STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from Ingham County Circuit Court, Lower Court No. 98-88770-CZ, Honorable Michael G. Harrison

BLAKEWOODS SURGERY CENTER, L.L.C. JACKSON MEDICAL SERVICES, INC., PAUL ERNEST, M.D., KEVIN LAVERY, M.D., ANTHONY SENSOLI, M.D., SIGMUND ANCEREWICZ, M.D., KHAWAJA IKRAM, D.O., SHARON ROONEY-GANDY, D.D., ARTHUR WIERENGA, M.D., MARTIN PATRIAS, M.D., MICHAEL CHAMES, M.D., GHULUM DASTGIR, M.D., AND KABINDRA MISHRA, M.D.,

Plaintiffs-Appellants,

S.C. No. 118935
C.O.A. No. 221494
Lower Ct. No. 98-88770-CZ

v.

COMMISSIONER OF FINANCIAL AND INSURANCE SERVICES, in his official capacity.

Defendant-Appellee.

_____/

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ORAL ARGUMENT REQUESTED

_____/

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PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

APPENDIX ON APPEAL AND PROOF OF SERVICE

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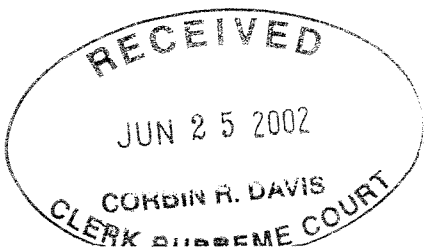


TABLE OF CONTENTS

Index of Authorities.....ii
Questions Presented.....vi
Orders and Judgment Appealed From and Relief Sought:
Basis of Jurisdiction in the Michigan Supreme Court.....1
Character and Summary of the Case.....5
Grounds for Consideration by the Supreme Court.....7
Material Proceedings and Facts.....8
Standard of Review and Jurisdiction: Question III.....18
Additional Law and Argument 28
Crux of The Matter.....28
Mistaken Factual Premises Upon Which The Courts
Based Decisions: Question III.....31
Explanation of the Concept of Provider Reimbursement
Under the Act: Question II.....31
Failure of the Courts to Consider What Blakewoods
Asked for as Relief: Questions II & III 33
No Remedy Available Under Part 5: No Primary or Exclusive Remedy:
Question III:.....35
BCBSM's Unlawful Discrimination in Favor of Hospitals: Question I.. 36
Blakewoods' Property Interest in State Licensure: Lack of Remedy
in Part 5 for the IC's Acquiescence in BCBSM's Ultra Vires Actions:
Question I.....37
Legislative History: Question I.....38
Statutory Framework and Definitions: Questions I,II & III.....39
Specific Requirements for Freestanding Surgery Facilities:
Question I.....46
Neither 1980 PA 350 nor the Public Health Code authorize
BCBSM's EON: Question I.....53
No Legislative Delegation.....54
Conclusion.....57
Relief Requested.....57

Mich. 384, 300 N.W. 134 (1941).....18
Shavers v. Attorney General, 402
Mich. 554, 267 N.W.2d 72 (1978);.....18,21,25,27
State Bar v Galloway, 422 Mich 188, 196; 369 NW2d 830 (1985);.....43
Western Michigan Univ. Bd. Of Control v Michigan, 455 Mich
531, 544; 565 NW2d 828 (1997),.....48
Westervelt v Natural Resources Comm.
402 Mich 412, 433; 263 NW2d 564 (1978);.....47,53
Union Carbide Corp. V Public Service Comm.
431 Mich 135; 428 NW2d 322 (1988).....51,53
Updegraff v. Attorney General, 298
Mich. 48, 52, 298 N.W. 400 (1941).....19

Michigan Court of Appeals Cases

Allstate Insurance Co. v Dept. Of Insurance,
195 Mich App 538, 545; 491 NW2d 616 (1992).....24
BCS Life Insurance Co. v Commissioner of Insurance,
152 Mich App 360; 393 NE2d 636, 640 (1986).....26,26,27
Blue Cross and Blue Shield of Michigan and F.W. Grotenhuis
Underwriters Inc. v Commissioner of Insurance,
155 Mich app 723; 400 NW2d 638 (1986).....26
Booth v. Consumers Power Co., 226
Mich App 368, 573 NW2d 333, 336 (1997),.....51
Butcher v. City of Detroit, 131
Mich App 698, 347 NW2d 702 (1984). 54
Buttleman v State Employees' Retirement System,
178 Mich App 688, 690; 444 NE2d 538 (1989).....24
Co. Of Alcona v Wolverine Environmental Production, Inc.,
233 Mich App 238; 590 NW2d 586 (1990).....48
Crawford Co. v Secretary of State, 160
Mich App 88, 95; 408 NW2d 112 (1987).....42
Grand Rapids Ed. Assoc. v Grand Rapids Bd. of Ed.,
170 Mich App 644, 651; 428 NW2d 731 (1988).....24
Genesis v BCBSM, 243 Mich App
692; _____NW2d_____(2000), BCBSM.....51
In re: Medical Doctor Provider Class Plan Review,
471 Mich App 471; 203 NW2d 707(1994).....3
In re Tariffs Telecommunications, 210
Mich App 533, 539, 534 NW2d 194 (1995).....51,53
Kuhn v. East Detroit, 50 Mich.App. 502, 213 N.W.2d 599 (1973).. 21
Lord v Genesee Circuit Judge, 51 Mich app
10, 17; 214 NW2d 321 (1973),.....25
People v Houston, 237 Mich App 707; 604 NW2d 706 (1988).....37
People v. Whisenant, 19 Mich. App. 182;
172 NW2d 524, on rehearing, 21 Mich App. 518;

175 NW2d 560, affirmed, 384 Mich. 693;
187 NW2d 229 (1969).....37,54
Price v Long Realty, Inc., 199 Mich App 461;
502 NW2d 337 (1993).....22
Revard v Johns-Manville Sales Corp, 111
Mich App 91, 95; 314 NW2d 533 (1981).....43
Smith v. Lumbermen's Mutual Ins. Co., 101 Mich App 78, 86,
300 NW2d 457 (1980), lv. den. 411 Mich. 873 (1981).....18
Spect Imaging, Inc. v Allstate Insurance Co. 246
Mich App 568; 633 NW2d 461 (2001).....23
W.A Foote Memorial Hospital v Department of Public Health,
210 Mich App 516; 534 NW2d 206 (1995),.....18,36
Welfare Employees Union v. Civil Service Commission,
28 Mich.App. 343, 350-351, 184 N.W.2d 247 (1970).....19.

Pennsylvania Court of Appeals Cases

Pennsylvania Coal Mining Ass'n v. Insurance
Dep't., 471 Pa. 437, 370 A.2d 685 (1977).....27

Michigan Constitution

Mich. Const. 1963, Art. 1, '17.....39,55
Mich. Const. 1963, Art. 4, '51.....38
Mich. Const. 1963, Art. 4, " 24, 25 & 36.....39,54,55,56

Statutes

1939 PA 109, Section 3.....38
1972 PA 233.....38
1972 PA 256.....38
1980 PA 350 Part 4.....42
1980 PA 350 Part 5.....2,3,5,21,24,25,35,37,39,42,49,52,57
MCL '333.16101-333.81237.....40
MCL '333.20801-20821 46
MCL '333.22201-333.22260.....12,51
MCL '333.22225.....53
MCL '333.2801-333.2821.....12
MCL '550.1102.....3,4,5,9,15,26,44
MCL '550.1105.....7,14,24,30,39,40,41,44,59
MCL '550.1107.....7,24,30,33,41,59
MCL '550.1108.....2,5,24,30,41,42,58
MCL '550.1207.....38
MCL '550.1401.....7,11,17,24,31,33,42,43,49,59

MCL '550.1403.....30
MCL '550.1502.....5,6,7,10,12,13,14,17,21,22,24,25,28,31,32,33,
36,38,41,44,45,46,47,48,49,52,57,58,59
MCL '550.1504..... 2,5,25,33,43,58
MCL '550.1516.....25
MCL '550.1619.....4,5,6,26,27,50,51,57,58

Court Rules

MCR 2.116(C)(4)(70(8)(9)(10).....1,21,27
MCR 2.116(C)(10).....56
MCR 2.116(G)(5).....56
MCR 2.605(A)(1).....18
MCR 2.605(A)(2) 26
MCR 2.605(C) 25
MCR 7.301 (A)(2).....1,28
MCR 7.302.....1,28
MCR 7.306.....1,28
MCR 7.309.....1,28
MCR 7.312.....1,28
MCR 7.317.....1,28

Attorney General Opinions

1985-86 Mich OAG No. 6410.....40,46
1989-90 Mich OAG No 6621.....40,46
1989-90 Mich OAG No 6567.....40,46
1994 Mich OAG 6809.....40,44,46

Miscellaneous

The Supreme Court, 1975 Term, 90 Harv.L.Rev. 86-104
(1976); Tribe, American Constitutional Law, pp. 514, 522.....27

STATEMENT OF QUESTIONS PRESENTED

I. Whether, pursuant to MCL 550.1502(8), an "evidence of need" determination on the part of a health care corporation constitutes a "reasonable standard" that may be set by such corporation in assessing whether to grant participating provider status to a freestanding surgical outpatient facility which otherwise complies with the requirements of MCL 550.1502(8).

The Defendant-Appellee answered: "Yes".

The Plaintiffs-Appellants answer: "No".

The Court of Appeals did not decide this question.

The Trial Court did not decide this question.

II. Whether, pursuant to 1980 PA 350, Parts 1, 2, 4 and 5, BCBSM may refuse reimbursement to a member or subscriber for covered services lawfully rendered by a non-participating fully licensed provider, absent fraud or documented, relevant overutilization and based on accurate claims, that have been submitted on a timely basis.

The Defendant-Appellee answered: "Yes".

The Plaintiffs-Appellants answer: "No".

The Court of Appeals did not decide this question.

The Trial Court did not decide this question.

III Whether the provider class plan review process found in Part 5 of 1980 PA 350 is a primary and/or exclusive remedy, or a remedy at all, and prohibits a court from taking jurisdiction, pursuant to MCL 550.1619(3), over a dispute involving a medical provider's request for a declaratory ruling and/or injunctive relief regarding the provisions of 1980 PA 350 and/or other pertinent statutory provisions and constitutional rights and grants of authority when such issues involve a dispute between a medical

provider and BCBSM.

The Defendant-Appellee answered: "Yes".

The Plaintiffs-Appellants answer: "No".

The Court of Appeals answered: "Yes"

The Trial Court answered: "Yes"

Orders and Judgment Appealed From and Relief Sought: Basis of Jurisdiction in the Michigan Supreme Court

Plaintiffs/Appellants, Blakewoods, L.L.C., *et al.*, through their attorney, Linda Fausey, pursuant to *MCR 7.301 (A) (2)* & *MCR 7.302*, in conformance with *MCR 7.306* & *MCR 7.309* and seeking relief pursuant to *MCR 7.312* & *MCR 7.317*, and pursuant to Orders issued by the Michigan Supreme Court on 10/23/01, and 4/30/02 (Appen. A, B) submit the following for their application for leave to appeal from an unpublished opinion and order, issued on 1/19/01, *Docket No. 221494* and from an order denying rehearing, issued on 3/8/01. *Appen. C,D.* These orders affirmed an order granting Defendant/Appellee's Motion for Summary Disposition that was brought pursuant to *MCR 2.116 (C), (4), (7), (8) & (10),* dismissing Plaintiffs/Appellants' complaint, issued by Ingham County Circuit Court Judge Michael Harrison, on 6/9/99, and from an order issued by the same trial court on 7/20/99, denying rehearing. *Appen. E, F.*

Appellants' Complaint was dismissed; that dismissal was upheld based upon the assumption that *MCL 550.1509*, that provides for the "provider class plan review" process offered a means to obtain a remedy and endowed the Insurance Commissioner ("IC") with primary jurisdiction. Additionally, the Court found that there was no actual controversy because the IC had, after a number of Ambulatory Surgery Facilities (ASF) like the Appellants had filed complaints with the Courts, agreed to conduct a provider class plan review of the BCBSM Ambulatory Surgery Facility Provider Class Plan that, ostensibly, implemented a BCBSM reimbursement arrangement that applied to Appellants.

Finally, the Court found that the IC had no duty to regulate BCBSM's actions that harmed Appellants, but only had a duty to carry out the specific provisions for the provider class plan review under *Part 5 of 1980 PA 350*, **if** and when he chose to conduct a provider class plan review. This permits the IC to choose to ignore or uphold actions by BCBSM that violate a statute or unlawfully harm the constitutionally protected rights and interests of others; review is not available in the Courts nor through any administrative means other than the Provider Class Plan (PCP) review that is never required to be conducted. The *Part 5* PCP Review provided for in *Sec. 509,* is statutorily limited to a review of whether a "reimbursement arrangement" as defined by *Sec.108(1)* meets or reasonably fails to meet specific statutorily-defined goals provided in *Sec. 504.* The *Part 5* review does not provide any means to review other violations of *1980 PA 350* or any other law or the constitution. *Part 5* cannot serve as a means for medical providers to seek a remedy for harm that stems from the IC's failure to prohibit BCBSM's unlawful actions or violations of the law that harm the interests of other parties. The review lacks the requisite due process protections for these purposes. *Part 5* provides no means for a medical provider to initiate or request a PCP review. *Sec. 509 (7)* provides that the **IC is never required to conduct a provider class plan review of any given provider class plan**, but is only required to review BCBSM PCP's to account for 75% of BCBSM's annual payout in any 3-year period. Since the Hospital PCP is regularly reviewed, very few other plans must be reviewed. Once a PCP review has been conducted or appealed, if BCBSM does not want to accept the result, it can,

according to the IC, simply file another "modification" of the PCP that will again, be unreviewable for at least another 3 years. (The statute provides for the plan to be in effect for 2 years; the IC requires at least another year to gather data.) This means the entire PCP review is illusory, is rendered moot simply by filing another plan, and can be negated by BCBSM. *Part 5* provides no remedy; that reimbursement review process was never intended to be used for that purpose. *1980 PA 350's Part 5* PCP review is limited to governing BCBSM regarding the "goals" in *Sec. 504*, with respect to "reimbursement arrangements" as defined *Sec. 108(1)*. *See BCBSM v Milliken, 422 Mich 1; 357 NW2d 1, (1985) and In re: Medical Doctor Provider Class Plan Review, 471 Mich App 471; 203 NW2d 707(1994).*

The BCBSM ASC Provider Class Plan was not reviewed by the IC from 1987 through 1999, and, even then, the IC only agreed to conduct a review after several lawsuits were filed and the IC was facing a Motion for Summary Disposition to require him to regulate BCBSM. This does not, even under the most strained interpretation, constitute due process under the state or federal Constitutions. *Appen.L,pp 369-377, Appellants' Br. On Appeal, Ct. of App., Exh.1Tr. Ct. Hearing Trans., 1/13/99, pp21-29* .

Sec. 102 expresses specific legislative intent to grant the IC the power and establishes the duty to "supervise and regulate" BCBSM. *Part 6 of 1980 PA 350*, grants the IC broad investigative and injunctive authority and requires the IC to take action to prohibit BCBSM from violating any law under *Sec's. 601, 603 & 605.* But the IC refuses

to take action pursuant to *Part 6* to regulate BCBSM regarding its relations with medical providers other than through the rarely conducted PCP reviews.

Finally, the trial Court found that the IC did not have a duty to prohibit BCBSM from engaging in the unlawful conduct that Appellants complained of, finding that this would require a writ of mandamus and that this extraordinary remedy was not appropriate. Appellants have argued that, under *Part 6* and pursuant to legislative intent expressed in *Sec.102*, the IC is obligated to take action to stop BCBSM from engaging in any violations of the statute or any actions that are not authorized by its enabling statute. BCBSM is a creature of statue and may not act in any *ultra vires* manner. **Appellants brought this action pursuant to *Sec. 619(3)* that specifically establishes a cause of action granting any person the right to bring an action in the Ingham Co. Circuit Court to compel the IC to enforce *1980 PA 350*.** This legislatively created remedy and legislatively granted jurisdiction is available to Appellants. BCBSM's carrying out unlawful or *ultra vires* acts by incorporating them into a PCP scheme does not make them lawful under the *Act.*

BCBSM, with the IC's cooperation, has assumed the legislative police power to determine who or what will be recognized as a medical provider. BCBSM discriminates against freestanding doctor-owned ambulatory surgery facilities in favor of hospital-owned outpatient facilities by using its unilateral Evidence of Need Determination (EON) process. **The power to regulate medical care is vested in the Legislature under *Article IV, Sec. 51* of the *Michigan Constitution of 1963*.** This power cannot be

assumed except through a specific grant from the Legislature; standards for use of that power must accompany such a grant. Nowhere in *1980 PA 350* is there such a grant of power to either the IC or BCBSM.

The specifically expressed purpose of *Sec. 619(3)* was to protect the public from any failure of the IC to regulate and supervise BCBSM. The IC is required under *Parts 1 and 6* of the *Act* to prohibit BCBSM from any *ultra vires* or illegal act. *Sec. 502 (2), (3) & (8)* prohibits BCBSM from engaging in behavior that interferes with the lawful provider and patient relationship, and prohibits BCBSM from interfering with the professional providers' methods of diagnosis and treatment, and further provides that each member of the health care corporation shall at all times have a choice of professional health care provider. Under the *Act*, the IC's regulatory authority and duties are broad; this has been specifically expressed in the legislative intent provisions of the Act. *See Sec. 102 and BCBSM v Milliken, supra.*

Character and Summary of the Case

Appellants ask this Court to consider this matter to resolve the following issues. Appellants ask the Court to find that the Provider Class Plan Review process provided for under *Part 5 of 1980 PA 350* is limited to the review of BCBSM reimbursement arrangements as defined in *Sec.108(1)* to determine whether or not BCBSM meets or reasonably fails to meet the goals of "cost", "access" and "quality" as defined by *Sec. 504;* and that this review does not provide a forum or a means of obtaining a remedy for BCBSM's violations of any statute or of BCBSM's unlawful harm to the rights and

interests of others and is not a forum for statutory interpretation or to decide constitutional issues. Appellants ask the Court to hold that medical providers whose rights or interests are affected by the ICs' refusal to review or to prohibit unlawful or *ultra vires* actions by BCBSM, are entitled to avail themselves of the Court's jurisdiction under *Sec. 619(3) of 1980 PA 350* in order to compel the IC to enforce the *Act* and to seek judicial interpretation of the law or to ask the Court to decide constitutional questions that involve the regulation of actions by BCBSM or any like health care corporation. Appellants also ask the Court to hold that the IC must prohibit BCBSM from assuming legislative powers that it have not been granted, specifically, that the IC must immediately prohibit BCBSM from not engaging in "Evidence of Need" (EON) determinations or making any other determinations about whom or what will be recognized as a medical provider, but that those determinations can be made only through the legislatively-delegated power that has been granted under the *Public Health Code*. (The only exception to this is under specific legislative enactments that permit BCBSM to operate managed care plans that are not a subject of the instant dispute.) Appellants ask the Court to hold that *Sec. 502(8) of 1980 PA 350* specifically prescribes the standards for BCBSM's participation with and recognition of freestanding ambulatory surgery facilities, including the state standard for licensure, and the state standard for medical provider "need", citing provisions found in the *Public Health Code,* Appellants further ask the Court to hold that where the Legislature has expressly prescribed the standard, as in *Sec. 502(8) of 1980* PA 350, neither the IC nor BCBSM

may ignore it or substitute other or additional standards for recognition of licensure or for medical provider "need". Appellants ask the Court to require the IC to require BCBSM to refrain from EON determinations and to accept the standards that have been legislatively prescribed in *Sec. 502(8)*. Finally, Appellants ask the Court to hold that, pursuant to Sec. 502(8), the IC must require BCBSM to grant participation status and/or provide reimbursement for covered health care benefits and health care services [defined in *Sec. 105(1) & Sec. 105(5*), respectively] to Blakewoods. See also, *Sec.'s 107(7), 401(7),403(1), 502 (2)(3)&(8).*

Grounds for Consideration by the Supreme Court

Appellants raise issues in this matter to seek interpretation of specific provisions of *1980 PA 350* that concern the duties and powers of the IC to supervise and regulate Blue Cross and Blue Shield of Michigan (BCBSM), a health care corporation whose existence and operation are enabled controlled through its regulatory statute,*1980 PA 350.* According to the National Association of Insurance Commissioners (NAIC), based on data reported by the Michigan IC's office, BCBSM controls about 70% of Michigan's health care coverage market (65.11% of the coverage market plus another 177,000+ covered lives under Medicare supplemental coverage). Given BCBSM's monopoly status in the state's market, if it chooses to act to exclude or restrict ASC provider market access, it has the power to eliminate price competition from the market, adding costs of hundreds of millions of dollars, annually. BCBSM has enough market presence to control prices and costs in the state's health care market. *1980 PA 350* was enacted

to control health care costs, to eliminate discriminatory treatment of providers by BCBSM and to assure the state's health care consumers the greatest possible access to quality care at an affordable price. *See BCBSM v Milliken, 422 Mich 1; 367 NW2d 1 (1985).* It is of the greatest public policy concern that affordable, quality health care be accessible to Michigan residents. The Court in *Milliken, supra, p 50*,emphasized that *1980 PA 350* did not grant legislative power to BCBSM and did not establish it as the state's health care planning agency. The Court acknowledged that a **lack of market competition** in health care was a principle cause of the uncontrolled escalation of costs in health care. The *Milliken* court found that *1980 PA 350* was intended to remedy the problem of out of control costs by giving the IC the expanded power to supervise and regulate BCBSM. Here, BCBSM seeks to negate or restrict the licensure of facilities such as Blakewoods, thus eliminating price competition. Blakewoods' facility fees are 40% less costly than facility fees for competing outpatient hospital facilities. This case raises issues that can be resolved only through the Court's interpretation of the extent of BCBSM's authority to regulate medical providers, through "need" determinations and restrictions, or to decide what or who will be recognized as a medical provider.

Material Proceedings and Facts

Plaintiff/Appellant Blakewoods is a limited liability company under the laws of the state of Michigan. The company's principal place of business is Jackson, Michigan. Blakewoods is fully licensed and accredited as an outpatient surgical facility. *Appen.Q,* pp 581-584,*Tr.Ct Doc. Entry 1,Complaint, Exh.1-3.* It seeks to provide outpatient

surgery with facility fees that are less costly than those charged in outpatient hospital settings, while offering the highest quality care in a setting that maximizes convenience to the patient. Defendant IC was sued in his official capacity, as the Commissioner of Financial and Insurance Services, charged with regulation and supervision of BCBSM pursuant to *1980 PA 350,specifically Sec. 102 & Sec. 601.*

On 8/20/98, Blakewoods Surgery Center, L.L.C., et al. filed a complaint against the state IC, in his official capacity, seeking to compel the IC to enforce *1980 PA 350. Blakewoods, et al.* sought declaratory and injunctive relief. On 9/9/98, Appellee IC moved for summary disposition. On 12/1/98, the IC filed a supplemental brief supporting his Motion for Summary Disposition. On 12/21/98, Appellants Blakewoods cross-claimed for summary disposition. Appen. P, 520-557, *Doc. Ent.19 Blakewoods; Cross Mot. SD.* On 1/7/99, Defendant IC filed a brief in opposition to Plaintiffs' cross motion for summary disposition. *Doc. Ent. 23.* On 1/8/1999, filed their brief in opposition to Defendant IC's Motion. Appen.O, pp 440-455, *Doc. Entry 24.* On 1/14/99, Defendant IC filed a post hearing brief. On 1/21/99, Plaintiffs answered Defendant IC's Post Hearing Brief. Appen. N,pp 416-439,*Doc. Entry 29.* After an exchange of Defendant's Objection to Plaintiffs' answering Defendant's Post Hearing Brief and Plaintiffs' response to this objection, the Court reviewed and decided Plaintiffs' case. On 6/9/99, the trial Court granted Defendants' Motions for Dismissal by Summary Disposition and ordered all claims dismissed. *Appendix F,pp 8-9.* On 6/23/99, Appellants filed for reconsideration of the trial court's order. Appen. M,pp 406-415,*Tr.Ct. Doc. Ent. 42.* On

7/20/99, the trial Court issued its order denying Appellants' Motion for reconsideration of its order granting summary disposition for Defendant, dismissing the Case. Appen. E p 7,*Tr. Ct. Doc. Ent. 46. The sequence of events in the trial court that led to the Court's final order is provided under A. Statement of Facts, in Appellants' Brief on Appeal,pp 0-5.Appen. L, pp300-305.*

Appellants filed a timely appeal of the trial Court's ruling, filing their Appeal Brief on 1/ 4/00 and their Reply Brief on 2/29/00. *Appen,L,pp 289-405;Appen. K pp 275-288, respectively.*

The Court of Appeals agreed with the trial Court's ruling, affirming the dismissal of Appellants' claims based upon its determination that Appellants had an administrative remedy available pursuant to *MCL 550.1509*; that there was no actual controversy where declaratory judgment would be necessary to guide the litigants' future conduct in order to preserve their legal rights; and, that therefore, the Court lacked jurisdiction. See Unpublished Opinion of the Court of Appeals, *No. 221494*, issued 1/19/01 and Order denying rehearing, dated 3/8/01. *Appen D p 4-6& Appen. C p3, respectively.*

The IC issued an Order and Determination on 3/30/00 finding that BCBSM had discriminated against physician-owned freestanding surgery facilities and requiring that a "remedial" PCP be prepared and filed. However, he did not prohibit BCBSM from using its EON requirements, instead of those prescribed in *Sec. 502 (8)* that included the state's Certificate of Need requirement, to determine whether or not it would recognize a freestanding ambulatory surgical facility for reimbursement for its services

or participation (if BCBSM will not grant participation status to these providers, BCBSM also refuses reimbursement to its members that would otherwise be available pursuant to *Sec. 401(7) & 403).* On 3/29/01, the IC issued his order retaining BCBSM's remedial plan that it had filed on 12/29/00. *See Appendix H,pp 131-132,152-154, IC's answer (dated 11/20/01)to this Court's Order [dated 10/23/01-Appen.Bp 2),* On 12/17/01, BCBSM filed a second remedial PCP for Ambulatory Surgery Facilities that the IC Ordered retained on 1/31/02 still containing EON (*Id*, *Appen. H pp 220-223*) requirements and refusing reimbursement under Sec.*401 & 403.* All of the remedial PCPs, including the one in effect, today, continue to include requirements that ASF's seeking participation status (the only means of gain recognition of their services for reimbursement by BCBSM) must meet BCBSM's EON criteria. The remedial plans contained provisions conditioning participation status for freestanding ambulatory surgery facilities on restriction of their rights in state licensure, in some instances, limiting their right to render services for <u>only one kind of surgical specialty</u>**.** *Appen. H, pp240-244.* Other BCBSM/EON requirements still must be met to gain participation status. The conditions of the participation agreements under these remedial plans required that if, at any time, such "participating" facilities were found to be exercising their rights in their state licensure by providing other kinds of outpatient surgeries, (**even for patients whose coverage is through other carriers**) their BCBSM participation status (and therefore, all recognition for reimbursement by BCBSM) would be terminated by BCBSM. On 10/9/01, having no recourse to gain entry into the majority of

the state's market, Appellants entered into a provider participation agreement agreeing to restrict the facility's surgical services only to eye care in order to secure some form of BCBSM participation. The state has licensed Blakewoods to perform all types of ambulatory (outpatient) surgery that do not require an overnight stay *(see MCL 333.20801 to 333.20821 & MCL 333.22201 to 333.22260)*; however, BCBSM now conditions participation (and, any recognition for reimbursement) on restricting Blakewoods to only a single specialty surgery, again, contrary to *Sec. 502 (8).* Blakewoods has physician owners and the availability of other surgeons who practice in other surgical specialties besides eye care who previously used its facility and would continue to use the facility for all of the ambulatory surgical procedures that it is licensed by the state to provide.

Because it was so misled by the Appellee IC, and because the Court of Appeals had little legal precedent from which to glean the truth, the Court erroneously assumed that the PCP Review was much broader in scope, could serve to decide questions beyond the statutorily mandated review of a reimbursement arrangement and the statutorily-defined parameters of that review: the Court failed to take into account that the PCP review process was never intended to resolve the issues raised by Appellants and therefore was completely lacking with regard to constitutionally required due process protections that must attach where a constitutionally protected property right is unlawfully being harmed through the violation of a statute. Appellants' property rights in their medical licensure have been harmed because the IC has assumed legislative

power that has never been granted to his office and has, in turn, unlawfully attempted to grant this power to BCBSM, a quasi-private entity, without color of law. The IC and BCBSM are not above the law and neither may enforce its will against any person or entity without review. Even the trial court commented on the lack of due process that was apparent and questioned the validity of the IC's position. *Appen, L pp366-376, 380-387; Tr. Ct. Hearing Trans., 1/13/99, pp 18-28 & pp 32-39, discussion of the harm to providers and failure of the process.*

On 10/23/01, this Court Ordered the Appellee IC to answer the following question:

> "[w]hether, pursuant to MCL 550.1502(8), an "evidence of need" determination on the part of a health care corporation consitututes a "reasonable standard" that may be set by such corporation in assessing whether to grant provider participation status to a freestanding surgical outpatient facility which otherwise complies with the requirements of MCL 550.1502 (8).

This case turns on the answer to that question.

Un-rebutted Proofs and Nature of the Action

It is un-rebutted that Appen Q, pp 586, Tr. Ct. *Complaint, Doc. Ent.1, Exh5,* consists of a letter from Eric Kropfreiter, Senior Analyst, Provider Contracting/Appeals, of Blue Cross and Blue Shield of Michigan, addressed to Mr. Kesler, Administrator for Blakewoods, that is in response to Blakewoods' request for participation with BCBSM. It is un-rebutted that BCBSM states in this letter that, regardless of Blakewoods' compliance with other qualification standards, BCBSM refuses to offer it participation status based solely on BCBSM's independent Evidence of Need (EON) determination. *Appen. Q, 563-564,Tr. Ct. Complaint, Doc. Ent 1, pp 6-7, paragraphs 24-26.* The

remedial PCP continues to retain the EON BCBSM requirement. Appen. *H, 114-119,* IC's Supplemental Brief & *Appen. H pp 220-223, Exh.4)*

Sec. 502(8) of *Act 350* specifically provides the standards for "need" that a freestanding surgical facility must meet for participation with BCBSM. This section relies upon and incorporates by reference the certificate of need provisions contained in the *Public Health Code. See also Sec. 105 (4)(5)* defining "health care provider" and "health care Services" making clear the meaning and distinction between the two. *Appen.N pp 419-421, Plaintiffs' Answer to Defendant's Post Hearing Brief, pp. 4-6, Doc. Ent. 29, & Appen M, pp413-414, Plaintiffs' Appellants Motion for Reconsideration, pp 8-9, Doc ent. 42.* It is un-rebutted as alleged in Appellants' Complaint that BCBSM also refuses to reimburse subscribers and plan members for Blakewoods' services. Appen.Q, pp 565-566; 589-592,Plaintiff's *Complaint, Doc. Ent.1, pp 8-9, paragraphs 32-36& Exhibits 7&8, doc ent, 1.*

Appellants sought partial summary disposition in the form of a declaratory judgment that, contrary to Sec. *502(8)* of *1980 PA 350*, BCBSM discriminates against Blakewoods, and, without statutory authority, has acted in an *ultra vires* manner by invading the licensure province of the state by denying participation status based on BCBSM's unauthorized, independent evidence of need ("EON") determination that effectively usurps the state's police power. Appellants alleged that invading the state's licensure process is not authorized by statute, is an unauthorized tier of need beyond that required by the state, and increases the cost of health care contrary to BCBSM's

statutory purpose. If BCBSM's separate, independent EON determination is authorized by *1980 PA 350*, this would be an unconstitutional delegation of licensure power to a quasi-public entity without sufficient standards (without *any* standards).

The Blakewoods facility is a fully licensed and fully accredited freestanding outpatient surgery facility. Blakewoods is licensed by the state of Michigan as a Freestanding Surgical Outpatient Facility (License Number 386810), is fully licensed and has accreditation by JCAHO and is a participating provider in the federal Medicare program. Appen. Q pp 559 & 563 and 578-580 and 581-584, *doc ent.1, Plaintiffs' Complaint, pp 2&6, paragraphs 4&5 & 21-23, Exhibits 1-3.* Defendant IC is charged with regulating and supervising health care corporation such as BCBSM. *See 1980 PA 350* (*hereinafter referred to as "Act 350" or " Act"* at *MCL 550.1102(2)*. Appen Q, pp 559, *Plaintiffs' Complaint, p 2, paragraphs 2&3, doc.ent. 1.* The true measure of BCBSM's dominance of the health care coverage market is found in the number of covered lives BCBSM services. BCBSM has long enjoyed a statewide monopoly in Michigan's health care coverage market; according to data maintained by the State's Community Health Department, Management and Budget Department and Insurance Bureau, BCBSM controls about 70% of covered lives in Michigan's health care coverage market. Appen Q, p366, *doc ent.1, p 9, paragraphs 37&38, and BCBSM v Milliken, 422 Mich 1, 16; 367 NW2 1 (1985)*. Appen G, pp 107-113, Appellants' Sup. Brief, SC, Exh.107-113.

Blakewoods was established for the purpose of constructing and operating a freestanding ambulatory surgical center to offer services to the residents of the greater Jackson area. Appen Q, pp 559-560, *Doc. Ent. 1, Plaintiffs' Complaint, pp 2&3, paragraphs 5-7.*

On 11/11/97, Ms. Viola McLennan, who had health care coverage from BCBSM, received an outpatient surgical procedure at the Blakewoods facility. BCBSM was billed for the facility fee by but has not yet reimbursed Blakewoods nor the patient. On 8/6/97, Mr. Erwin Draper, who had health care coverage from BCBSM, received outpatient surgical procedures at the Blakewoods facility. BCBSM was billed for the facility fee by has not yet reimbursed Blakewoods nor the patient. Appen Q pp 365; 389-392, *Doc ent. 1, Plaintiffs' Complaint, p 8, paragraphs 32&33, Exhibits 7&8.* Both claim denials reflect BCBSM's refusal to recognize Blakewoods' license.

BCBSM refuses to reimburse subscribers for facility fee claims for outpatient surgical services provided at BCBSM has failed to provide subscribers with explanations as to why such claims are denied, rejected or refused.

BCBSM bases its refusal to reimburse claims for facility fees for outpatient surgical services upon BCBSM's independent EON determination, even though, in the course of its licensure process the state has determined that the facility is needed, has granted a Certificate of Need and has issued a license for to operate. Thus, BCBSM has used a separate, unauthorized, independent, arbitrary EON determination beyond the state's. BCBSM's refusal to recognize as a licensed medical provider is an attempt to usurp the

state's police power to grant medical licensure. Appen Q p 366, *Tr. Ct. docket entry 1, Complaint, p 9, paragraphs 35-36.*

Appellants submitted un-rebutted proof that BCBSM refuses to reimburse Blakewoods facility fee claims for outpatient surgical services provided at the facility. Appellants submitted un-rebutted proof that, in violation of *MCL 550.1502(3)*, BCBSM also refuses to reimburse subscribers facility fee claims for outpatient surgical services provided at the facility. Appen Q pp 365-366, 586, 589-592,*Tr. Ct. doc ent. 1, p.8-9, paragraph 34 & Exh. 5,7&8.* Appellants submitted un-rebutted proof that BCBSM fails to provide subscribers with explanations as to why such claims are denied, rejected or refused. *Id.* Appellants submitted un-rebutted proof that BCBSM's refusal to reimburse claims for facility fees for outpatient surgical services provided at the Blakewoods facility is based upon BCBSM's separate determination that the facility is not needed. *Id.* Appellants submitted un-rebutted proof that such refusal to reimburse is a refusal to recognize the license of Blakewoods. *Id.* Appellants submitted un-rebutted proof that BCBSM's refusal to recognize Blakewoods as a licensed medical provider usurps the police power of the state to grant medical licensure. *Id.* Appellants submitted un-rebutted proof that BCBSM has established a policy that precludes payment to both the non-participating provider and the subscriber. *Id.* The BCBSM Freestanding Ambulatory Surgical Center PCP, therefore, vitiates Sec. *403(1)*. BCBSM clearly does not recognize the Appellants consistent with Sec.'s *401(7) & 403(1) of 1980 PA 350.* Appen Q pp 571-573, 589-592,*doc ent.1, pp 14-16, paragraphs 60 & 61,& Exh 7&8, &*

Appen P,pp 523-528, & 536-537; Plaintiffs' Tr. Ct. Cross Mot. for Sum. Disp, pp 4-9&17-18.

The above cited documentation forms the factual underpinning for the conclusion that BCBSM unlawfully, and in an *ultra vires* manner, exercises police power that is a function of the state. No statute delegates to BCBSM the licensing power constitutionally reserved to the Legislature.

Standard of Review and Jurisdiction: Question III

Standard of Review and the Declaratory Judgment Power of the Circuit Court

The standard of review is *de novo*. In *W.A Foote Memorial Hospital v Department of Public Health, 210 Mich App 516; 534 NW2d 206 (1995),* the Court held that the issue of jurisdiction is a question of law that requires *de novo* appellate review. Since the granting of summary disposition is likewise a question of law the standard of review for this appeal is *de novo*. "Actions in the nature of declaratory judgments are reviewed *de novo* by [the] court [of appeals]." *Smith v. Lumbermen's Mutual Ins. Co., 101 Mich App 78, 86; 300 NW2d 457 (1980), lv. den. 411 Mich. 873 (1981).*

MCR 2.605(A)(1) provides as follows:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> "Accordingly, the grant of a declaratory judgment is discretionary with the trial court and, in any event, can only be granted where there is an actual controversy." *Shavers v. Attorney General, 402 Mich. 554, 267*

N.W.2d 72 (1978); Rott vStandard Accident Ins. Co., 299 Mich. 384, 300 N.W. 134 (1941); Central High School Athletic Ass'n v. Grand Rapids, 274 Mich. 147, 264 N.W. 322 (1936).

This is an issue of first impression and Appellants meet the requirements of the Court Rules and established case law.

The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people. The existence of an "actual controversy" is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights. *Updegraff v. Attorney General, 298 Mich. 48, 52, 298 N.W. 400 (1941); City of Flint v. Consumers Power Co., 290 Mich. 305, 309-310, 287 N.W. 475 (1939); see also, Welfare Employees Union v. Civil Service Commission, 28 Mich.App. 343, 350-351, 184 N.W.2d 247 (1970).* The *Blakewoods* trial court, however, took a constricted view of the declaratory judgment rule and declined to exercise jurisdiction. Since the IC has long permitted and, even after the PCP review, continues to permit BCBSM to use its *ultra vires* EON determination, to act to restrict or vitiate Blakewoods' license by refusing or limiting participation and/or reimbursement for services lawfully rendered by Blakewoods, and since Blakewoods is fully licensed by the state and entitled to reimbursement for its professional services, there is an actual controversy.

Appellants have pled the regulator's failure to prohibit unlawful and *ultra vires* conduct that must be restrained by a court of general jurisdiction.

The requirement of an "actual controversy" prevents a court from deciding hypothetical issues. However, a court is not precluded from reaching issues before actual injuries or losses have occurred. *Merkel v. Long, 368 Mich.1, 11-14, 117 N.W.2d 130 (1962)*. There is no question that Blakewoods loses its right to enjoy the benefits granted by its state licensure because BCBSM unlawfully uses EON as a tool to deny participation status or to condition it on limited or restricted rights in the use of state licensure and to refuse reimbursement to members and subscribers for services lawfully rendered at physician-owned ambulatory surgical facilities like Blakewoods. Pursuant to the IC's retention of BCBSM's remedial Ambulatory Surgery Facility provider class plan (filed 12/29/00, retained on 3/29/01—*see Appen H pp 127-256, Exh.'s 3&4*--and its subsequent modifications), Blakewoods can participate with BCBSM only if it agrees to refrain from exercising its full rights in its state licensure by refraining from performing all surgeries except those dealing with eye care. Blakewoods is fully licensed for outpatient surgical services; however, because the facility cannot compete in the state's market without rendering services to BCBSM-covered patients (representing a monopoly share of the market—*see Appen G, pp107-112, Exh 2*,NAIC's market share statistics), Blakewoods is forced to exclude all surgeries from its facility other than those for eye care. The state licensed Blakewoods and granted it a Certificate of Need based

on its application for licensure to perform all types of outpatient surgery at its facility. However, BCBSM's EON requirements assume BCBSM's power to take away the bulk of Blakewoods' rights in its state licensure and to render null and void its Certificate of Need that was granted to it by the state.

Before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, i.e., a plaintiff must allege and prove an actual justiciable controversy. *See Kuhn v. East Detroit, 50 Mich.App. 502, 213 N.W.2d 599 (1973).* Blakewoods Appellants presented proofs but the trial court erroneously declined jurisdiction believing that Blakewoods had a primary and exclusive remedy under *Part 5 of 1980 PA 350.* Under *Mazur v Blendea, 413 Mich 540, 547, 321 NW2d 376 (1982),* the trial court was clearly erroneous. *Appen F p 8-9; Trial Court Order & Appen D pp 4-6, Appellate Court Order & Appen L pp 349-389.Tr. Ct. Hearing Trans.,1/13/99.*

What is essential to an "actual controversy" under the Declaratory Judgment rule is that Appellants plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised. *Shavers, supra, at 402 Mich 588-589.* The *Blakewoods* Court committed reversible error by declining jurisdiction. The duty to stop the unlawful interference with Appellants' rights granted through state licensure is clear given that these violations are being carried out by a state-regulated entity in derogation

of its own enabling legislation and contrary to public policy. Appen L,pp 329-332, *Appellants' Brief on Appealpp 30-33.*

The entry of summary disposition based upon *MCR 2.116(C)(4)(7)(8)(9)&(10)* is inappropriate. *Attorney General v Diamond Mortgage Co., 414 Mich 603; 327 NW2d 805 (1982)* decided that a regulated entity could not be shielded from actions against unlawful or *ultra vires* conduct not specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States. Appellants seek jurisdiction before this Court to stop BCBSM's unlawful and *ultra vires* activity. Judgment in the form of declarations and findings and injunctive relief are appropriate vehicles to accomplish this. Regarding the shield of a regulatory statute, the "*Diamond*" court found that a "common-sense" reading of a statute's language must be applied to conclude that when the Legislature says "authorized", it does not mean "illegal acts." The Supreme Court ruling in Diamond is controlling law.

Thus, regardless of BCBSM's inclusion of its unauthorized, illegal acts in its PCP, the IC has a duty to prohibit such acts and Appellants have a right to jurisdiction before the Court at common law.

In *Price v Long Realty, Inc., 199 Mich App 461; 502 NW2d 337 (1993),* the Court permitted the Plaintiffs to bring an action against a real estate licensee under the *MCPA* because the regulatory statute did not **"specifically authorize"** the conduct that the plaintiff claimed violated the *MCPA.* The defendants were not entitled to a dismissal by

summary judgment based on the fact that were governed by a regulatory statute. That is precisely the result that must be achieved here. BCBSM is engaging in licensure activity that is not specifically authorized. The IC may not make an argument that the Court must defer to special agency expertise to determine the validity of BCBSM's EON criteria to medical provider "need". This matter fails the 3-prong test prescribed by the courts that the IC must meet to claim primary or exclusive jurisdiction over this matter through the *Part 5* review process. The Court in *Spect Imaging, Inc. v Allstate Insurance Co. 246 Mich App 568; 633 NW2d 461 (2001)* cites what the court must consider to determine whether or not primary jurisdiction can be claimed by an agency.

> [a] Court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue...the court should consider the need for uniformity and consistency in resolution of the issue...it should consider whether juridical resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities.

The IC cannot meet any of these tests. The IC cannot claim expertise in regulating medical provider "need", since the power to regulate health care is vested in the Legislature, pursuant to *Mich Const of 1963, Art. IV, Sec. 51*, and was not delegated to the IC. The IC has no authority over medical provider licensure or "need" determination; therefore, his involvement does not result in uniformity and consistency, but rather generates confusion about the provider's rights in the use of its licensure. The Court's assumption of jurisdiction in this matter cannot interfere with the IC's performance of his office's regulatory responsibilities, since the regulation of medical provider "need" is not

within that agency's responsibilities. In fact, the IC's involvement in these matters is more likely to interfere with the responsibilities of the Dept.of Community Health. The *Spect* Court stated the standard of review is *de novo* to decide the issue of jurisdiction.

Blakewoods seeks a judicial determination of whether the IC may continue to support BCBSM's use its own medical provider licensure system (EON), that is not authorized by law, and for which no standards exist, and to insert itself between Blakewoods and the patient population that Blakewoods is licensed by the state to serve. This is contrary to *Sec. 105, 107, 108(1), 401(7), 403(1), 502(2),(3) &(8).* Blakewoods' right to its interests in its medical licensure stem from the Michigan Constitution and the Legislature's subsequent delegation of the licensure function through its enactments in the *Public Health Code*.

The critical point is that in its enactment of *1980 PA 350*, the Legislature took care to ensure that any health care corporation (such as BCBSM) created pursuant to the *Act* would have no part in medical licensure. Blakewoods seeks to enforce a right pursuant to *1980 PA 350*, and seeks to protect its own rights granted to it by virtue of its medical licensure. Blakewoods asserts that the IC is unlawfully permitting BCBSM to use its statewide monopoly in the health care coverage market, combined with unauthorized, illegal acts to discriminate against Blakewoods and to attempt to vitiate its license. The PCP review process, contained in *Part 5* of *1980 PA 350* provides no remedy for Blakewoods or any medical provider similarly situated.

In *Luddington Service Corp. v Acting Commissioner of Insurance, 444 Mich 481; 511 NW2d 661, 672 (1994)* the court held:

> [A]lthough this Court affords an agency some statutory deference. The agency's interpretation is not binding on this Court, and cannot be used to overcome a statute's plain meaning"....
> *Citing Grand Rapids Ed. Assoc. v Grand Rapids Bd. of Ed., 170 Mich App 644, 651; 428 NW2d 731 (1988), Buttleman v State Employees' Retirement System, 178 Mich App 688, 690; 444 NE2d 538 (1989) and Allstate Insurance Co. v Dept. Of Insurance, 195 Mich App 538, 545; 491 NW2d 616 (1992), emphasis added.*

The IC's failure or inability to address or correctly apply *1980 P.A. 350* and the IC's failure to address BCBSM's unauthorized discriminatory conduct toward Blakewoods is not in any way binding on the Court and may not be upheld because it is contrary to the plain language in *1980 PA 350.* The IC has no discretion to act contrary to the plain meaning of statutory provisions. Therefore, the Court has jurisdiction.

MCL 550.1502, MCL 550.1504, MCL '550.1509 and MCL 550.1516 reveal that the PCP review process is not the appropriate vehicle for the IC to use in determining if *ultra vires* or unlawful activities are being carried out by BCBSM. If the PCP process was construed to broaden the permissible BCBSM conduct in ways that grant unbridled discretion, then *Part 5* of the *Act* would be unconstitutional.

BCBSM is not a fourth branch of government immune from administrative and judicial review, particularly when BCBSM commits illegal and *ultra vires* acts. In *BCS Life Insurance Co. v IC of Insurance, 152 Mich App 360; 393 NE2d 636, 640 (1986)* the

court cited *Lord v Genesee Circuit Judge, 51 Mich app 10, 17; 214 NW2d 321 (1973),* stating "[T]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." The Court also cited *MCR 2.605(C).* The Court explains that "...the intent of the declaratory judgment rule to provide broad, flexible remedies and increase accessibility to the courts has been increasingly recognized in recent years. *See Shavers, 402 Mich 554, 588-589; 267 NW2d 72 (1978).* The *BCS* court stated that "...circuit court jurisdiction over declaratory judgment actions despite the existence of alternative remedies has been further clarified by the addition of the following provision at *MCR 2.605 (A)(2)*:

> For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

BCS Life, supra at 368.

In the instant matter, the controlling statute specifically grants the Court jurisdiction to compel the IC to enforce the *Act. See Sec. 619(3).* Finally, the IC can never assume jurisdiction over a constitutional claim, this adds support for the Court's right and responsibility to assume jurisdiction in this matter; not only is jurisdiction proper before the Court, it is indeed the **only** entity that can take initial jurisdiction over the matter.

In *Blue Cross and Blue Shield of Michigan and F.W. Grotenhuis Underwriters Inc. v Comm. of Insurance, 155 Mich app 723; 400 NW2d 638 (1986)* the court stated:

> [T]he public is in jeopardy when a corporation and its agents engage in *ultra vires* acts. The public is in jeopardy when those *ultra vires* acts threaten the vitality of legitimate businesses who operate within the law.

155 Mich App at 733, emphasis added.

The issue of the IC's refusal to prohibit BCBSM's abuse and misuse of the PCP system is an issue of first impression for this Court. Clearly there are sufficient actual justiciable constitutional issues raised by the *Blakewoods* complaint to justify the court proceeding. Clearly, Blakewoods has no less right to judicial review than did BCBSM when it sought and was granted judicial review in *BCBSM v Milliken, 422 Mich 1, 367 NW2d 1 (1985)*. BCBSM is a regulated entity and the IC has a legal duty to prohibit the conduct by BCBSM that Appellants have complained of in this matter. *Sec.'s 102(1), 601 & 603* are valid and vest the IC with the responsibility and duty to regulate BCBSM to prohibit it from violating any statute or engaging in any *ultra vires* act. The Court's review under *Sec. 619(3)* is appropriate. In *Shavers, supra* the court noted the following about due process considerations *vis-a-vis* the declaratory judgment rule:

> This Court, however, has recognized that the concepts of "liberty" and "property" protected by due process "are not to be defined in a narrow or technical sense but are to be given broad application".
> *Bundo v. Walled Lake, 395 Mich. 679, 690, 238 N.W.2d 154,159 (1976). See, also, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).*

Medical licensure has long been recognized as a state-regulated, protected property right. The Court has stated: "We are reminded: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined". *Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548. The Supreme Court, 1975 Term, 90*

Harv.L.Rev. 86-104 (1976); Tribe, American Constitutional Law, pp. 514, 522; Pennsylvania Coal Mining Ass'n v. Insurance Dep't., 471 Pa. 437, 370 A.2d 685 (1977).

Shavers, supra, at 598, BCS Life and the cases cited therein and herein support Blakewoods' claims that the complaint presents an actual controversy with justiciable issues that are cognizable only before the circuit court. The entry of summary disposition based upon *MCR 2.116(C)(4) (7)(8) & (10) and contrary to Sec. 619(3)* is inappropriate. *See Brief on Appeal, Appendix B, pp 33-40.*

The Legislature never intended the result that the IC would permit BCBSM to determine who or what would be recognized as a medical provider. With respect to its dealings with medical providers BCBSM has statutory authority only to establish rates, to enter into reimbursement arrangements to pay for health care services and to determine what services it will cover, with an obligation to cover mandated services. It cannot implement licensure requirements or make "need" determinations, particularly when such determinations have been subsumed into the state licensure process and when *Sec. 502(8)* prescribes the "need" requirement that must be met.

The Supreme Court has jurisdiction to grant leave to appeal and to hear and decide the instant matter pursuant to *MCR 7.301, 7.301, 7.312, 7.316 & 7.317.*

Additional Law and Argument

Blakewoods' Sup. Ct. Sup. Brief, dated 12/03/01 is incorporated by reference as though fully stated, here.

The "Crux" of the Matter: Question I

This case turns on the answer to the Question posed by the Court in its Order, dated 10/23/01. In short, can BCBSM make its EON requirement or any other BCBSM licensure-type criteria, beyond the legislative-prescribed requirements in *Sec. 502(8),* a condition that a state-licensed freestanding ASF must meet in order to enjoy participation status or be recognized for reimbursement for services lawfully rendered to BCBSM members or subscribers? Can BCBSM require a medical provider to restrict its right to use its state license in order to enjoy BCBSM reimbursement for services that it renders to BCBSM members of subscribers? There is no authority in the law for BCBSM to do this; BCBSM is a creature of statute. It has no powers beyond its enabling *Act.* It has, in fact, used EON criteria to favor hospitals with whom it has long maintained a symbiotic relationship. *See* Milliken, *supra, including that Court's reference to law review article, Regulation Through the Looking Glass, 79 Mich LR 203 (1979). Appen G pp 33-106, Appellants SC Sup. Br., Exh. 1.* Facility fees for outpatient surgeries done in the physician-owned, freestanding ambulatory surgery facilities are 30-50% less costly than for surgeries done in outpatient hospital-owned units. Facility fees for surgeries performed at Blakewoods are about 40% less costly than those performed at local outpatient hospital facilities. Facilities such as Blakewoods are reimbursed on a flat fee schedule, while hospital outpatient units are reimbursed on a "cost" basis. Blakewoods must either survive or fail on the flat fees that it receives and

based upon its own management skills and ability to attract patients and physicians to use its facility. It cannot add "costs" to the system to make up for management deficiencies—only its owners bear any losses that it sustains. The allowable costs a hospital reports determine its level of reimbursement, e.g., it can increase its rate or reimbursement based on the extent to which it can add costs to its overall operation. The Medicare program has a special "carve out" in federal law to enable it to enjoy the cost savings that result from the use of physician-owned freestanding surgery facilities. They introduce significant price competition into the marketplace. And, the same highly skilled and experienced surgeons who currently perform surgical procedures in outpatient hospital units, perform surgeries in the physician-owned freestanding surgery facilities, such as Blakewoods. At a time when Michigan is experiencing considerable financial difficulty, particularly in the cost of health care, it is poor public policy to act to restrict or deny the opportunity for positive market competition that can be realized through opening the market to physician-owned freestanding surgery facilities. Additionally, the legislative intent and specific cost containment provisions of *1980 PA 350* require BCBSM to cease acting in an unlawful manner that attempts to interfere with these facilities' property right in their state licensure to be recognized for reimbursement for their services. BCBSM has no authority to determine who or what will be recognized as a medical provider or to what extent a licensed provider can enjoy its rights in its state licensure.

It is necessary to pay careful attention to the definitions provided in *Part 1* of the *Act*. *Sec.103* states that the words and phrases defined in *Sec.'s 104 to 108* shall have the meanings ascribed to them in these sections. Considering the definitions of "health care benefit", "health care provider" and "health care services" [*Sec.105(1)(4) & (5)]* together with the definitions of "participation provider", "participating contract", "provider class", "provider class plan" and "provider contract" *[Sec.107 (1), (2), (6), (7) and (8)]* with the definition of "reimbursement arrangement" *[Sec.108 (1)],* it is clear that "health care benefits" or "health care services" are not to be used to define or determine who or what is a "provider". It is also clear that the "provider class plan" is a document that contains a "reimbursement arrangement" that is a "means of making payments to a provider—not a means of determining who or what is a provider.

Reimbursement arrangements, whether they are with BCBSM or any other health care coverage carrier, include requirements such as the use of specific claims formats, use of uniform procedure and diagnosis coding, maintenance of adequate records to document the treatment and services being billed, refraining from fraudulent practices or over utilization, cooperation with audits and reporting requirements that concern the payment of claims, timeliness in submission of claims, cooperation with established prior approval procedures, etc. They do not include restrictions upon state licensure or the addition of other medical provider "need" standards for recognition of the medical provider license. BCBSM has stepped over the line with its EON process.

Mistaken Factual Premises Upon Which the Courts Based Decisions: Question III

Explanation of the Concept of Provider Reimbursement Under the Act: Question II

Much of the error in deciding this case has been based upon mistaken reliance on numerous misrepresentations and previous misunderstandings about how BCBSM reimbursement is actually accomplished and how it is required to be carried out under *1980 PA 350.* This resulted in a failure of the courts to consider the contorted misapplication and violations of the governing statutory definitions and requirements. *See Part 1, Sec. 401(7), 403(1) & 502 (2), (3) & (8).* For these reasons, Appellants now provide a simple, straightforward explanation of the difference between a BCBSM participating medical provider and a non-participating provider, classifications that relate only to BCBSM reimbursement. A participating provider is one (whether it be a facility or a licensed practitioner) who has signed a BCBSM's participating agreement (the contract included in the pertinent provider class plan) and has thereby agreed to accept the amounts in BCBSM's fee schedule as payment in full for any given service. A participating provider cannot bill the patient for the difference, if any, between its charge and the amount of BCBSM's pre-determined level of payment for a service. BCBSM is authorized by statute to reimburse a participating provider directly. A non-participating provider is one who has not entered into a participation agreement, *i.e.*, has not signed the contract with BCBSM, but who lawfully renders a service to a BCBSM subscriber or plan member. BCBSM is prohibited from directly reimbursing a non-participating

provider; but must, instead, send payment for the service to the patient, who in turn, pays the provider. BCBSM reimbursement for services rendered by non-participating providers is the same pre-determined fee for each service that BCBSM would pay **to** participating providers. However, the non-participating provider may bill the patient for the difference, if any, between its charges and the amount of BCBSM's reimbursement. BCBSM may in some instances, refuse to grant a licensed provider participation status, but it cannot refuse to provide reimbursement for services lawfully rendered by non-participating providers as long as these services are within the scope of the coverage plan or certificate and as long as properly completed claims are submitted. The only instances in which BCBSM may refuse to recognize licensed providers for reimbursement are in the case of managed care plans, such as HMO's or Prudent Purchaser Agreements. *See Sec.'s 502(6) & 502a.* BCBSM's certificates and plans of coverage that are not constituted as managed care plans may not be operated as managed care plans. Otherwise, there would be no need for any statutory provision for BCBSM's operation of managed care plans, that, by definition, limit provider panels. The provisions in *Sec.'s 107(6)&(7),401(7), 403(1), 502(3) and 502(6)(8), 502a, 504(1)* would be nonsensical or be vitiated. With this understanding, Appellants have provided the legal underpinnings, consisting of statutory definitions and other provisions that make it quite clear that BCBSM has not been granted authority to make EON determinations, no standards have been provided for such determinations, and BCBSM

is bound to recognize the state's licensure of medical providers. BCBSM may not use the mechanism of the provider class plan as a shield to violate the balance of its statute, to change applicable statutory definitions, or to violate other state laws, to unlawfully violate the rights of others.

*Failure of the Courts to Consider What Blakewoods Asked for as Relief:*Questions II&III

Blakewoods argues that the IC permits BCBSM to unlawfully deny its request to BCBSM for full participation status1 and requests that the Court make findings and declarations and findings as to why BCBSM's action was unlawful and eventually grant injunctive relief. However, Blakewoods also complained that BCBSM not only denied participation status to Blakewoods, but BCBSM also refused to recognize Blakewoods' license by refusing to provide reimbursement, even to BCBSM subscribers, for claims for services lawfully rendered by Blakewoods. BCBSM has adopted a policy that it applies to Ambulatory Surgery Facilities that provides that if BCBSM does not grant participation status to these providers, then it will also refuse to recognize their license at all by refusing to provide reimbursement for facility fees for outpatient surgical services that are lawfully rendered by these providers to BCBSM covered subscribers and plan members. With the latest modifications to BCBSM's Ambulatory Surgery Facility Provider Class Plan, the only means that Blakewoods has of gaining any form of BCBSM participation and therefore any form of recognition of its license in the form of

1 Not for restricted participation status based on limiting surgeries to only one surgical specialty contrary to existing state licensure and the state's grant of a Certificate of Need.

BCBSM reimbursement for its services, is to agree to a BCBSM-imposed restriction of its rights in its licensure, i.e., Blakewoods must agree to limit the surgical procedures that can be performed at its facility to only a single specialty—in this instance, eye care even for patients who are covered by other carriers—thus, depriving the entire health care market of cost savings through positive competition. This is contrary to the state's licensure of Blakewoods and contrary to the Certificate of Need that it has been issued by the state. Through its EON process, BCBSM has appointed itself as the determinate of limitations that may be placed on Blakewoods' use of a medical license. If Blakewoods does not conform to BCBSM's EON requirements that prohibit it from providing services involving ambulatory surgeries other than one specialty, then, per the provider class plan and participation agreement contained in that plan, BCBSM will withdraw participation status and will deny all reimbursement for Blakewoods' lawfully rendered services. As a non-participating provider whom the IC permits BCBSM to also refuse recognize as a licensed provider (who is therefore not included in any BCBSM reimbursement arrangement), Blakewoods is left with no means of litigating to preserve its rights in its state licensure. It is routine for medical services lawfully rendered by most providers to be reimbursed by BCBSM; *e.g.*, many surgeons do not participate with BSBCM, but BCBSM recognizes their licensure and the services rendered by these doctors are reimbursed by BCBSM. The issue of whether or not BCBSM can make "need" determinations that are used to refuse to recognize or act to restrict a provider's

state license, requires an interpretation of the statute. It is a question of law that a Court must decide. See *Marbury v. Madison, 1 Cranch 37; 2 L Ed 60*) that states that it is the province of the court to say what the law is.

No Remedy Available Under Part 5: No Primary or Exclusive Remedy:Question III

Part 5 of 1980 PA 350 that the trial court seemed to deem an exclusive remedy for Blakewoods deals only with the review of the PCPs and provides only for the consideration of whether or not BCBSM meets the statutorily defined goals of cost, access and quality and provides no mechanism for determining whether or not any statute has been violated, for determining the constitutionality of the application or the language of *1980 PA 350,* for determining whether or not *ultra vires* activity has occurred, or for determining whether or not the rights of others have been unlawfully violated. It provides no remedy for the Appellants. *See Sec.'s 509-518*. Additionally, *BCBSM v Milliken 422 Mich 1,72; 367 NW2d 1, 37 (1985)* makes it clear that the court did not determine whether or not *1980 PA 350* was constitutional regarding BCBSM's relations with medical providers. Due to an injunction granted to BCBSM, the *Act* was not implemented until 1985 and therefore, the Court had no actual controversy to consider. *See BCBSM v Milliken, supra, at 422 Mich 72; 367 NW2d 37.* If the *Act* grants BCBSM absolute immunity from review for any activity that it carries out through a PCP, amends the *Public Health Code* by reference, and permits BCBSM to assume

legislative power without a specific delegation and without standards for the exercise of such power, then the *Act* is unconstitutional.

BCBSM's Unlawful Discrimination in Favor of Hospitals: Question I

Pursuant to CON Application Number 95-0141, on November 3, 1997, Foote Hospital in Jackson Michigan completed the construction of a five operating room, free-standing, outpatient surgical center called the Jackson Surgical Center. The Jackson Surgical Center, located in Jackson, Michigan, began operation on November 24, 1997. Appen Q, pp 587-588, *Tr. Ct. Doc Ent1, Exhibit 6.* Despite BCBSM's EON policy, Jackson Surgical Center was granted participation status and was and is reimbursed by BCBSM. Granting participation status and reimbursing Jackson Surgical Center is discrimination in violation of *MCL 550.1502(8),* which prohibits BCBSM from discriminating against a free standing surgical facility based on ownership.

BCBSM did not bar the hospital-owned Jackson Surgical Center from full participation status through the application of BCBSM's independent, unauthorized EON. Therefore by refusing or restricting Blakewoods participation status and refusing to reimburse members and subscribers BCBSM violates Sec. *502(8).*

BCBSM discriminates against Blakewoods in favor of Jackson Surgical Center. There is a presumption that this discrimination is in violation of *502(8)* because a majority of Blakewoods is owned by physicians, while the Jackson Surgical Center is

wholly owned by Foote Hospital. However, the trial Court never permitted this issue to be litigated even though unrebutted proofs were before the Court.

Blakewoods' Property Interest in State Licensure: Lack of Remedy in Part 5 for the IC's Acquiescence in BCBSM's Ultra Vires Actions: Question I

BCBSM will not recognize Blakewoods' licensure; BCBSM, instead, attempts to create its own licensure criteria, deciding that medical providers (freestanding ambulatory surgery facilities) must meet BCBSM's licensure criteria in the form of its EON to gain any recognition of state licensure in the form of reimbursement for services lawfully rendered. Here, BCBSM determines how many operating rooms can be used and to what extent, and what kind of surgeries can be performed in them in order for a ASC to gain recognition of its license by BCBSM. This ignores the fact that only the Legislature is vested with the authority to regulate medical providers (and, therefore to conduct "need" determinations as part of licensure requirements). The Legislature did not grant this power to either the IC or to BCBSM. The IC's attempt to assume the power to regulate medical provider "need" and thus, licensure is and to attempt to grant such legislative power to BCBSM is an unconstitutional attempt at delegation of police power without standards. The right to charge for professional services flows from the state's grant of licensure. Only the Court may decide the issues raised, here. *People v Houston, 237 Mich App 707; 604 NW2d 706 (1988).* Only the Court may interpret the *Act* and the power to interpret the constitution is in the exclusive province of the

judiciary. *People v. Whisenant,19 Mich. App.182, 172 NW2d 524, on rehearing, 21 Mich App. 518,175 NW2d 560, affirmed, 384 Mich. 693, 187 NW2d 229 (1969).*

Under the IC's interpretation of the *Act*, BCBSM could implement any action as long as it was contained in a BCBSM provider class plan that the IC could choose to **never** review. *See Sec. 509(7). 1980 PA 350* is not a grant of immunity for unauthorized activities even if such actions are against medical providers. If that were true, the *Act* would be an unconstitutional violation of due process.

Legislative History: Question I

More support for BCBSM's lack of authority to use medical provider "need" determinations is found in the *Act's* legislative history. Under *MCL 550.1207's* (powers) annotations under "prior acts", it specifies that in 1972, the Legislature amended the Act's forerunner, *1939 PA 109 at (3)*. Using "tie-barred" bills, it amended this *Act* with *1972 PA 233* and the *Public Health Code with 1972 PA 256*, respectively, removing from Blue Cross all authority to determine provider "need" and, at the same time, establishing CON as part of medical provider licensure in the *Public Health Code.* No legislative enactment ever again delegated this police power to BCBSM. Legislative intent could not be more clearly expressed. *Appendix L pp 390-405, Brief onAppeal, Exh. 2, Legislative History.* The IC is not authorized to make any determination about medical provider licensure including "need" determinations. The Legislature delegated this power under the *Public Health Code as is indicated in Sec. 502(8) of 1980 PA 350 that refers to the Public Health Code for the "need" standard that must be met--not the*

Insurance Code or General Insurance Laws. Neither the IC nor BCBSM is the recipient of legislatively delegated police power over medical providers or their licensure. BCBSM uses the *Part 5* Provider Class Plan mechanism as a foil to assume police powers that it does not have. This is a constitutional issue for the Court to decide. If the *Act* permits BCBSM to engage in medical provider "need" determination, this would be an unconstitutional delegation of police power without standards, an amendment by reference, a title object problem, (*Const. 1963, Art IV, sec's 24, 25, 36*), a failure to notify Appellants of another tier of criteria to be met to enjoy rights in licensure. *Alan v Wayne Co., 388 Mich 210; 200 NW2d 628 (1972) (Appen L pp 344-346, Appellants' Appeal Brief, pp 45-57)* See *Const. 1963 Art I Sec. 17* and cite case Appellants do not contend that standards of *1980 PA 350* are unconstitutional; Appellants contend that the **lack** of legislative delegation and **lack** of standards in the *Act* result in a violation of the constitution if BCBSM is permitted to apply its EON criteria. The IC has a duty to prohibit BCBSM to carry out *ultra vires* actions and assume the Legislature's police powers without a specific delegation of this authority and without the enactment of standards, if he does not, then BCBSM is established as a fourth branch of government, endowed greater power than any of the three existing branches of government. The Legislature did not intend that result. *Appen L pp 345-346,Appellants' Brief on Appeal, pp 46-47. See also Crawford, infra.*

Statutory Framework and Definitions: Questions I, II & III

Below are the statutory definitions and provisions regarding issues raised, here.

P.A.1980, No. 350, Sec.105(1)(4)(5)

> Sec. 105 (1)"Health care benefit" means the right under a certificate to have payment made by a health care corporation *for a specified health care service*, regardless of whether or not the payment is made pursuant to an administrative services or cost-plus arrangement.

Emphasis added.

> (4) "Health care provider" or *"provider"*, except as provided in section 301(8)(a), *means a health care facility; a person licensed, certified, or registered under parts 161 to 182 of Act No. 368 of the Public Acts of 1978, as amended, being sections 333.16101 to 333.18237 of the Michigan Compiled Laws;* any other person or facility, with the approval of the IC, who or which meets the standards set by the health care corporation for all contracting providers; and, for purposes of section 414a, any person or facility who or which provides intermediate or outpatient care for substance abuse, as defined in section 414a.

Emphasis added.

> (5) "Health care services" *means services provided, ordered, or prescribed by a health care provider*, including health and rehabilitative services and medical supplies, medical and rehabilitative services and medical supplies, medical prosthetics and devices, and medical services ancillary or incidental to the provision of those services.

Emphasis added.

The statute clearly defines a "health care benefit" as the right to payment for a health care "service" or "benefit". It is not defined in this *Act* by the setting or the provider who renders the service. Therefore, if BCBSM's certificates and plans cover outpatient surgical services, such services are covered if rendered in any facility licensed by the state to provide such services. See*1985-86 Mich OAG No. 6410; 1989-90 Mich OAG, No 6621*; *and 1989-90 Mich OAG, No 6567* and *1984 OAG 6809.*

If the corporation provides a benefit that establishes the right to payment for a "service", this refers to the treatment or item ordered or rendered by a health care provider. BCBSM may determine which benefits it will establish for coverage of specific health care services. Nowhere, outside of the Act's provisions for managed care, is BCBSM authorized to select which licensed providers may be engaged to provide such covered services.

1980 PA 350 permits BCBSM to limit or restrict benefits only by limiting the services that it covers (pays for)--not by restricting the patient's choice of provider. *See also* Sec.*502(2) (3), supra.* Clearly the *Act* distinguishes between "provider" and "service" and prohibits BCBSM from discriminating against certain providers or from influencing or restricting the subscriber's choice of provider.

350 P.A.1980, Sec. 107(1)(2).

> Sec. 107. (1) "Participating provider" means a provider that has entered into a participating contract with a health care corporation and that meets the standards set by the corporation for that class of providers.
>
> (2) "Participating contract" means an agreement, contract, or other arrangement under which a *provider agrees to accept the payment of the health care corporation as payment in full* for health care services or parts of health care services covered under a certificate, as provided for in section 502(1).

Emphasis added.

> (6) "Provider class" means classes of providers, as defined in section 105(4), that have a provider *contract or a reimbursement arrangement* with a health care corporation to render health care services to subscribers, as those classes are established by the corporation. *Emphasis added.*

(7) "Provider class plan" or "plan" means a *document containing a reimbursement arrangement and objectives* for a provider class, *and, in the case of those providers with which a health care corporation contracts, provisions that are included in that contract. Emphasis added.*
(8) "Provider contract" or *"contract"* means an *agreement between a provider and a health care corporation that contains provisions to implement the provider class plan. Emphasis added.*

1980 PA 350 , Sec. *108*

Sec. 108. (1) "*Reimbursement arrangement*" means *policies, practices, and methods by which a health care corporation makes payments to a provider to implement the provider class plan. Emphasis added.*

The provider class plan's function is to implement a reimbursement agreement or arrangement between BCBSM and health care providers. The statute defines "reimbursement" as payments to providers that implement the provider class plan.

Reimbursement for Services Rendered By Non-Participating Providers: Recognition of License
1980 PA 350 Sec. 401(7)

(7) A health care corporation shall not *directly* reimburse a provider in this state who has not entered into a participating contract with the corporation. *Emphasis added.*

1980 PA 350 Sec. 403(1)
Sec. 403. (1) A health care corporation, on a timely basis, shall pay to a member or a participating provider benefits as are entitled and provided under the applicable certificate. When not paid on a timely basis, benefits payable to a member shall bear simple interest from a date 60 days after a satisfactory claim form was received by the health care corporation, at a rate of 12% interest per annum. The interest shall be paid in addition to, and at the time of payment of, the claim.

This the *Part 4* and *Part 5* language, (along with *Part 1* definitions) must be read in *pari materia*; they are parts of the same *Act* that may not be construed to vitiate or contradict each other. The Court in *Crawford Co. v Secretary of State, 160 Mich App 88, 95; 408 NW2d 112 (1987)* provided the rule for determining whether two statutes should be read *in pari materia:*

> Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose; and although an act may incidently refer to the same subject as another act, it is not *in pari materia* if its scope and aim are distinct and unconnected.
> *Cited in Feld v Robert & Charles Beauty Salon, 435 Mich352; 459 NW2d 279 (1990).*

The Court in *Revard v Johns-Manville Sales Corp, 111 Mich App 91, 95; 314 NW2d 533 (1981)* found that requiring a reading of statutory provisions in pari material is particularly applicable to the construction of statutes such as the worker's compensation act (and, therefore, likewise *1980 PA 350*) that are in derogation of the common law.

> Fundamental rules of construction also requires that every word of a statute must be given meaning and no word should be treated as surplusage or rendered nugatory.
> *State Bar v Galloway, 422 Mich 188, 196; 369 NW2d 830 (1985); citing Baker v General Motors Corp, 409 Mich 639, 665; 297 NW2d 387 (1980)*

All provisions of *1980 PA 350* are intended to apply to BCBSM and its relationships with the regulator, and with providers and members/subscribers.

If BCBSM could lawfully refuse to provide reimbursement for a non-participating fully licensed provider's lawfully rendered services, then *Section 401* would make no sense.

Act 350 explicitly and unambiguously sets forth the reimbursement parameters BCBSM must follow. Appen Q p 569; *Tr. Ct. doc ent1, p 12. MCL 550.1504(1)(c)*

governs goals of reimbursement arrangements with health care providers and in pertinent part reads:

> Sec. 504. (1) A health care corporation shall, with respect to providers, contract with or enter into a reimbursement arrangement to assure subscribers **reasonable access to**, and **reasonable cost** and quality of, health care services....

The provider-patient relationship is disrupted and the choice of provider and the method of treatment are restricted when the IC permits BCBSM to illegally create a separate independent EON in contravention of the *Public Health Code* and in contravention of the anti-discrimination provision set forth in *the Act*, Sec. *502(2)&(3)* which state:

> (2) A contract entered into pursuant to subsection (1) shall provide that the private provider-patient relationship shall be maintained to the extent provided for by law....
> (3) A health care corporation shall not restrict the methods of diagnosis or treatment of professional health care providers who treat members. Except as otherwise provided in section 502a, each member of the health care corporation shall at all times **have a choice of professional health care providers.**

MCL 550.1502(2)(3), emphasis added. See also, 1994 Mich OAG 6809.

The Legislative intent of *the Act* is expressly codified at *MCL 550.1102(1)-(3)*. The Legislature intended *1980 PA 350* to **assure access to health care**. *See MCL 550.1102 and BCBSM v Milliken, 422 Mich 1, 40; 367 NW2d 1 (1985).* Therefore Sec.*502(3)* which states that "this subsection does not apply to limitations in benefits in certificates" must be read considering the definitions in the *Act*: they are the definition of "benefits" at *sec. 105(1)*-- the right under a certificate to have payment made for a

specified health care service; and the definition of "health care services" under *sec.105(5)* **means services provided, ordered or prescribed by a health care provider**. The language in *502(3)* means that it does not obligate BCBSM to cover any particular services. **It does not mean that BCBSM may use certificate language to decide who or what will be recognized as a provider for each covered service**.

Appen L pp 311-314, Appellants' Brief on Appeal, pp11-14.

In *In re State Highway Commission, 383 Mich 709, 714-715, 178 NW2d 923 (1970),* the Supreme Court held:

> The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the Legislature; courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction; seeming inconsistencies in the various provisions of a statute should be reconciled, if possible, so as to arrive at a meaning which gives effect to all parts of the statute; **a construction leading to an absurd consequence should be avoided.**

Citations omitted, emphasis added.

To interpret the language of *Sec.502(3)* as allowing the Defendant to put "limitations" in benefits contained in certificates so as to eliminate a subscriber's choice of professional health care providers would lead to an absurd result and be contrary to the intent of *1980 PA 350* which is to assure access to health care, not to diminish access.

MCL 550.1502(2)(3) is really a codification of *Blue Cross and Blue Shield of Michigan v Demlow, 403 Mich 399, 270 NW2d 845 (1978)*, where the court stated:

> [T]he next question is whether rates which include waste are "fair and reasonable". We believe that they may not be. Rates unnecessarily inflated by waste retard rather than promote the availability of financial health care

protection. We believe **the Legislature did not intend that health care corporations, such as BCBSM, which were designed as a solution to the problem of inadequate health care, were to be free to engage in a course of action or inaction that would make them a contributing cause of the problem.** ... [T]he IC cannot disapprove a rate increase request on the basis of expenditures which the corporation can affect only by invading the physician-patient relationship, **usurping the physician's control over the practice of medicine or by limiting the subscriber's free choice of hospitals and doctors....the IC must exercise his authority reasonably and cannot issue orders and opinions which conflict with more specific grants of authority by the Legislature to other state agencies, such as the Department of Public Health.**

Demlow, supra, at 429-430, emphasis supplied.

The case was decided based on BCBSM's previous regulatory statute. However, the intent to specifically prohibit the IC and BCBSM from any acts that would interfere with the provider-patient relationship or with the grant of state licensure pursuant to the Public Health Code is expressed in *MCL 550.1502(2)(3) (8). 1985-86 Mich OAG No. 6410; 1989-90 Mich OAG, No 6621*; *and 1989-90 Mich OAG, No 6567*and *1984 OAG 6809* seek to enforce this statutory prohibition and carry out legislative intent.

Specific Requirements for Freestanding Surgery Facilities: Question I

(8) A health care corporation *shall not deny participation* to a freestanding medical or surgical outpatient facility on the basis of ownership if the facility meets the reasonable standards set by the health care corporation for similar facilities, *is licensed under part 208 of the public health code, 1978 PA 368, MCL 333.20801 to 333.20821, and complies with part 222 of the public health code, 1978 PA 368, MCL 333.22201 to 333.22260.*
Emphasis added.

BCBSM is prohibited from acting in any manner other than lawful participation requirements to choose one provider over another. BCBSM is not authorized to refuse

to honor the benefit provisions of its certificates and plans based upon which licensed provider lawfully rendered a service. BCBSM must pay either the provider or the patient for the lawfully rendered covered service. The IC cannot permit BCBSM to violate these provisions by simply establishing a PCP that negates them. BCBSM, in its statutorily-defined role as a carrier providing health care coverage, cannot require that surgeons perform surgeries only in licensed facilities of BCBSM's choosing.

The Legislative prohibition against discrimination makes it clear that the Legislature had reason to be concerned that BCBSM would attempt to exclude some facilities on the basis of ownership. However, beyond this protection, the Legislature also prescribed the basis for determining need and licensure referencing the *Public Health Code*. *Sec. 502(8)* refers to the state's Certificate of Need Determination. BCBSM is not authorized to make need determinations of any kind, but, is specifically directed to determination of need as it is provided for in the *Public Health Code*. The determination of need is part of state's licensure process. The *Michigan Constitution of 1963* vests the Legislature with the police power to regulate health care. No other entity may make licensure determinations unless specifically authorized to do so by the Legislature. Even the Legislature delegated licensure authority, it would have to be accompanied by sufficient standards for use of delegated power. No delegation and no such standards can be found anywhere in *1980 PA 350.* See *Westervelt v Natural Resources Comm. 402 Mich 412; 263 NW2d 564 (1978)* for an extensive discussion of the requirements

for specific delegation of legislative powers and requirement to accompany such delegations with standards that are as reasonably precise as the subject matter requires or permits. Both a specific delegation and standards for use of such a delegation are lacking in *1980 PA 350.*

In *Sec. 502(8),* the Legislature provided the "need" and licensure standards that must be met for participation status to be granted to a freestanding surgical facility. The maximum *expressio unis est exclusio alterius* applies—the expression of one thing is the exclusion of another. *See Feld v Robert & Charles Beauty Salon, 435 Mich 352; 459 NW2d 279 (1990).* It is ludicrous to conclude that the Legislature expressly refers the health care corporation to the *Public Health Code* to satisfy the standard for provider "need" determination and then intends for the health care corporation to proceed to make its own, separate, unspecified "need" determination to use instead to determine whether or not to grant participation status. *See also County of Alcona v Wolverine Environmental Production, Inc., 233 Mich App 238; 590 NW2d 586 (1999).* The Appellee IC cannot simply use his own interpretation to create a delegation of authority that the Legislature did not grant either to his Agency or to BCBSM by statute. *See also Western Michigan Univ. Bd. Of Control v Michigan, 455 Mich 531, 544; 565 NW2d 828 (1997),* also cited in *Alcona, supra*, wherein the Court found that while and agency's construction of a statute must be given deference, it cannot be used to overcome the statute's plain meaning. And, see *Luddington Service Corp. v Acting IC of Insurance,*

444 Mich 481; 511 NW2d 661, 672 (1994) wherein the Court found that an agency's interpretation of a statute was not binding on the Court to overcome a statute's plain meaning. In the instant matter, the Legislature clearly directed BCBSM to recognize and abide by the state's determination of provider "need" pursuant to the requirements provided for in the *Public Health Code*. Nowhere in *1980 PA 350* is BCBSM ever granted the authority to determine provider "need" or any aspect of medical licensure requirements.

***Sec. 502(8)* provides the provider "need" standard to be applied and met and the case law that governs the interpretation of the *Act* prohibits BCBSM from establishing or applying a different provider "need" criteria in order to determine whether or not to grant participation status to freestanding surgical facilities. BCBSM's "evidence of need" standard cannot be a "reasonable" standard—it is an unlawful standard.**

The IC is knowingly permitting BCBSM to violate *1980 PA 350, sections 401, 403, 502 (2)(3) and (8)*. BCBSM is acting in an *ultra vires* and illegal manner in violation of its own enabling statute.

The purpose of the Provider Class Plan review in *Part 5* is neither to stop nor to promote, protect or shield illegal activity. The Legislature did not authorize illegal activity through use of the PCP or in any other manner. Rather, the purpose of the PCP review is to determine to what extent certain goals of "reimbursement agreements" are being

met by BCBSM. The IC's duty to stop BCBSM from engaging in illegal, unauthorized or *ultra vires* activity is not conditioned upon his conducting a PCP review. The IC has assumed regulatory authority that the Legislature has not granted. There is no duty on the part of the Appellants to exhaust administrative remedies. The *Part 5* provider class plan process does not provide for injunctive relief, does not provide for a determination whether or not PCP provisions violate other parts or sections of the *Act*, and does not provide remedies of any kind for unlawful or unconstitutional actions by health care corporations. Its only function is to determine to what extent PCPs contain "reimbursement arrangements" that meet the narrowly defined goals specified in *Part 5* of the *Act*. There is no provision for a substantive review of the Plan under this *Part.* Appellants are not arguing about to what extent "goals" are being met, here. Plaintiffs are asserting that the law is being violated by BCBSM and the IC has failed to carry out his legal duty to stop these violations.

On a final note regarding the PCP review process, the Court must remain cognizant of the fact that if the IC found that the PCP did not meet the required goals or if BCBSM simply chose to rewrite its plan, a new plan could be filed, would be non-reviewable for several years, would never be required to be reviewed, and could, again, contain any number of provisions that violate the law.

Section 619(3) grants the court jurisdiction to hear the Appellants' case without regard to any other administrative remedy. It does not exclude providers from its grant

of jurisdiction and does not say that it applies only when the offending conduct is not being facilitated by a PCP. It grants all persons direct access to the Ingham County Circuit Court to compel the IC to enforce the *Act*. This eliminates concern about whether mandamus must be supported. Specific legislative authority has been provided to compel the IC to act. More support is not needed. The grant of jurisdiction to the Court and standing to the Appellants, in *section 619,* enables the Court to consider the Appellants' request to direct the IC through declarations. Enforcing the specific language of the statute is not a matter of discretion for the IC if Appellants have shown that BCBSM is violating any law or acting in an *ultra vires* manner. *Section 619(3)* eliminates any question regarding exhaustion of remedies. It grants direct access to the Court and certainly this is meant to be used to enforce the balance of the provisions of the *Act*. If exhaustion of administrative remedies were applicable, then *Section 619(3)* would be meaningless. Sec. 619(3) presupposes a duty on the part of the IC, and, therefore, presupposes that some process for action was available to the IC. And, BCBSM is not a required party. *In Genesis v BCBSM, 243 Mich App 692; _____ NW2d_____(2000),* BCBSM successfully argued it cannot be sued by a provider.

There is no state statute that delegates to BCBSM the licensing power constitutionally reserved to the Legislature. "As a creation of the Legislature, [any agency] possesses only that authority specifically granted by statute." *See Booth v. Consumers Power Co., 226 Mich App 368, 573 NW2d 333, 336 (1997), relying on Union Carbide Corp. v. Public Service Comm., 431 Mich. 135, 146, 428 NW2d 322 (1988).* Agencies have no inherent power, beyond that delegated by the Legislature. Moreover, a "statute that grants power to an administrative agency must be strictly

construed **and the** administrative **authority** drawn **from such statute must be granted plainly, because doubtful power does not exist**." *Booth v. Consumers Power Co.,supra, relying on In re Tariffs Telecommunications, 210 Mich App 533, 539, 534 NW2d 194 (1995)*], *emphasis added.* See *Brief on Appeal, pp, 23, Appendix C.* There is no delegation of legislative authority to BCBSM to make any medical provider "need" determination. The authority to determine the "need" for ambulatory surgery facilities has been delegated to the Department of Community Health under the *Public Health Code* at *MCL 333.22201 to 333.22260.* The authority to interfere with or alter medical provider licensure must be affirmatively delegated by the Legislature pursuant to the *Michigan Constitution of 1963, Article IV, Sec. 51.*

At *MCL 550.1502(2)(3)(4) &(8)* BCBSM's **enabling statute already specifically provides the parameters** to guide the health care corporation in its relationships with medical providers and this same statute clearly specifies the need to look to the *Public Health Code* for any determination that involves licensing considerations. Therefore, the Court must look to the specific provisions of the *1963 Mich Const, 1980 PA 350* and the *Public Health Code.*

There is nothing in either the title or the *Act* itself that supplements or amends the *Public Health Code's* Certificate of Need law. This could not be accomplished without also amending the Public Health Code. The Legislature affirmatively acted to amend both the Insurance Code and *Public Health Code* in 1972 to make it clear that provider need determinations were delegated only to the Department of Community Health.

Constitutional requirements (*e.g. Marbury v. Madison, 1 Cranch 37; 2 L Ed 60*) dictate that the Court maintains primary jurisdiction for substantive review. The

Legislature could not have intended that the power it has delegated to BCBSM, under *Part 5 of 1980 PA 350*, be non-reviewable for a three year period--*much less over an 11 or 12-year period.* Otherwise, BCBSM could, as it has with Blakewoods, abuse with impunity the legislatively delegated power by ignoring the standards set forth in *1980 PA 350.* BCBSM has no power to conduct any activity, in any manner not specifically authorized by *1980 PA 350. MCL 550.1502(8)* directs BCBSM to use **reasonable standards,** but the use of unauthorized, additional evidence of "need" determinations is a *per se* unreasonable invasion of the state's determination of need under the certificate of need licensure process.

Neither 1980 PA 350 nor the Public Health Code authorize BCBSM's EON: Quest. I

In *Blue Cross and Blue Shield of Michigan v Paul, 174 Mich. App. 188, 435 NW2d 420 (1988)*, the Court makes it clear that the CON process belongs to the state and that the purpose of the CON process is to prevent providers and insurers from passing on the expense of unneeded equipment to the consuming public. The Court stated:

The purpose of the requirement that the equipment be approved by the appropriate agency is to prevent increased health care costs, including those of insurance, when providers pass on the expense of equipment which is not needed in the community.
Id. at 195. Emphasis supplied.

BCBSM v Paul, supra, reveals that the Legislature intended the CON statute to govern **necessity** for a wide variety of specific health care related costs. Determination of the need for specific projects such as the outpatient surgical center is specifically delegated to the Department of Public Health—not the IC. *See MCL 333.22225.*

BCBSM is not a state agency so there could be no effective delegation of the CON power because *1980 PA 350* has **no standards for the exercise of this essential**

state licensing function. If the Legislature had delegated "need" type licensing functions to BCBSM the delegation would be clear from the title or the plain language of the statute. *See Westervelt, supra.*

BCBSM has no power that is not specifically delegated by the Legislature. "As a creation of the Legislature, [any agency] possesses only that authority specifically granted by statute." *See Booth, supra, see Union Carbide, supra.*

A "statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly, because doubtful power does not exist." *Booth, supra, relying on In re Tariffs Telecommunications, 210 Mich App 533, 539, 534 NW2d 194 (1995)*], *emphasis added.*

No Legislative Delegation

Constitutional limitations prevent a declaration that *1980 PA 350* authorizes BCBSM to determine "evidence of need" beyond that authorized by the *Public Health Code.*

1963 Mich. Const., *Art. IV, Sec.51* for example reads:

> The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

Cases interpreting this constitutional provision set forth the limitation in precise terms; the Legislature did not intend to delegate to BCBSM a licensing function that flows directly from the police power of the state.

See e.g., City of Gaylord v. Beckett, 378 Mich. 273, 144 NW2d 460 (1966); People's Appliance & Furniture, Inc. v. City of Flint, 358 Mich. 34, 99 NW2d 522 (1951).

The constitutional right to engage in business is subject to the police power of the state to preserve the public health, safety, morals, and general welfare.

Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 142 Mich. App. 294, 312, 370 NW2d 328 (1985). Butcher v. City of Detroit, 131 Mich App 698, 347 NW2d 702 (1984).

A public authority may not regulate private rights by purely arbitrary means.

Milford v. People's Community Hospital Authority, 4 Mich. App. 142, 144 NW2d 687, affirmed, 380 Mich 49 (1966). A conflict between the constitution and a statute is a legal question which only a court can decide. *Regents of University of Michigan v. Michigan Employment Relations Commission, 389 Mich 96, 204 NW2d 218 (1973).* The power to interpret the constitution is in the exclusive province of the judiciary. *People v. Whisenant, 19 Mich. App. 182, 172 NW2d 524, on rehearing, 21 Mich App. 518,175 NW2d 560, affirmed, 384 Mich. 693, 187 NW2d 229 (1969).*

1963 Mich. Const. Art. IV , Sec.'s *24, 25 & 36* also establish limits that preclude a declaration that *1980 PA 350* delegates to BCBSM a licensing function of the state.

The provisions respectively provide:

> No law shall embrace more than on object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not by its title.

1963 Mich. Const. Art. IV,Sec. 24.

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be reenacted and published at length.

1963 Mich. Const. Art. IV, Sec. 25.

> No general revision of the laws shall be made. The legislature may provide for a compilation of the laws in force, arranged without alteration, under appropriate heads and titles.

1963 Mich. Const. Art. IV, Sec. 36.

Supporting this limitation on legislation is *Alan v Wayne County, 388 Mich 210, 200 NW2d 628 (1972). Alan, supra at 268-28* includes an exhaustive, dispositive explanation of the interrelation of these three constitutional provisions. If the Legislature had intended to delegate to BCBSM, "need determination" power previously delegated to the Department of Public Health, such delegation would be an unconstitutional change to the CON statute. The rule in *Alan, supra*, would preclude such a change:

> [W]here the legislature really intends to amend previous statutes so that their operation is narrower or broader than stated or previously construed to be, then this intent as expressed is not amendment by implication and cannot be rendered

> amendment by 'implication' by the device of failing to point out the specific section intended to be altered or amended.

Alan, supra, at 282. Emphasis added.

Since the state created the CON process, granting licenses to qualified applicants, the state is obligated to give licensees notice of subsequent changes that impair that property right. Constitutional due process requires that the state give licensees notice that another tier of need requires fulfillment before the licensee or applicant can enjoy the benefit of the CON license. *1963 Mich. Const. Art. I,Sec.17.* Nothing in the public health code notifies the Appellants that BCBSM's arbitrary, independent EON criteria must be met before BCBSM will recognize Blakewoods' CON license.

If BCBSM's separate, independent EON determination is authorized by *1980 PA 350*, this would be an unconstitutional delegation of licensure power to a quasi-public entity without sufficient standards, an unconstitutional amendment by reference or implication in violation of *1963 Mich Const. Art IV, Sec's 24, 25 & 36.* There is no indication in either the title, or in the act, that *1980 PA 350* amends the Public Health Code's CON law. In fact it cannot be done without also amending the public health code. Reasonable minds cannot differ about whether the Legislature delegated the licensing function to BCBSM. If BCBSM had legislative authorization for separate, independent, conflicting EON criteria, it would be unconstitutional. *Article IV, Sec.'s 24, 25 & 36* also establish limits that preclude a declaration that *1980 PA 350* delegates to BCBSM a licensing function of the state.

The standard is simple as set forth in *Dept. of Social Services v. Aetna Cas. & Sur. Co., 177 Mich. App. 440,444-45; 443 NW2d 420 (1989).*

> A motion for summary disposition brought under *MCR 2.116(C)(10)*, based on the lack of a genuine issue of material fact, tests whether there is factual support for the claim. In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. *MCR 2.116(G)(5)*. The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed **would leave open an issue upon which reasonable minds could differ** .... A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome.

177 Mich. App. 440,444-45, 443 NW2d 420 (1989). Citations omitted, emphasis added.

Based upon *DSS v Aetna, supra*, and the constitutional argument presented above, reasonable minds cannot differ that BCBSM has established an unauthorized, independent tier of need, beyond that determined by the state.

CONCLUSION

Appellants have established sufficient grounds for the Court to exercise jurisdiction. Appellants have demonstrated that, as a matter of law, BCBSM must recognize Blakewoods' licensure either through granting participation status or providing reimbursement to BCBSM subscribers/ plan members for services rendered by Blakewoods and may not restrict the services delivered by Blakewoods by establishing "need" criteria other than that required by the state for licensure. There is no basis for the *ultra vires* use of EON by BCBSM. There is no constitutional delegation of authority to BCBSM to use EON. *MCL 550.1502(8)* provides that BCBSM must recognize the state's CON Process as the applicable standard and prohibits discrimination against freestanding facilities based on ownership. BCBSM may not use its EON determination to deny participation.

RELIEF REQUESTED

WHEREFORE, Appellants ask this Court to do the following:

1. Find that Appellants have proper jurisdiction under *MCL 550.1619(3)* and reverse the trial Court's Order Dismissing Appellants' Declaratory Judgment Complaint.

2. Decide this matter, declaring the rights and obligations of the parties, as follows:

A. Appellants ask the Court to declare that the PCP Review process provided for under *Part 5* is limited to the review of BCBSM reimbursement arrangements as defined in *Sec. 108(1),* is limited to a determination of whether or not BCBSM meets or reasonably fails to meet the goals of "cost", "access" and "quality" as defined in *Sec. 504,* and that this review does not provide a means of obtaining a remedy for BCBSM's violations of statutes, or constitutional violations that involve disputes about BCBSM's unlawful or *ultra vires* actions that harm the rights or interests of other parties and is not appropriate for statutory or interpretation or to decide constitutional issues.

B. Appellants ask the Court to hold that medical providers whose rights or interests are affected by the ICs' refusal to prohibit unlawful or *ultra vires* actions by BCBSM, are entitled to avail themselves of the Court's jurisdiction under *Sec. 619(3)* in order to compel the IC to enforce *1980 PA 350,* to seek judicial interpretation of the law, or to ask the Court to decide constitutional issues that involve actions by BCBSM.

C. Appellants also ask the Court to hold that the IC must prohibit BCBSM from assuming legislative powers that have not been granted to it, specifically, that the IC must immediately act to prohibit BCBSM from engaging in "Evidence of Need" determinations or making any other determinations about whom or what will be recognized as a medical provider, but that those determinations can be made only through the legislatively-delegated power granted under the *Public Health Code*. (The

only exception to this is specific legislative enactments that permit BCBSM to operate managed care plans that are not a subject of the instant dispute.)

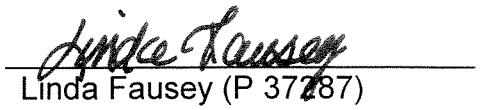
D. Appellants ask the Court to hold that *Sec. 502(8)*, specifically prescribes the standards for BCBSM's participation with and recognition of ASF's, including state licensure, and the state's determination of medical provider "need", citing the *Public Health Code's* licensing requirement and its requirements for Certificate of Need that must be met in order to obtain a license for an ASF such as Appellant Blakewoods. Where the Legislature has expressly prescribed the standard, BCBSM may not ignore it or substitute its own standard for recognition of licensure or for medical provider "need". Appellants, therefore, ask the Court to compel the IC to prohibit BCBSM's use of EON determinations and to recognize the standards legislatively prescribed in *Sec. 502(8)*.

E. Appellants ask the Court to hold that the IC must require BCBSM to immediately agree to provide reimbursement for covered health care benefits and health care services (defined in *Sec. 105(1) & Sec. 105(5)*, respectively) either through participation, as Blakewoods has requested or, or to BCBSM's covered subscriber/plan members. *See Sec.'s 107(7), 401(7),403 (1), 502 (2)(3)&(8) of 1980 PA 350.*

F. Grant such other relief this Court deems equitable or just.

Respectfully submitted,

Dated: June 25, 2002



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