

From The Capitol - November 2011

11/22/2011 James G. Cavanagh

OVERVIEW

The Legislature is officially in **recess** for firearm deer season and Thanksgiving and is scheduled to return **November 29**. The Senate has passed legislation calling for Michigan's version of a healthcare insurance **exchange**. However, lawmakers failed to move enabling legislation for a **new bridge** across the Detroit River and they are still working on changes to Michigan's **no fault auto insurance** law. Other looming issues included expanding the **scope of practice** for nurse practitioners and specialty nurses, possibly revamping the enabling legislation of **Blue Cross/Blue Shield** (PA 350), deciding whether to enact legislation to make Michigan a "**right to work**" state, revising at least 3 articles of the **Uniform Commercial Code**, revamping the **personal property tax**, and revising the entire system of **transportation funding**, to name a few.

POLITICS

"Be careful what you wish for"

Greek adage

Going into the final weekend prior to the recall election of **Rep. Paul Scott (R-Grand Blanc)**, "robo call" polling showed him beating back the recall effort by a margin of 50 to 42 percent. However, by the wee hours of Wednesday morning, November 9, the day after the election, vote totals showed Scott being recalled by just over **200** votes out of almost **25,000** cast. In those early morning hours, state GOP officials considered a legal challenge to what they termed were "**voting irregularities.**" However, the next day Scott announced he would no longer serve in the legislature, thus ending a brief and controversial political career for now, as Scott is only 29 years old.

What did all this prove and what are the consequences? Well, it proves the **Michigan Education Association (MEA)** and organized labor still have plenty of money and clout. The MEA had targeted Scott because of his zeal in revamping Michigan's Teacher Tenure Law, something the MEA vehemently opposed. Toward its effort the MEA spent well in excess of **\$150,000** of its own funds. Not to be outdone, the Michigan GOP and its allies outspent the pro-recall forces. In the end nothing was or will be accomplished. The old adage "**be careful what you wish for**" seems appropriate in this case. A day after the Scott recall, **Speaker Jase Bolger** (R-Marshall) appointed **Rep. Tom McMillin** (R-Rochester) to replace Scott as House Education Committee Chair. McMillin is seen as **even more conservative** than Scott, if that's possible. Then, in order to fill the vacancy created by the recall, the general election will be held on February 28, 2012, the day of the **Republican Presidential Primary** in Michigan, almost assuring a Republican successor to Scott. In fact, Genesee County Republicans have chosen County Commissioner Joe Graves as their nominee. Then, in answer to the Scott recall effort and that waged against several GOP lawmakers, Republican

operatives began a recall effort against selected Democratic incumbent legislators. After spending a considerable amount of resources and time, the state GOP called off these attempts. Finally, even in the unlikely event that a Democrat succeeds Scott, the Republicans will still have a **solid House majority**, so all of this doesn't make a difference.

It would seem, then, that this is much ado about nothing. On the Democrats' side, time and money would have been better spent on placing another **initiative** on the November 2012 ballot, one which would "**gin up**" the Democratic base to ensure greater statewide turnout, such as repeal of the "**pension tax.**"

PENSION TAX CONSTITUTIONAL – FOR THE MOST PART

By a partisan 4-3 vote, the **Michigan Supreme Court** upheld most of the controversial provisions of **Public Act 38 of 2011**. The law imposes an individual income tax on pensions earned from jobs in the public sector and expands it to private sector pensions as well. However, the Court unanimously ruled as unconstitutional the provision in the law basing a pensioner's eligibility for exemptions on "**total household resources.**" That section of the law involves the phase out of the personal exemption that pensioners were able to claim starting with those earning **\$75,000** a year or more. That provision, the Court declared, violates the Michigan Constitution's ban on a **graduated income tax**. The Court said this portion of Public Act 38 was severable from the remainder of the law. The immediate problem posed by the Court's ruling is with the elimination of the exemption the current state budget is shorted approximately **\$60 million**. It appears both the Governor and the Legislature will have another matter to tackle.

UCC REVISIONS COULD PLACE MICHIGAN IN 21ST CENTURY

When the **Uniform Commercial Code (UCC)** was first published in **1952**, it attempted to harmonize the law of sales and other commercial transactions in all 50 states with the exception of Louisiana which has not adopted it in its entirety.

Many parts of Michigan's (UCC) have not been revised since first enacted in **1962**. Many business concerns, consumers and the National Conference of Commissioners on Uniform State Laws have been working on **upgrades** to the UCC to reflect a changing economy in an electronic age.

On November 9, the House Committee on Banking and Finance heard testimony from witnesses supporting a three bill package that would significantly revise Michigan's UCC. House Bills 5081, 5082 and 5083 would amend Articles 1, 7 and 9.

HB 5081 sponsored by **Rep. Matt Huuki (R-Atlantic Mine)** adds and redefines several terms in Article 1. It adds new language to the term "conspicuous" when describing warranties and "good faith" to mean not only "honest in fact," but also "and the observance of reasonable commercial standards

of fair dealing” It adds new terms such as “consumer,” “fungible goods,” “insolvent” and “record.” The bill also allows the parties to a transaction to agree upon which jurisdiction’s laws will govern the agreement.

HB 5082 sponsored by **Rep. Kevin Cotter (R-Mt. Pleasant)** makes revisions to Article 7 of the UCC, that article governing **common carriers** and **warehousemen**. The bill recognizes “**electronic documents of title**” or electronic warehouse receipts and bills of lading. It is believed that a revised Article 7 will help to solve many of the emerging issues in the new age of electronic rights and title transfer by incorporating consistent provisions for electronic documents of title. Moreover, adoption of a revised Article 7 will reflect business realities, make it easier for Michigan businesses to compete and participate in **interstate commerce** and place Michigan in line with the **40** other states that have already enacted it.

HB 5083 sponsored by **Rep. Ellen Cogen Lipton (D-Huntington Woods)** revises Article 9, the law governing the perfection of **secured transactions**. Among other things this bill adds a new term called “**public organic record**” which is a record available to the public in its original form, an organic record of business trust filed in its original or any filing amending the original, or a record of legislation enacted by a state legislature or Congress forming an organization. In addition, the bill creates rules **for collateral** to which a security interest attaches within four months after the debtor changes location to another jurisdiction. It also provides a format for an acceptable financing statement.

To date there has been no registered opposition to these revisions and a Committee vote on this legislative package is expected before the end of the year.

NO FAULT PIP BILL STALLED ON HOUSE FLOOR

The House Insurance Committee, by an almost totally partisan 9-7 vote, moved a substitute for **HB 4936** to the full House. That was on October 13 and since that time backers of the legislation have had a difficult time mustering the votes needed to pass the bill. This is due in large measure to the public relations campaign being waged by the health provider community and some lawyers. The bill ends lifetime benefits for people who are severely injured in an automobile accident. Currently, the **personal injury protection (PIP)** provision of Michigan’s No Fault Auto Insurance Law requires auto insurers to provide **unlimited medical coverage**. The substitute would end unlimited coverage and allow an insured to pick PIP coverage limits of **\$500,000, \$1 million or \$5 million**.

BLUE CROSS SEEKS TO BYPASS RATE SCRUTINY BY ATTORNEY GENERAL

In testimony before the Senate Insurance Committee over the past month, representatives of Blue

Cross & Blue Shield of Michigan (BCBS/M) advocated for amendments to its enabling act (PA 350 of 1980) which would **remove the attorney general's oversight** of its rate making and remove its statutory obligation to **subsidize** its Medicare supplemental policies. BCBS/M says these measures would "level the playing field" of health insurance competition. Opponents contend BCBS/M is a **public charitable trust** which requires attorney general oversight. Moreover, the obligation imposed on BCBS/M for a "**Medigap**" subsidy is in line with its mission as a charitable trust, for to eliminate the subsidy would dramatically increase costs for seniors. Finally, opponents contend that BCBS/M now holds nearly **70%** of the commercial market and will soon be in the Medicaid market with its purchase of **AmeriHealth Mercy**, a Pennsylvania based Medicaid Health Plan. Critics contend removing the attorney general's oversight authority and the obligation of the Medigap subsidy would only further expand its market share. Look for introduction of this or similar legislation before the end of the year.

DETROIT ON VERGE OF FISCAL COLLAPSE?

Mayor Dave Bing announced that the City of Detroit faces a **\$45 million** shortfall by June, the end of its fiscal year. In an effort to close this hole the Mayor said he planned to cut **1,000** city jobs by February, saving approximately **\$14 million**. Meantime, the Detroit City Council said the Mayor's plan wasn't enough and is coming up with a plan of its own which will include ending subsidies to the Detroit Zoo and museums, selling city owned parking lots, cutting recreation centers and cutting **1,700** jobs. Waiting in the wings is the Snyder Administration which earlier in the week indicated it expected Mayor Bing to ask for a **preliminary financial review**, the first step toward appointment of an **emergency manager**.

WORKERS' COMPENSATION REVISIONS COMING

Even though the Legislature is in recess, the Senate Committee on Reform, Restructuring and Reinventing will hear testimony on the House Substitute to **HB 5002**, which revises Michigan's **worker compensation** system. Among other things, the bill includes retirement payments that an employee is entitled to receive be deducted from his/her weekly benefit, increase from **10 to 45** the number of days the employer could choose the employee's treating physician and include the wages a worker **could be earning** and subtract that amount from the weekly benefit. A Committee vote is expected in December.

WORK GROUPS ASSIGNED FOR INTEGRATING DUAL ELIGIBLES

Four work groups have been appointed to make recommendations to the Department of Community Health (DCH) regarding integrating those people who qualify for both Medicare and Medicaid (**dual eligibles**) into a managed care system. It is felt that by coordinating care and avoiding "**churning**," the practice of going back and forth from system to system, the quality of care will improve with the

realization of significant savings. The first meetings were held last week and will continue until the middle of next month. The four work groups are **Performance Measurement and Quality Management, Service Array and Provider Network, Education Outreach and Enrollee Protections and Care Coordination and Assessment.**

SENATE PASSES HEALTHCARE INSURANCE EXCHANGE

By a vote of **25-12** the Senate passed a Substitute to SB 693 creating the **MiHEALTH MARKETPLACE**. MiHEALTH MARKETPLACE is Michigan's alternative to the healthcare insurance **exchange** mandated by the federal **Patient Protection and Affordable Care Act (PPACA)**. All of the **"nay"** votes came from Republicans who oppose the PPACA on principle and believe enactment of an exchange only acts to further legitimize the federal act. Others believe that it is far better to create a Michigan exchange rather than have the federal government step in and create and operate one of its own. The bill is now with the House Committee on **Health Policy**. The Chair of that Committee, **Rep. Gail Haines (R-Lake Angelus)**, has indicated she intends to hold more hearings on the matter, and frankly, is in no hurry to report it to the full House. In fact, many members of her Caucus do not want a vote to take place until the U.S. Supreme Court decides upon the constitutionality of PPACA, a decision which is expected next June. Unlike their Senate counterparts, all House members who are not term limited face re-election next year. Many fear casting a vote in favor of anything seen as furthering the cause of **"Obamacare"** will subject them to a Primary fight against well funded **"Tea Party"** conservatives.

HEAVYWEIGHT FIGHT – BLUE CROSS AND BEAUMONT SQUARE OFF

Beaumont Health System, Inc. has said it is opting out of the **Blue Cross Network (BCN)**. This decision leaves patients with BCN coverage in the lurch because their medical bills will not be paid.

The current contract between Beaumont and Blue Cross **expires** at the end of the year. At issue are the reimbursement rates Blue Cross pays to Beaumont. Beaumont officials want a **9 percent** increase over a **3-year** period. Blue Cross is offering a **2.6 percent** inflationary increase for next year in addition to sums based on a **value based incentive agreement**. The value based incentive agreement focuses on cutting healthcare costs through a proactive approach to medicine. Beaumont counters by insisting it is already engaged in this practice and has one of the best patient outcome rates in the country. Beaumont believes the hard line taken by Blue Cross is another effort by it to use its **market power** to deny fair rates. Negotiations continue in earnest, but time is growing short.

EXPANSION OF NURSES' SCOPE OF PRACTICE STAYING PUT FOR NOW

Senate Bill 481 sponsored by **Sen. Mark Jansen (R-Grand Rapids)** and **House Bill 4774** sponsored by **Rep. Lesia Liss (D-Warren)** have remained in their first House Committees since being

introduced in June. They would allow nurse practitioners to order, conduct and interpret diagnostic tests including those involving imaging. Medical groups such as the Michigan State Medical Society are actively opposing this legislation. This promises to be a hard fight in the months to come as the effort, backed by the **Michigan Nurses Association**, will be well financed.

ON THE HORIZON

- Look for an effort to **reduce** the number of occupations the **state licenses**.
- Either through an Executive Order or by way of a “negative” supplemental appropriation, look for the **\$60 million** hole in the state budget created by the recent Michigan Supreme Court decision in, *In Re: Request for Advisory Opinion Regarding Constitutionality of PA 38* to be closed by January 1.
- It looks like work on reform of Michigan’s **personal property tax** levied on businesses will wait until next year.
- With a recent **EPIC-MRA** poll showing **President Obama** trailing **former Governor Mitt Romney** among Michigan voters, look for a number of Presidential visits to the Great Lakes state in the next few months.
- Legislation will soon be introduced establishing a **protocol for audits** by pharmacy benefit managers of pharmacists.
- Look for an attempt by the Legislature to “test the waters” for **transportation funding** reform. However, if there is the slightest political pushback against **increased registration fees**, the Legislature will back off, especially as we approach an election year.
- In early 2012 conservatives will explore the likelihood of enacting some form of “**right to work**” legislation. If there is no appetite by the spring break, the effort will be dropped for this legislative session.
- The **Office of Regulatory Reform (ORR) Advisory Committees** created by Executive Order continue to work toward issuing their recommendations toward reforms in both administrative rule and statute. The Advisory Committees will make recommendations on the **environment, insurance and finance, liquor control, natural resources, occupational licensing, workplace safety and inspections** and **permitting**.
- After efforts in the last two legislative sessions failed, it appears there is now some momentum toward enactment of legislation to require health insurers to at least offer **coverage for autism**. Proponents of the legislation want health insurers to be **mandated** to “cover” the condition, but it now appears support is growing for a mandatory “offer.” It

also appears the vehicle to be used will be **SB 415** sponsored by **Sen. Tupac Hunter (D-Detroit)**.

- It looks as if opponents of Michigan's new **emergency manager law** will gain enough valid petition signatures to put the statute up for a **referendum vote**. Over **161,000** valid signatures are needed by the end of March. By the first week of November, repeal advocates claimed they had **200,000** valid signatures.
- After hearing oral argument earlier this month, the **Michigan Supreme Court** will decide the question of whether the **Natural Resources and Environmental Protection Act** authorizes a circuit court to order a local government to install a municipal sanitary sewer system when a private system fails. In *DEQ v Worth Township*, SC Docket No. 141810, privately owned septic tanks discharged waste into **Lake Huron**, but the township did not install a public sanitary sewer system. The circuit court ruled for the DEQ, but the **Court of Appeals** overturned the circuit court in a split decision.