>:

Abstention by the trial court while the [Board] reviewed the scope of the chiropractic profession would accomplish very little. The [Board] has already issued memoranda indicating that acupuncture is within the scope of the chiropractic act. The [B]oard had also indicated that it is their belief that a chiropractor may administer non-narcotic chemicals when treating a patient [under certain circumstances]. Hence, the [Board] had already expressed their opinion in respect to the use by chiropractors of the techniques at issue in the instant case.

However, the [B]oard's views in respect to these procedures appear to be in conflict with the statutory and common-law definition of the chiropractic profession. Accordingly, the present case is ripe for adjudication by the courts.

The facts in *Raguckas* are strikingly similar to the present case. The Commissioner has already expressed his opinion on the propriety of the \$125 million capital contribution, and his opinion is at odds with the statutory language. The Attorney General's Complaint is therefore "ripe for adjudication by the courts," and this Court should decline to invoke the doctrine of primary jurisdiction.

**3. The Court should not apply the doctrine of primary jurisdiction based on other recognized exceptions to that doctrine and the related doctrine of exhaustion of administrative remedies.**

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<sup>57</sup> *Raguckas*, 84 Mich App at 622.

<sup>58</sup> *Raguckas*, 84 Mich App at 622-23 (citations omitted).

Standing alone, the Commissioner having already opined on the issues raised by Count II of the Complaint provides a decisive basis for the Court to decline to invoke the primary jurisdiction doctrine. Additionally, well-settled exceptions to both this doctrine and the related doctrine of exhaustion of administrative remedies militate against transferring Count II to the Commissioner so that he can review this issue yet again. These exceptions include: 1) Futility; 2) Agency predisposition; 3) Predominantly legal issues; and 4) Inadequate administrative remedy. All of these exceptions exist in this case and dictate against this Court's application of the primary jurisdiction doctrine.

**a. Futility and agency predisposition.**

Michigan courts have repeatedly recognized a futility exception to the doctrines of primary jurisdiction and exhaustion of administrative remedies. In *Trojan v Township of Taylor*,<sup>59</sup> the Michigan Supreme Court affirmed the circuit court's decision allowing plaintiff to seek a writ of mandamus without having first exhausted his administrative remedies. In doing so, the Court quoted with approval the following language from the circuit court's opinion<sup>60</sup>:

To this rule requiring the plaintiff to exhaust his administrative remedies, there are a number of exceptions, one clear exception is that the law will not require a citizen to undertake a vain and useless act. The law does not require useless expenditures of effort. Where it is clear that resort to the administrative body is but a formal step on the way to the courthouse, the law will not require such a step to be taken.

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<sup>59</sup> *Trojan v Township of Taylor*, 352 Mich 636; 91 NW2d 9 (1958).

<sup>60</sup> *Trojan*, 352 Mich at 638-39; see also *Manor House Apartments v City of Warren*, 204 Mich App 603, 606; 516 NW2d 530 (1994) (reversing Tax Tribunal's dismissal of plaintiff's property tax assessment appeal based on its failure to exhaust administrative remedies because plaintiff's appearance before the board would have been "an exercise in futility and nothing more than a formal step on the way to the courthouse") (quoting *Turner v. Lansing Township*, 108 Mich App 103, 108; 310 NW2d 287 (1981)); *Raguckas*, 84 Mich App at 622-23.

Closely related to the futility exception is the exception when the administrative agency is predisposed to a certain outcome.<sup>61</sup>

The Commissioner has already concluded that Blue Cross' \$125 million capital contribution did not violate Section 207(1)(x)(vi). Given the Commissioner's perfunctory, result-driven opinion on this issue, it is highly doubtful that transferring it to him once again would result in any meaningful consideration of the issue's merits or a different outcome.<sup>62</sup> Moreover, regardless of the Commissioner's decision, subsequent court action initiated by either Blue Cross or the Attorney General would be a certainty, placing the parties and the Court in the exact same position that they are in today—only after having wasted innumerable resources and untold time pursuing meaningless agency review.<sup>63</sup> Because the Commissioner is predisposed to decide this issue in a certain way and because doing so would be futile, the Court should not transfer Count II of the Attorney General's Complaint to the Commissioner under the doctrine of primary jurisdiction.

**b. Predominantly legal issues.**

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<sup>61</sup> See *Michigan Waste Sys, Inc v. Michigan Dept of Natural Res*, 157 Mich App 746, 758-59; 403 NW2d 608 (1987) (holding that because defendant's acting director had "made clear his firm conviction that he was legally prohibited from granting plaintiff an operating license" once certain events had occurred, plaintiff was not required to exhaust its administrative remedies based upon the recognized exception "where the administrative decision maker is predisposed to rule against the aggrieved party"); see also *Raguckas*, 84 Mich App at 622-23.

<sup>62</sup> See *Association of Little Friends, Inc v City of Escanaba*, 138 Mich App 302, 311; 360 NW2d 602 (1984) (excusing plaintiff's failure to exhaust administrative remedies on the grounds of futility because it was reasonable to assume that the Escanaba property tax Board of Review's finding that plaintiff "was not entitled to tax-exempt status in one year would not be reversed in a subsequent year").

<sup>63</sup> See *Michigan Waste Sys, Inc*, 157 Mich App at 759-760 (1987) (upholding trial court's decision excusing plaintiff from exhausting its administrative remedies in part because, as stated by the trial court, the opinion of the hearing officer would address "legal matters which ultimately will be reviewed by this Court" and "[t]here is no reason why this Court should not address those questions forthwith and to require Plaintiff to pursue them before the agency would surely be 'useless'").

Another exception (or as sometimes explained by the courts, "factor") that precludes application of the primary jurisdiction and exhaustion doctrines is when the issues involved are predominantly legal in nature.<sup>64</sup> Count II of the Complaint raises primarily legal issues involving the proper interpretation and application of Section 207(1)(x)(vi). Under these circumstances, agency review is unwarranted because the Commissioner has no special expertise enabling him to better interpret or apply PA 350 than can the Attorney General or, ultimately, this Court.<sup>65</sup>

**c. Inadequate administrative remedy**

One final exception to the primary jurisdiction doctrine that applies in this case is "where the administrative remedies are not sufficient to give plaintiff the relief to which he or she is

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<sup>64</sup> See *Huggett v Department of Natural Resources*, 232 Mich App 188, 193; 590 NW2d 747 (1998) (holding that plaintiff was not required to exhaust administrative remedies in the defendant agency because "the issue was clearly framed for the court as one of law (statutory interpretation) that did not call for extensive findings of fact or technical expertise") (parenthetical in original); see also *LaSalle Townhouses Coop Ass'n v Detroit Edison Co*, 69 Mich App 7, 12; 244 NW2d 347 (1976) (Bronson, P.J., concurring) ("One [factor to be considered in deciding whether to invoke the primary jurisdiction doctrine] which is frequently mentioned is whether issues of law, rather than issues of fact, are paramount. If issues of law are significant, the trial court's decision to entertain the proceedings is usually upheld.").

<sup>65</sup> See *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 615; 327 NW2d 805 (1982) (refusing to apply the doctrine of primary jurisdiction because, *inter alia*, the questions that the defendants argued the Department of Licensing and Regulation should initially address due to its expertise were "not factually complex" and were "ones that can be competently determined in the courts that enforce" the laws at issue); see also *International Bus Mach v. Department of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977) (holding that the trial court's review of the Department of Treasury's actions by right rather than by leave was harmless error and that exhaustion of administrative remedies was not required because "the issue of the agency's statutory authority is clearly framed for the court . . . [e]xtensive fact findings are unnecessary, and the decision does not demand special technical expertise").

entitled."<sup>66</sup> The Commissioner's enforcement powers over Blue Cross are limited to the suspension or limitation of its certificate of authority.<sup>67</sup> Unlike the Court, the Commissioner does not possess broad equitable powers to enjoin and set aside Blue Cross' unauthorized activities. For this additional reason, the Court should decline Blue Cross' invitation to invoke the doctrine of primary jurisdiction.

#### **IV. Count III – Breach of Asset Purchase Agreement by Making Capital Contributions in a Form Other Than a Surplus Note.**

The agreement to limit future capital contributions by Blue Cross to the Accident Fund to capital notes was an integral part of the 1994 sale. In the absence of any such agreement, Blue Cross has no authority to transfer subscriber funds to the capital and surplus account of its for-profit subsidiary, the Accident Fund.

In his complaint, the Attorney General alleges that provisions of the sale of the State Accident Fund to Blue Cross in 1994 allowed Blue Cross to make capital contributions to the Accident Fund to maintain the Fund's AM Best rating, so long as those contributions were in the form of interest bearing capital notes. The basis of this conclusion were statements made to the Attorney General's Office by Blue Cross staff when asked for the legal basis to support Blue Cross' decision to transfer \$125 million of subscriber funds to the Accident Fund in November of 2007. Blue Cross staff expressly referenced its commitment made to the State of Michigan in the 1994 purchase agreement. Admittedly both the Business Plan presented to the State by Blue

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<sup>66</sup> *Raguckas*, 84 Mich App at 622; *see also Diamond Mortgage Co*, 414 Mich at 610-11 (concluding that exhaustion of administrative remedies in the Department of Licensing and Regulation was not required because none of the Attorney General's requested relief, including dissolution of the defendant corporation and reformation of prior mortgages, was available in that agency).

<sup>67</sup> MCL 550.1605.

Cross at the time and the Asset Purchase Agreement contained language that contemplated that Blue Cross would maintain:

[A]n adequate surplus in the Accident Fund as it has in its HMO subsidiaries. BCBSM recognizes that the Michigan Insurance Commissioner will require an adequate surplus to support the Accident Fund's business and that rating agencies such as A.M. Best will consider the Fund's surplus level in establishing their rating. For planning purposes, BCBSM expects that a net premiums written to surplus ratio of 1.5 to 1 must be maintained, and has therefore anticipated surplus notes beginning in 1994 from BCBSM to maintain this surplus level. This process will be performed in consideration with the Insurance Commissioner and will be subject to his prior approval. It is BCBSM's plan that these surplus notes will be repaid, with interest, once the Accident Funds' statutory surplus exceeds a net premiums written to surplus ratio of 1.5 to 1." (See Exhibit A to complaint, page 6)

This contractual authority and commitment on the part of Blue Cross is repeated in section 8(o) of the 1994 Purchase Agreement, although the Business Plan is not expressly incorporated therein. If, as Blue Cross now claims, this provision expired in 2001, Blue Cross is left with no authority to make capital contributions to its Accident Fund subsidiary, either in the form of capital notes or as was done here by way of a gift, regardless of the Accident Fund's Best rating or its premiums to surplus ratio. Instead, the Accident Fund would need to raise capital in the same manner as its competitors and cannot rely on the benevolence of its tax-exempt parent.

**RELIEF REQUESTED**

**WHEREFORE**, Attorney General Mike Cox requests this Court to deny Blue Cross' Motion to Dismiss in its entirety.

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