Declaratory Ruling 93-15918-M

1993 PA 143 -- Validity of Referendum and effective date

December 22, 1993

I. BACKGROUND

A. The Request for Declaratory Ruling

The Michigan Association of Insurance Companies ("MAIC") is an association of insurance companies that provides casualty insurance, including automobile insurance, in Michigan. The MAIC filed a request for declaratory ruling dated November 24, 1993, which is attached as Attachment A. The Automobile Club Insurance Association and the Farm Bureau Mutual Insurance Company of Michigan joined in the request. These companies provide automobile insurance pursuant to the insurance laws of Michigan, in particular pursuant to the no-fault and essential insurance provisions of the Insurance Code of 1956, as amended (the "Insurance Code"), MCLA 500.100 et seq.; MSA 24.1100 et seq.

The applicants for a declaratory ruling filed a supplement to their request dated December 2, 1993 (the "Supplement"). In the Supplement, which is attached as Attachment B, they made certifications. They also augmented their request for declaratory ruling by a document entitled No-Fault Insurance Issues If Referendum Petitions Remain Uncertified After April 1, 1994 (the "Issues Document"). The Issues Document is attached as Attachment C. On December 20, 1993 the request was further amended, through correspondence with the Commissioner, to revise the questions presented. (Attachments D & E).

In the Supplement, the applicants certify as follows:

> 1. 1993 PA 143[1] makes significant changes in the no-fault and essential insurance provisions of the Insurance Code.
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> 2. 1993 PA 143 was signed by Governor John Engler on August 6, 1993.
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> 3. 1993 PA 143 will take effect upon the expiration of ninety days from the end of the current legislative session.
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> 4. Opponents of 1993 PA 143 appeared before the State Board of Canvassers on November 7, 1993 to advise the Board of their intention to circulate a petition calling for a referendum on 1993 PA 143 on November 8, 1994.Upon information and belief, that petition is being circulated for signature.

5. The following statutes and rules are known to the applicants and are relevant to this declaratory request: 1993 PA 143; MCL 168.471 to 168.486; MSA 6. 1471 to 6.1486; MCL 24.263; MSA 3.560(163); 1963 Const, art 2, sec 9; 1963 Const, art 4, sec 24; 1908 Const, art 5, sec 1; 1908 Const, art 5, sec 2; 1908 Const, art 5, sec 21. The applicants have also cited additional authority in their November 24, 1993 letter. The above statutes and rules, coupled with the statutes and rules cited in the November 24, 1993 letter, are all of the statutes and rules which the applicants seek to have considered by the Commissioner in making the declaratory ruling.

These certifications, along with the facts and analysis contained in the November 24, 1993 letter, underlie the applicants' request that the Commissioner of Insurance ("Commissioner"), issue a declaratory ruling as to the following questions:

1. Does the mere filing of a referendum petition with the Secretary of State within 90 days following the final adjournment of the legislative session at which 1993 PA 143 was enacted (the "90 day period") properly invoke the power of referendum such that 1993 PA 143 would not become effective, not become a part of Michigan's insurance laws, and, thus, not be applicable to automobile insurance companies unless and until approved by a majority of electors voting thereon at the next general election?

2. If the Board of State Canvassers (the "Board") has within the 90 day period not taken definitive action with respect to the referendum petition, has the power of referendum properly been invoked such that 1993 PA 143 does not become effective unless and until it is approved by a majority of electors voting thereon at the next general election?

3. If not, and if the Board declares the sufficiency of the referendum petition subsequent to the end of the 90 day period, would that cause the referendum power to be properly invoked?

4. If yes, as of what date would 1993 PA 143 be ineffective?

5. If the answer to question 2 is yes, and if the Board subsequent to the end of the 90 day period declares the insufficiency of the referendum petition, would that determination mean that 1993 PA 143 becomes effective, becomes a part of Michigan's insurance laws, and, thus, applicable to automobile insurance companies?

6. If yes, would the effective date of 1993 PA 143 be its originally scheduled effective date of April 1, 1994?

B. The Commissioner is Authorized to Issue this Declaratory Ruling

The Commissioner is authorized generally to issue declaratory rulings pursuant to Section 63 of the Administrative Procedures Act of 1969, as amended, (the "APA"), MCLA 24.201 et seq.; MSA 3.560(101) et seq.:

> On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

The applicants are obviously interested persons as to the effective date of laws that regulate them and the insurance they sell. Their request for declaratory ruling relates to an actual state of facts arising from the scheduled April 1, 1994, effective date of Public Act 143 of 1993 ("1993 PA 143") and the uncertainty as to that effective date arising from the circulation of a petition calling for a referendum respecting 1993 PA 143.The request relates to the applicability of laws administered by the Commissioner in that the applicants seek to ascertain which insurance liars will apply to their operations on and after April 1, 1994.

In determining that the Commissioner is authorized to issue this declaratory ruling, the Commissioner is aware of the doctrine that an agency may not pass upon the constitutionality of a statute the agency administers. See *Davis, 1982 Supplement to Administrative Law Treatise*. (1982) Here, however, the Commissioner is not called upon to pass on the constitutionality of 1993 PA 143 or any other provision of the insurance laws administered under the Commissioner's authority. Instead, the question concerns the impact of certain constitutional provisions on the effective date of a new insurance law in the light of a referendum petition drive currently under way respecting that law. Hence the declaratory ruling is in furtherance of the administration of Michigan's insurance laws.

Under Michigan case law, the Commissioner has jurisdiction to resolve issues, such as the effective date of statutes he administers, even though these issues are couched in constitutional terms. In *Universal AM-CAN* v *Atty Gen*, 197 Mich App 34, 37-38 (1992), the Court stated:

> …While the PSC has jurisdiction over the enforcement of the Motor Carrier Act, it has generally been held that an agency that exercises quasi-judicial authority does not possess the power to determine the constitutionality of statutes . . . However, if the agency is merely asked to

> resolve issues couched in constitutional terms that do not involve the validity of a statute, it has jurisdiction to do so.[Citations omitted.]

C. The Public Importance of Resolving This Issue Warrants the Commissioner Issuing a Declaratory Ruling

The issuance of a declaratory ruling under Section 63 of the APA is a matter of discretion with the Commissioner. Every consideration warrants the Commissioner issuing a declaratory ruling in response to this request. 1993 PA 143 brings about profound and far-reaching changes as to automobile insurance in Michigan. A few of these major changes are as follows:

> 1. Automobile insurance premiums are reduced by 16% on an average statewide basis.
>
> 2. The introduction of consumer choice as to personal injury protection (PIP) medical benefit maximum levels, thus changing the present system of mandatory unlimited benefit levels.
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> 3. Limitations on medical provider charges in respect of PIP benefits.
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> 4. Further constrictions on the threshold for tort suits for non-economic loss.
>
> 5. The introduction of a new requirement for substantial uniformity of loss ratios by company and by territory.
>
> 6. Larger companies required to have an active agent in each of their territories.
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> 7. Elimination of complex current requirements related to the development of an insurer's rate by territory.
>
> 8. Elimination of prior insurance as an underwriting requirement.

Whether and when 1993 PA 143 takes effect is critical to insurers and insureds alike. It is exactly because of the importance of the changes the new law would bring about that uncertainty as to when they take effect, and particularly any retroactive effect as to those changes, would produce chaos in the insurance industry.

The disruption and confusion to policyholders, insurers, health providers, accident victims, and the public in general would be rampant. There could be wrenching swings back and forth in the law involving rates, coverage’s, rights to sue in tort, benefits, rating territories, and provider fees. The gravity of this situation warrants quoting at length from one of the scenarios the applicants set forth in their Issues Document [pp 2-3]:

Scenario Two: Act 143 is suspended as of its effective date of April 1, 1994, but is reinstated on or about September 8, 1994, on a retroactive basis.

This scenario would be disastrous for consumers and insurance companies alike. Moreover, if it is assumed that Act 143 is suspended upon the filing of an uncertified petition, which is later determined to be deficient could, and perhaps should, be viewed as a legal nullity for all purposes including that of suspending the effectiveness of the new law. In any event, lawsuits asserting that claim would be inevitable.

Under this scenario, if the Board of Canvassers determines on or about September 8, 1994, that the petition is deficient, insurance companies will have been in noncompliance with, and consumers will have been denied the benefits of, the new law for over five months. Changes which should have been instituted on April 1, 1994, will not have been. Among them:

— Elimination of prior insurance requirements.

— Use of standardized applications and declaration forms.

— Regulation of direct repair shop programs.

In addition, policies which were issued or renewed in August and early September, 1994, and which, under the new law, should have provided rate rollbacks, limitations on medical benefits, uniformity between rating territories, and informal dispute resolution procedures will not have any of these features because they will have been issued under the erroneous assumption the old law was still effective. Furthermore, policy renewals due in the last three weeks of September and the entire month of October will be so far along in the renewal process (renewal notices and invoices based on the old law and old rating territories will already have been sent to policyholders) that it will be impossible to issue renewals under the new law. And for new policies issued or renewed before January 1995, insurance companies will be deprived of the full 120-day implementation period and, as a result, it is highly doubtful that many of those policies could be issued in compliance with the new law. Insurance companies will be confronted with the choice of issuing policies which are known not to comply with the new law or issuing no new or renewal policies at all. If the first option is selected, companies will expose them elves to lawsuits from insureds and licensure or enforcement actions by the Insurance Bureau. If companies select the second option, hundreds of thousands — perhaps millions — of Michigan motorists will be unable to obtain insurance (and new license plates, for that matter) until such time as the companies are capable of issuing policies which comply with the new law.

In addition to the legal and practical problems presented by the scenario set forth above, confusion among policyholders would be overwhelming. The applicants set forth causes of this confusion in their November 24, 1993 request [pp 16-17]:

> …If the Board of Canvassers is able to put off its determination as to the sufficiency of the petition until two months prior to the November general election, it would mean that Act 143 would go into effect on April 1, 1994, subject to being suspended on or before September 8, 1994.By August, approximately 830,000 Michigan policyholders will have selected new medical and liability limitations, received their rate rollbacks, and, be subject to most of the new law's provisions. Other policyholders whose policies are due for renewal in September and October will have received notices as to new premium rates and coverage options, and many of them will have selected the options they prefer. In addition, all lawsuits filed on or after August 1, 1994 will be subject to the tort reform provisions of the new law. Suspension of the new law would leave the rights of policyholders who have already been converted to the new system in limbo. It would also raise serious questions with wide-reaching implications for parties involved in litigation initiated after August 1, 1994.And it would cause massive confusion for those policyholders who receive notices about their new rates and coverage terms, only to be confronted later by policies issued under the old law. In short, the automobile insurance industry will be in chaos.

Clearly, uncertainty as to the effective date of 1993 PA 143 and potential retroactive shifts as to which insurance laws are in effect and when they are in effect, would bring about shocking disorder in the insurance industry. There is every reason to issue this expedited declaratory ruling. In doing so, the Commissioner is mindful of purposes underlying a constitution as expressed by a leading Michigan jurist and scholar in Cooley, *The General Principles of Constitutional Law in the United States of America* [pp 22]:

> … A constitution is valuable in proportion as it is suited to the circumstances, desires, and aspirations of the people, and as it contains within itself the elements of stability, permanence, and security against disorder and revolution …

II. ANALYSIS

A. Constitutional Provisions

Invoking the referendum power is a serious matter, because once it is properly invoked a duly enacted statute is prevented from coming into effect or, in the case of statutes given immediate effect, the statute is rendered ineffective, unless and until a majority of electors voting thereon approves the statute at the next general election.

The questions before the Commissioner revolve around what steps need be taken and by whom within the 90-day period following the final adjournment of the legislative session in which 1993 PA 143 was enacted, in order properly to invoke the referendum power. This is a question of first impression, as no Michigan court appears to have ruled exactly

upon it. There is, however, an unpublished, informal letter opinion of the Attorney General, dated March 28, 1988, to C. Patrick Babcock which treats with this issue and which is discussed below.(Attachment F)

The process for invoking the power of referendum is governed mainly by Art. 2, Sec. 9 of the 1963 Constitution. This provision provides, in pertinent part, as respects the referendum power:

> The people reserve to themselves…the power to approve or reject laws enacted by the legislature, called the referendum…The power of referendum…*must be invoked* in the manner prescribed by law *within 90 days* following the final adjournment of the legislative session at which the law was enacted. *To invoke* the…referendum, petitions signed by a number of registered electors, not less than…five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> No law as to which the power of referendum *properly has been invoked* shall be effective thereafter unless approved by a majority of electors voting thereon at the next general election. (Emphasis added)

It should be noted at the outset that Art. 2, Sec. 9 of the 1963 Constitution was intended to be self-executing, even though much of the "legislative detail" contained in the predecessor provision (Article V, Sec. 1, of the 1908 Constitution) was eliminated in Art. 2, Sec. 9.As stated in the Convention Comment:

> Matters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear, however, that section is self-executing and the legislature cannot thwart the popular will by refusing to act.

This means, at the very least, that one must look first to the language of the Constitution to determine how its self-executing provisions operate and only then should one turn to enabling legislation; only such legislation which is consistent with the provisions of the Constitution will be upheld. Cooley, *supra*, p 24; *Wolverine Gold Club* v *Hare*, 384 Mich 461 (1971).

B. The 90 Day Rule for Invoking Referendum Power is Clearly of a Piece With the 90 Day Rule For the Effective Date of Laws

The requirement that the referendum power must be invoked with respect to a law within 90 days of the final adjournment of the session of the legislature, which enacted the law, is clearly related to Art 4, Sec. 27 of the 1963 Constitution which provides that:

> No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, …[exception to this for acts given immediate effect].

In the case of 1993 PA 143, the law will take effect 90 days after final adjournment of the current legislative session under the normal constitutional rule (Art. 4, Sec. 27). The obvious parallel reference in Art. 2, Sec. 9, is that the power of referendum must be invoked, if at all, during this same 90 day period measured in the same way as in Art. 4, Sec. 27.

The obvious intended effect of properly invoking the referendum power with respect to a newly enacted law is to prevent the law from becoming effective at the time it would normally become effective and to keep it ineffective unless and until approved by the electors at the next general election.

The clear intention and expectation of these constitutional provisions was that most laws would not be given immediate effect, but would come into effect 90 days after the Legislature adjourned that the referendum power would have to be invoked during that same 90 day period. The result in this normative case is that no question of a law coming into effect and then being put out of effect by the invoking of the referendum power ever arises, because that power must be properly invoked prior to the time that the law in question would normally come into effect.

The Constitution Convention recognized that a more complex situation was created in the case of laws given immediate effect, which required a 2/3's vote of each house, but the expectation of what would happen in the normal case, such as 1993 PA 143, was very clear.

C. Michigan's Constitutional Doctrine Since the Very Beginning of the Provision of the Referendum Power Has Required Adherence to Safeguards to Prevent Its Abuse

The power, to prevent the effectiveness of a law regularly passed by the Legislature, which can be invoked by only 1/20 of the members of electors voting for governor at the preceding election, is a substantial and solemn one, such that all safeguards for its exercise provided by law should be carefully adhered to. Indeed, the first Supreme Court consideration of the referendum power came close in time to the adoption of the referendum power by amendment to the 1908 Constitution and remains good law today, and makes this point emphatically. In *Thompson* v *Secretary of State*, 192 Mich 512, 522-23 (1916), the Supreme Court said:

> Under the referendum clause of the Constitution one twentieth of the electors of the State may suspend the operation, until the next general election, of any act of the legislature, however important, except acts making appropriations and such as are immediately necessary for the preservation of the public peace, health, and safety. And, as in this case, such suspension may be for more than a year. Where a power so great as this is vested in a minority of the people, every safeguard provided by law against its irregular or fraudulent exercise should be carefully maintained. It is true that no issues have been framed to determine the truth or falsity of the charges of fraud made by relators in this case. This is because respondent is not given any power to investigate those charges, and mandamus will issue only to compel the

> performance of a plain legal duty. He must canvass the petition as it is filed in his office, and can look no further. But he should be careful to see that its various sections comply with the requirements of the Constitution fairly and reasonably construed. Whatever other purpose these requirements may have, it is plainly to be seen that each and every one was intended to safeguard the honesty of the petition. And each and every one is mandatory and must be complied with. [Emphasis supplied]

D. The Constitutional Safeguards Concerning the Referendum Power Turn Strongly On the Meaning of Being "Properly Invoked" During the 90-Day Period

These constitutional safeguards turn importantly on the meaning of the term "invoke" which is used three times in Art. 2, Sec. 9. The power of referendum "must be invoked" in the manner prescribed by law within 90 days of the final adjournment of the session of the legislature in which the law was enacted. "To invoke the . . . referendum" the constitution requires petitions signed by registered electors not less than 5% of the total vote for governor in the last election at which a governor was elected. Finally, no law as to which the "…power of referendum was properly invoked" shall become "*effective thereafter*" unless approved by a majority of electors voting on the question in the next general election.

The 1963 constitution does not provide a definition of "invoke" or "properly invoked," but terms in a constitution are to be given a common sense general meaning, rather than a technical or obscure one, unless the context clearly indicates otherwise.

The Random House Dictionary of the English Language, 2nd Edition, Unabridged, defines "invoke" as follows:

> …3. to declare to be binding or in effect: to invoke the law; to invoke a veto…7. to cause, call forth, or bring about…

Invoke would seem to have the common sense meaning of bringing something into effect, to cause something to be binding or in effect. To invoke the power of referendum thus means to bring it into effect in a binding way. In this constitutional context, bringing the power of referendum into effect means to prevent an act of the legislature from coming into effect or in the case of laws given immediate effect from remaining in effect after the power has been invoked unless and until the electors approve that act at the next general election.

But under the Constitution this happens only when the power has been "properly invoked." The same dictionary defines proper as follows:

> 1. adapted or appropriate to the purpose or circumstances; fit; suitable; 2. conforming to established standards of behavior or manners; 3. fitting; right:…

The term "proper" in its relevant common sense meaning connotes the notion of being appropriate to the purpose or circumstances, a sense of being fit or suitable, of conforming correctly to established standards of behavior. In addition, the power of referendum must be invoked in the "manner prescribed by law."

To this point, it would seem that:

(a) The power of referendum must be brought into effect in a binding way in a manner appropriate to the circumstances;

(b) This means, at least, it would seem that the power must be brought into effect in the "manner prescribed by law";

(c) The power must be brought into effect within the prescribed 90 day period.

E. In the Absence of Implementing Legislation, Michigan Courts Would Construct a Process that Gave Effect To All the Requirements of the Referendum Provisions

Keeping in mind the central question — what must be done and by whom within the 90 day period to invoke the power of referendum and bearing also in mind that we deal with a self-executing constitutional provision, it may prove helpful to the analysis to consider what the Michigan courts might require to be done, as a constitutional minimum, in order to determine whether the power of referendum had been properly invoked — assuming that the Legislature had failed to provide implementing legislation or had done so incompletely.

This analysis is suggested as a way of focusing consideration on the self-executing nature of these provisions and the generally accepted Michigan constitutional doctrine that an interpretation of the constitution that gives effect to all of the relevant provisions will always be preferred to one that requires the ignoring of some of those provisions.

There is ample Michigan authority for the proposition that courts will not allow a self-executing provision of the constitution to become ineffective or frustrated because of the legislature's failure to enact implementing legislation. *Wolverine Golf Club* v.*Sec. of State*, 24 Mich App 711, 728-729 (1970)

A court would, it is believed, focus first on the central concrete constitutional provision dealing with the invocation of the referendum power:

> To invoke the…referendum, petitions signed by a number of registered electors, not less than…five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

A court would next create a process reasonably calculated to determine that the referendum petitions actually contained the requisite number of valid signatures of qualified, registered electors.

A court would not ignore, but would enforce the constitutional requirement that the referendum power must be invoked within the 90-day period by requiring that the determinations described above concerning the petition signature be completed within the requisite 90-day period. Otherwise, the constitutional requirement concerning invocation of the referendum, viz., the requisite number of registered elector signatures, would not have been ascertained within the requisite time period.

Michigan courts have also made clear that the beginning of the time period for invoking the referendum power is not the final day of adjournment of the legislative session in which the law was enacted. Instead, the beginning of the period is the date upon which the law was enacted in accordance with the applicable constitutional provisions. *Michigan Farm Bureau* v *Secretary of State*, 379 Mich 387 (1967).In the instant case, the beginning date is August 6, 1993.The ending date of the period is explicitly prescribed and can always be measured precisely, viz., 90 days after the final adjournment of the legislative session enacting the law which is the subject of the referendum petition.

Some significance may be attached to this doctrine. It means that there will always be at least 90 days in which properly to invoke the referendum power. It means also that in the normal case, there will be a considerably longer period for the process for invoking the referendum power to be definitely completed. In the instant case the relevant period began on August 6, 1993 and runs until March 31, 1994 — 237 days or almost 3 times the constitutional minimum.

This precise ending date is of great constitutional significance and must be strictly observed, if all the constitutional provisions are to be given effect and weight. If the power of referendum has been properly invoked during the prescribed, precisely measured period, the law which is the subject of the referendum does not go into effect or in the case of a law given immediate effect becomes ineffective as of the date the referendum power has been properly invoked and remains so unless and until approved by a majority of the electors voting thereon at the next general election. The last date upon which the referendum power can be properly invoked is in all cases the 90th day of the prescribed period.

There is simply no constitutional provision for reviving a law after that 90th day, except a vote thereon by the electors at the next general election.

Definiteness on this point is of great public importance. The public simply must know whether a law is in effect or not and when it came into effect. This is nowhere more true than with respect to 1993 PA 143 which, as previously noted, has many complex requirements and creates a myriad of new responsibilities and rights and significantly alters others.

For all these reasons, one may be confident that Michigan courts implementing this self-executing provision would insist, as a constitutional minimum, that the prescribed constitutional deadline be adhered to and that properly to invoke this referendum power the process for determining whether the referendum petitions actually contained the requisite number of valid signatures of qualified, registered electors must be completed within the 90-day period.

F. Implementing Legislation of a Self-Executing Constitutional Provision Must Be Governed By the Same Constitutional Standards as a Court Created Implementation

While a court would undoubtedly not require the Legislature to arrive at the same precise method for making the constitutionally mandated determination in respect of referendum petitions that a court might adopt, there seems little doubt that legislative implementation of self-executing constitutional provisions would be subject to the same constitutional standards.

It is thus appropriate to turn now to an examination of provisions of law that bear upon the central constitutional question surrounding the invocation of the referendum power, viz. a determination of the constitutional sufficiency of the number of signatures by registered electors.

The legislature has provided a process for making the requisite determination and has delegated that responsibility to the State Board of Canvassers.

Section 473 of the Michigan Election Law, MCLA 168.473, MSA 6.1473, provides:

> Referendum petitions shall be presented to and filed with the secretary of state within 90 days after the final adjournment of the legislature.

Section 475 of the Michigan Election Law, MCLA 168.475; MSA 6.1475, provides:

> Upon the filing of a petition under this chapter, the secretary of state shall immediately notify the board of state canvassers of the filing of the petition. The notification shall be by first class mail.

Section 476 of the Michigan Election Law, MCLA 168.476; MSA 6.1476, provides:

> Upon receipt of said petitions, said board shall canvass the same to ascertain if such petitions have been signed by the requisite number of qualified and registered electors, and for the purpose of determining the validity thereof, may cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which said petitions were circulated for properly determining the authenticity of such signatures. It shall be the duty of the clerk of any political subdivision to cooperate fully with said board in any request made to said clerks by said board in determining the validity of doubtful signatures by

> rechecking the same against registration records, and said clerk shall make the requested rechecks in an expeditious and proper manner. Said board may hold hearings upon any complaints filed or for any purpose deemed necessary by said board to conduct investigations of said petitions, and to conduct said hearings said board shall have the power to issue subpoenas and to administer oaths. Said board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes, but shall complete said canvass at least 2 months prior to the election at which such proposals are to be submitted.

Examining these provisions in the light of the constitutional requirements, it appears clear that Section 473 and Section 475 are not in conflict with the constitution. The referendum petitions must be presented to and filed with the Secretary of State within 90-days of the final adjournment of the legislature. In light of the constitutional requirements, this provision must be read to mean final adjournment of the legislative session at which the law in question was enacted.

The Secretary of State has no substantive responsibilities with respect to the validity or sufficiency of the signatures on the petitions and simply must "immediately notify" the canvassers of the filing of the petitions.

The canvassers, on the other hand, are delegated the substantive responsibilities with respect to the petitions and are specifically required "to canvass the same to ascertain if such petitions have been signed by the requisite number of qualified and registered electors . . . " [Sec. 476]. The provision then provides a process for determining the validity of signatures. The provision then requires the canvassers to "…complete the canvass at least 2 months prior to the election at which such proposals are to be submitted."

These provisions prescribe the manner in which the power of referendum must be invoked. However, to the extent that Sec. 476 would permit the canvass of referendum petitions to be completed *after* the expiration of the 90-day period following the adjournment of the legislative session at which the subject law was enacted, the provision does not appear to accord with the constitutional requirement that the referendum power be invoked within the 90-day period.

To allow the canvass to extend beyond the end of the 90-day period would create the possibility for one of several untoward and unconstitutional scenarios to play out. First, it could allow the law to become effective at the end of the 90-day period, subject to its subsequently being made ineffective when the canvass was complete and the canvassers found that the petitions had been signed by the "…requisite number of qualified and registered electors."

Such a result would take into account the normal effective date of laws (90-days after adjournment), but would conflict with the deadline for preventing a law from coming into

effect or in the case of laws given immediate effect rendering the law ineffective by referendum petition (within 90-days after adjournment).

Second, it could mean that a law duly enacted by the legislature could be prevented from going into effect or rendered ineffective by the mere filing of the referendum petitions within the 90-day period without the completion or even commencement of the canvass prescribed by law within that same 90-day period. That apparently ineffective law would be subject to being revised at a later point, if the canvass found that the petitions were not signed by "…the requisite number of qualified and registered electors."

This result clearly is not in accordance with the requirements of the constitution. The referendum power must either have been properly invoked in the manner provided by law within the 90-day period or not. If a mere filing can invoke the referendum power, then there is little meaning to the constitutional requirement concerning the requisite number of signatures by registered electors. A canvass finding subsequent to the end of the 90-day period that the requisite number of qualified and registered electors had not executed the petitions must mean that the petitions were not valid as filed and that the power of referendum had not been properly invoked within the 90-day period. This, in turn, arguably means that the law in question was not rendered ineffective at the end of the 90-day period and presumably was in effect at that time.

Further, this result fails to pay respect to the provision that states that "No law as to which the referendum power properly has been invoked shall be effective thereafter . . . " until approved by the electors. Clearly for the provision to have its obvious intended purpose, the public needs to know with certainty at the end of the 90-day period, whether a law is or is not in effect and, if not in effect, whether it will or will not remain ineffective until a subsequent approval of the electors.

To have complex legislation, such as 1993 PA 143 or criminal statutes, remain in constitutional and effectiveness limbo for periods of time after the expiration of the 90-day period — subject to revival or even retrospective effectiveness — is not concurrent with the precise language of the constitution which provides a definite, always ascertainable date by which the effectiveness of legislation can be determined. Such a result also flies in the face of the teaching of the *Thompson* case.

Such a result also fails to pay due respect to *In re Proposals D & H*, 417 Mich 409 (1983), where the court, in respect of the parallel constitutional provisions governing the exercise of the initiative, required the full statutory process concerning the canvass of petitions to be completed before the legislature was required to begin its constitutional duties concerning legislation proposed by initiative. The court clearly held that a mere filing of the initiative petitions with the Secretary of State was an insufficient event to trigger the beginning of the 40-days during which the legislature may take prescribed action concerning the initiated legislation.

If a mere filing of initiative petitions with the Secretary of State will not trigger the beginning of a constitutional process with respect to the initiated legislation, it is difficult

to see how the mere filing of referendum petitions with the Secretary of State, without conclusive action by the canvassers, within the 90-days can have the constitutional effect of invoking the referendum power and preventing thereafter the effectiveness of a law duly enacted by the legislature.

III. RULING

A. Ruling, If Commissioner's Analysis Alone Were Controlling

Based on the foregoing analysis, the Commissioner would make the following rulings if he believed that he were not constrained by an Attorney General's informal opinion discussed in section B below:

> 1. Does the mere filing of a referendum petition with the Secretary of State within 90-days following the final adjournment of the legislative session at which 1993 PA 143 was enacted (the "90-day period") properly invoke the power of referendum such that 1993 PA 143 would not become effective, not become a part of Michigan's insurance laws, and, thus, not be applicable to automobile insurance companies unless and until approved by a majority of electors voting thereon at the next general election?
>
> No. The mere filing of referendum petitions with the Secretary of State within the 90-day period would not properly invoke the power of referendum and would not stay the effectiveness of 1993 PA 143.
>
> 2. If the Board of State Canvassers (the "Board") has within the 90-day period not taken definitive action with respect to the referendum petition, has the power of referendum properly been invoked such that 1993 PA 143 does not become effective unless and until it is approved by a majority of electors voting thereon at the next general election?
>
> No. The fact that the Board of Canvassers has not completed its work such that definitive action by the Board with respect to the referendum petitions has not been taken within the 90-day period means that the power of referendum has not been properly invoked as required by the constitution and 1993 PA 143 would go into effect on April 1, 1994.
>
> 3. If not, and if the Board declares the sufficiency of the referendum petition subsequent to the end of the 90-day period, would that cause the referendum power to be properly invoked?
>
> No. There is no constitutional power properly to invoke the power of referendum beyond the end of 90-day period by action of the Board of Canvassers or otherwise.
>
> 4. If yes, as of what date would 1993 PA 143 be ineffective?

In light of the answer to Question 3, this question is inapplicable.

5. If the answer to question 2 is yes, and if the Board subsequent to the end of the 90-day period declares the insufficiency of the referendum petition, would that determination mean that 1993 PA 143 becomes effective, becomes a part of Michigan's insurance laws, and, thus, applicable to automobile insurance companies?

In light of the answer to Question 3, this question is inapplicable.

6. If yes, would the effective date of 1993 PA 143 be its originally scheduled effective date of April 1, 1994?

In view of the response to Question 5, this question is inapplicable.

B. The Attorney General's March 28, 1988 Informal Opinion

On March 28, 1988 the Attorney General issued an unpublished, informal opinion to C. Patrick Babcock, Director, Department of Social Services, attached as Attachment F, which treats with some of the issues and questions under consideration in this declaratory ruling.

The careful thought and scholarship evinced in the formal published opinions of the Attorney General over the past 30 years have justly won him high regard throughout this state and the rest of the country. However, his March 28, 1988 letter opinion is clearly not of that nature, but seems, rather, a quick response to an immediate crisis. A number of other considerations leads the Commissioner, even though feeling bound by the letter, to state his own views and the conclusions he would have reached, but for that letter.

1.Section 63 of the APA charges the Commissioner, not the Attorney General, with the responsibility of issuing a declaratory ruling as to the applicability of 1993 PA 143.

2.The Commissioner is in a unique position to apprehend the chaos that may result in the event the effective date of 1993 PA 143 is suspended by the mere filing of an initiative petition without certification by the Board of Canvassers. The grave practical, social, and economic consequences manifest in the context of this request for declaratory ruling might well have led the Attorney General to conclude other than he did in the March 28, 1988 letter had he confronted these issues rather than those actually before him in 1988.

3.The March 28, 1988 letter appears to be inconsistent with a May 7, 1976 letter, attached as Attachment G, to the Honorable H. Lynn Jondahl, State Representative, concerning time periods with respect to initiative petitions. This analysis was subsequently confirmed by the Supreme Court in *In Re Proposals D & H, supra*.

4.The March 28, 1988 letter does not cite the highly relevant judicial authority referred to above.In particular, *Thompson* and *In Re Proposals D & H*, *supra* are crucial to the proper resolution of these questions.

5.It is difficult to determine what weight to accord an unpublished, informal Attorney General's opinion addressed to another official within the administration on a date over 5 years in the past. Indeed, the Commissioner would, in the normal course, have no knowledge of the existence of such an opinion and would not have had such knowledge in this case, if the opinion had not been a part of the materials submitted in connection with the request for this declaratory ruling.

Nevertheless, because the Commissioner ventures outside his normal realm of presumed statutory competence when interpreting law other than the insurance laws of this state (including constitutional interpretation however necessary that may be to the discharge of his duties), the Commissioner is constrained to advise the applicants and to rule accordingly that he is, in the absence of other authority directly on point, bound by the Attorney General's March 28, 1988 opinion. *Traverse School Dist*. v *Atty Gen*, 384 Mich 390 (1971) The Commissioner does this reluctantly because the opinion, for reasons set forth herein, appears to be wrongly decided and not adoptive of a constitutional interpretation which gives full and proper weight to all of the constitutional provisions implicated by the questions presented.

C. Final Ruling In Light of the Attorney General's March 28, 1988 Opinion Letter

The Commissioner rules as follows:

> 1. Does the mere filing of a referendum petition with the Secretary of State within 90-days following the final adjournment of the legislative session at which 1993 PA 143 was enacted (the "90-day period") properly invoke the power of referendum such that 1993 PA 143 would not become effective, not become a part of Michigan's insurance laws, and, thus, not be applicable to automobile insurance companies unless and until approved by a majority of electors voting thereon at the next general election?
>
> The Commissioner must answer this with a qualified yes. While the Attorney General does not say that the mere filing of petitions with the Secretary of State is sufficient to invoke the referendum power, he does say that the filing of petitions which on their face have a sufficient number of signatures and are entitled to presumed validity will invoke the referendum power at least for a period of time. On the other hand, the Attorney General does not require some process or official finding of a sufficient number of signatures.
>
> Because neither the face of the Constitution nor the implementing statutes grant any substantive responsibility to the Secretary of State in respect of referendum petitions, the Board of Canvassers, not the Secretary of State,

would appear to be the proper body to make such a finding if one is required.

2. If the Board of State Canvassers (the "Board") has within the 90-day period not taken definitive action with respect to the referendum petition, has the power of referendum properly been invoked such that 1993 PA 143 does not become effective unless and until it is approved by a majority of electors voting thereon at the next general election?

Yes. The Attorney Generals' opinion clearly allows for this possibility. If the petitions on their face have sufficient signatures in terms of numbers of signatures, the petitions are then entitled to a presumption of validity until further definitive determination by the Board of Canvassers. Under these circumstances, if they occur within the 90-day period, the power of referendum would be presumptively invoked pending the outcome of final determination by the Board of Canvassers. Accordingly, under these facts, 1993 PA 143 would not go into effect on April 1, 1993.

3. If not, and if the Board declares the sufficiency of the referendum petition subsequent to the end of the 90-day period, would that cause the referendum power to be properly invoked?

The answer to Question 2 renders this question inapplicable; however, a comment appears justified. By logical extension of the Attorney General's opinion, the determination of the Board of Canvassers as set forth in Question 3 really has the effect of confirming the presumptive validity of the petitions. Therefore, no action of the Board of Canvassers subsequent to the end of the 90-day period had the effect of reversing the presumptive invoking of the power of referendum and 1993 PA 143 would remain ineffective unless and until approved by the electors at the general election.

4.If yes, as of what date would 1993 PA 143 be ineffective?

The answer to Question 2 and the comment in connection with Question 3 renders this question inapplicable.

5. If the answer to question 2 is yes, and if the Board subsequent to the end of the 90-day period declares the insufficiency of the referendum petition, would that determination mean that 1993 PA 143 becomes effective, becomes a part of Michigan's insurance laws, and, thus applicable to automobile insurance companies?

Yes. The Attorney General's opinion makes it clear that he believes that the power of referendum presumptively invoked within the 90-day period can become subsequently uninvoked by action of the Board of Canvassers.

He also makes it clear that this action would remove the constitutional impediment to the statute's effectiveness and that 1993 PA 143 would become effective, a part of Michigan's insurance laws, and applicable to Michigan automobile insurance companies.

6. If yes, would the effective date of 1993 PA 143 be its originally scheduled effective date of April 1, 1994?

The Commissioner must answer this question with a qualified no. The literal language of the Attorney General's opinion seems to envision an effective date for 1993 PA 143 at the point of the Board of Canvassers subsequent action; that is some time after April 1, 1994 but prior to the general election: "…statute at issue is stayed or suspended until either the petitions are found invalid or a vote of the people occurs."

The logic of this conclusion is elusive. It means that the Attorney General has found a date after the end of the 90-day period on which a law, whose effectiveness was rendered inoperable by the filing of numerically sufficient and presumptively valid petitions within the 90-day period, can spring into effectiveness. Such a date is nowhere to be found in the constitution. Further, the very action of the Board of Canvassers in this instance means that petitions *presumptively* invoking the referendum power within the meaning of the constitution during the 90-day period never did *properly* invoke the referendum power during the 90-day period.

This, in turn, means that it could be argued and probably would be argued that, the power of referendum never having been properly invoked, 1993 PA 143 was not and could not have been rendered ineffective. Therefore, it would be argued that 1993 PA 143 went into effect on April 1, 1994, became part of the Michigan insurance laws, and was applicable to Michigan automobile insurers on that date.

In any event, the Attorney General's conclusion could well be the source of endless confusion and years of litigation should be requisite circumstances arise.

This ruling is limited to the facts which were presented by the applicants and the constitutional and statutory sections identified by applicants in their declaratory ruling request.

David J.Dykhouse
Commissioner of Insurance

ATTACHMENT A

Honorable David J.Dykhouse
Commissioner
Michigan Insurance Bureau
Second Floor
Ottawa Building North
611 West Ottawa
P.O.Box 30220
Lansing, MI 48909

November 24, 1993

Dear Commissioner Dykhouse:

The undersigned Michigan Association of Insurance Companies ("MAIC") is an association of insurance companies which provides casualty insurance, including automobile insurance, in Michigan. The undersigned insurance companies provide automobile insurance pursuant to the no-fault and essential insurance provisions of the Insurance Code.

We write because of our concern over the manner in which the Insurance Bureau will interpret the no-fault law after April 1, 1994 in response to a referendum petition currently being circulated to suspend the effectiveness of the no-fault reform measures contained in Public Act 143 of 1993 ("PA 143"). As you may know, certain opponents of PA 143 appeared before the State Board of Canvassers on November 7, 1993 to advise the Board of their intention to circulate a petition calling for a referendum to be held on PA 143 on November 8, 1994, and to request the Board's approval of the proposed petition is proper as to form. Under the 1963 Constitution, a referendum petition has the effect of suspending the law which it challenges. There is confusion, however, as to exactly when the petition has that effect. In view of the complexities of the new no-fault law and the extensive changes which must be made by insurance companies to discharge our obligations to the public, it is imperative that the effect of the referendum petition on the rights of the public and the obligations of insurance companies be determined as soon as possible The purpose of this letter is to request the Insurance Bureau's declaratory ruling on this subject. Our specific questions are set forth at the end of this letter.

I. CONSTITUTIONAL AND STATUTORY BACKGROUNDS[1]

Article 2, s 9 of the Constitution of 1963 reserves to the people the power to approve or reject laws enacted by the Legislature except those making appropriations for state institutions or to meet deficiencies in state funds. Under this section of the Constitution, the power of referendum must be properly invoked within 90-days following the final adjournment of the legislative session at which the law being challenged was enacted. Once the referendum power has been properly invoked, the effectiveness of the law being challenged is suspended until such time as the law is approved by a vote of the people.

Unless the power of referendum is properly invoked, PA 143 will become effective 90-days after the current legislative session adjourns *sine die*. If the Legislature adjourns *sine die* on December 31, 1993 as expected, PA 143 will become effective on April 1, 1994 unless the power of referendum is properly invoked prior to that date.
The state Elections Code requires referendum petitions to be filed within 90-days of the final adjournment of a legislative session. MCL 168.473.Upon the filing of a petition for a referendum, an initiative, or for submission of a constitutional amendment, the Board of Canvassers is required by the Elections Code to canvass the signatures and determine that the petition is in proper form for submission to the voters. MCL 168.476.The Board must certify the sufficiency or insufficiency of the petition at least two months prior to the election at which the proposal is to be submitted. MCL 168.477.

II. ATTORNEY GENERAL'S 1988 INFORMAL AND UNPUBLISHED LETTER OPINION

In a letter opinion issued to the Director of the Department of Social Services on March 28, 1988 (Attached here as Appendix, Tab E), the Attorney General ruled that the referendum process is "properly invoked" upon the filing of a petition and that the effectiveness of the law being challenged is suspended as of the date of such filing, notwithstanding the absence of the Board of Canvassers' certification of the sufficiency of the petition. The Attorney General ruled further that if the Board determines thereafter that the petition is insufficient, the effectiveness of the challenged law is reinstated upon the making of that determination.

It is our belief that the Attorney General's 1988 opinion is erroneous, contrary to the historical treatment given to referendum petitions, and, if applied in this context, could not only deprive Michigan motorists of the benefits of PA 143 but could lead as well to chaos in the automobile insurance industry. Under the Attorney General's erroneous interpretation, PA 143 would be suspended by the filing of a referendum petition anytime before April 1, 1994, even if that petition is not supported by the requisite number of signatures or otherwise is not in proper form. Under his interpretation, however, at any time prior to September 8, 1994 (two months prior to the November 8, 1994 general election), PA 143 could be reinstated if the Board of Canvassers fails to place the issue on the 1994 general election ballot.

In contrast to the unpublished Attorney General's letter opinion, it is our view that the power of referendum has not been properly invoked and thus that a law is not suspended until and unless the Board of Canvassers determines that the petition meets all applicable legal requirements for submission to the voters. *See, Kanagur* v *Hare*, 284 F Supp 426 (WD Mich 1968). Moreover, we believe that it is the responsibility of the proponents of the petition to file it sufficiently before the ninetieth day after the Legislature adjourns *sine die* to enable the Board of Canvassers to complete its review before the constitutional deadline. Our view is consistent not only with the language of article 2, s 9 of the Constitution of 1963, but with the manner in which referendum petitions have historically been treated.

III. NEED FOR DECLARATORY RULING

As you know, PA 143 makes significant changes in the no-fault and essential insurance provisions of the Insurance Code. Among other things, automobile insurance companies will be required to make extensive revisions in rating territories to assure that premiums charged are directly related to the actual loss ratios experienced by each insurance company and to prevent, with limited exceptions, having differing base rates within the same municipality. In addition, to assure the reasonable availability of insurance in all rating territories, all but the smallest insurance companies will be required to have an agent physically located in each of their rating territories who actively market automobile insurance products.

Beginning 120 days after the effective date of PA 143 — or by August 1, 1994 if the law becomes effective on April 1, 1994 — all new or renewal policies must conform with the basic requirements of the new law. Among other things, insurance companies will be required to reduce premiums by 16% on average statewide. Premium rates will depend, in part, on an insured's selection of limits on personal injury protection medical coverage, liability coverage, and deductibles. To implement these changes, insurance companies will be required to contact current policyholders well before renewal notices are sent to notify them of coverage options and corresponding premium rates. Because of the sheer volume of policy renewals — an estimated 830,000 per month[2] — the undertaking is massive. Under the schedule imposed by the Legislature, policies issued on or after August 1, 1994 must include the new coverage options and premiums. To accomplish this in an orderly fashion will effectively take the entire 120-day period allotted by the Legislature. It is imperative that insurance companies know whether or not the new law will be suspended as early as possible, and it is equally important that if its effectiveness is suspended, it is not subject to reinstatement at the will of the Board of Canvassers.

In addition to the major changes in premiums and coverage options which must be in place 120 days after PA 143 becomes effective, there are less sweeping but nevertheless significant changes which are imposed immediately on the effective date of the new law. Among them is the prohibition against having a proof of prior insurance requirement. Under the new law, a person's failure to maintain insurance on vehicles operated during the previous six months may not be used as a basis to deny insurance. This prohibition will nullify underwriting rules filed by many companies with the Commissioner which preclude extension of new coverage to previously uninsured motorists. Certainty as to the effective date of the new law or the suspension thereof is especially important for these companies if they are properly to discharge their responsibilities to the public.

No-fault insurance coverage is mandatory in Michigan. Whether and when PA 143 takes effect directly and substantially affects every automobile owner in the state. Given the complexities of the matter, predictability and certainty are imperative. The Attorney General's interpretation of the Constitution fosters neither. It is entirely possible under his interpretation that the filing of a defective petition which does not meet constitutional and statutory requirements will ostensibly toll the effectiveness of the new law, depriving policyholders of the rate rollback and other benefits conferred by the Legislature, without any determination having been made as to the petition's sufficiency or lack thereof.

If the power of referendum is "properly invoked" as to PA 143, certainty as to the date when the new law is suspended is essential if the rights of the public are to be protected.

If it is not clear whether PA 143 is in effect on or after April 1, 1994, how can an insurance company determine and discharge its obligations? What is an insurance company's responsibility, for example, to a previously uninsured motorist who demands coverage after April 1, 1994, if that company has an underwriting rule which prohibits coverage? Is the company required to follow its underwriting rule and deny coverage? If the Board of Canvassers subsequently determines that the petition was insufficient and that the new law should have taken effect, will the insurance company be liable if the uninsured motorist is involved in an accident, or will that motorist — who was actually entitled to coverage — simply go without it?

There are other questions created by the Attorney General's unpublished letter opinion. For example, under the Attorney General's interpretation, an affirmative declaration of insufficiency would have the effect of reinstating PA 143.What happens, however, if the Board of Canvassers issues no such declaration but also fails to adopt a resolution placing the question before the voters? In other words, what if the Board's decision is in the form of inaction?[3] How and at what point in that circumstance does the new law become effective? And if the Board of Canvassers should at some point after April 1, 1994 formally declare the petition to be insufficient, what basis is there for the Attorney General to conclude that the new law is effective only prospectively from the time of the Board's declaration? If the petition is a legal nullity, why wouldn't the new law be effective in accordance with the original schedule, that is on April 1, 1994? And, if the insurance industry is not made aware of its retroactive reinstatement, how can insurance companies possibly discharge their obligations to policyholders and the public in accordance with the schedules adopted by the Legislature?

Based on these questions and many others like them, we believe the Insurance Bureau should issue a declaratory ruling as to the effective date of PA 143 based on the known fact that a referendum drive is occurring.

IV. LEGAL ANALYSIS

A. Certification Of The Sufficiency Of The Petition Is Required Before The Law Being Challenged Is Suspended

1. The Plain Language Of The Constitution Provides For The Suspension Of A Law Only After The Power Of Referendum Has "Properly Been Invoked."

Article 2, s 9 of the Constitution of 1963 provides in pertinent part that:

> The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90-days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor

> at the last preceding general election at which a governor was elected shall be required.
>
> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

There is no hint in this language that a law is suspended automatically merely upon the filing of a petition as the Attorney General has ruled. Were that the case, petitions containing less than the requisite number of signatures or which otherwise were not in compliance with statutory or constitutional requirements would have the extraordinary effect of nullifying laws adopted by a majority of the representatives of the people and signed by the Governor. A law is suspended *only* if the power of referendum is properly invoked by the requisite number of registered electors acting in the manner prescribed by law. Necessarily implicit in article 2, s 9 is the requirement that a determination be made that a petition is in compliance with statutory and constitutional requirements by the officers charged with that duty before a law is suspended.

In addition to the requirements set forth in the Constitution, chapter XXII of the Elections Code, MCL 168.471 *et seq*., establishes additional requirements with respect to referendum petitions. Among other things, the Elections Code establishes detailed requirements governing the form and contents of the petition. *See*, MCL 168.482.In addition, the Board of Canvassers is given the responsibility to canvass the signatures for the purpose of determining their sufficiency. *See*, MCL 168.476.The Board also has authority to determine whether a petition is in proper form and meets other legal requirements. *Automobile Club of Michigan Committee for Lower Rates Now* v *Secretary of State*, 195 Mich App 610 (1992) (on rem). Unless the Board determines that a petition is supported by the requisite number of valid signatures and is otherwise in proper form, it may not be submitted to the voters.

In the analogous context of an initiative petition submitted under the same section of the Constitution which governs referendum petitions, the Supreme Court held that a petition has no legal force until it has been certified by the Board of Canvassers. *See, In Re Proposals D & H*, 417 Mich 409 (1983). That case involved, in part, the Legislature's duty under article 2, s 9 to enact or reject a law proposed by an initiative petition. At issue was whether the Legislature has a duty to act prior to the Board of Canvassers determination as to sufficiency. The Supreme Court held that the filing of an uncertified petition imposes no duty on the Legislature to enact or reject the proposed law; it is only after the petition has been certified that the Legislature is obligated to do so. If an *un*certified initiative petition imposes no obligation on the Legislature to consider a law proposed by an initiative petition, then logic dictates that an uncertified referendum petition imposes no constraints on the effectiveness of a law already enacted by the Legislature.

Accordingly, it is apparent from both the language of article 2, s 9, as well as from the only appellate case which has directly considered whether an uncertified petition has

legal force, that the mere filing of a petition is insufficient to suspend the effectiveness of a law adopted by the Legislature.

2.The Attorney General's 1988 Informal Letter Opinion Was Based On Legally And Factually Incorrect Premises

On page 3 of his informal letter opinion issued to the Director of Social Services on March 28, 1988, the Attorney General said:

> Based on the foregoing, I must conclude that when a petition seeking referendum, which on its face meets legal requirements, is filed the signatures appearing on that petition are presumed valid and the statute at issue is stayed or suspended until either the petitions are found to be invalid or a vote of the people occurs.

The Attorney General's ruling was based on two premises, neither of which is sufficient alone or in combination with one another to support his conclusion.
The first premise relied upon by the Attorney General is that signatures on petitions filed with the Secretary of State are presumptively valid. ccording to the Attorney General:

> If, as the Court of Appeals said in *Jaffe* v *Allen*, *supra*, petition signatures are presumed valid, then a referendum petition which apparently has a sufficient number of valid signatures must be presumed valid and, as a result, the power of referendum "properly invoked" when the petition is filed.

While petition signatures may indeed be presumptively valid, the Attorney General's leap of logic to the conclusion that such a presumption is sufficient to give an uncertified petition legal force is contrary to Michigan law. S*ee, In Re Proposals D & H, supra*. It is also inconsistent with the proposition long ago recognized by the Supreme Court that a referendum petition may not be allowed to suspend the effectiveness of a law until it is clear that the petition meets all requirements imposed by law.

In *Thompson* v *Secretary of State*, 192 Mich 512, 522-23 (1916), the Supreme Court said:

> Under the referendum clause of the Constitution one-twentieth of the electors of the State may suspend the operation, until the next general election, of any act of the legislature, however important, except acts making appropriations and such as are immediately necessary for the preservation of the public peace, health, and safety. And, as in this case, such suspension may be for more than a year. *Where a power so great as this is vested in a minority of the people every safeguard provided by law against its irregular or fraudulent exercise should be carefully maintained*. It is true that no issues have been framed to determine the truth or falsity of the charges of fraud made by relators in this case. This is because respondent is not given any power to investigate those charges,

> and mandamus will issue only to compel the performance of a plain legal duty. He must canvass the petition as it is filed in his office, and can look no further. *But he should be careful to see that its various sections comply with the requirements of the Constitution fairly and reasonably construed. Whatever other purpose these requirements may have, it is plainly to be seen that each and every one was intended to safeguard the honesty of the petition. And each and every one is mandatory and must be complied with.*[4]

The Attorney General's 1988 letter opinion is contrary both to the holding in *In Re Proposals D & H* and to the logic of *Thompson* v *Secretary of State*.

The second premise relied upon by the Attorney General was described this way in his 1988 ruling:

> This conclusion conforms to the Michigan Supreme Court's comment, in dicta, concerning the filing of a referendum petition in connection with the daylight savings time issue.In a 1971 case, the Supreme Court said:
>
> "the effect of MCLA s 435.211 *et seq, supra* was suspended by the filing of referendum petitions." *Wolverine Golf Club* v *Secretary of State*, 384 Mich 461, 463; 185 NW2d 392 (1971).

The problem with this premise is that what the *Wolverine Golf Club* court said happened is *not* what actually occurred. *Wolverine Golf Club* did not involve a referendum petition but rather an initiative petition. In the section quoted by the Attorney General, the court was describing what had happened to an earlier referendum petition involving the same subject matter. The referendum petition being referred to was the subject of an earlier decision in *Michigan Farm Bureau* v *Secretary of State*, 379 Mich 381 (1967).It is clear from briefs submitted to the Supreme Court in *Farm Bureau*[5] as well as from newspaper articles reporting on the case[6] that the law was not suspended upon the filing of the petition. It was only after the Supreme Court lifted a stay which prevented the Board of Canvassers from making an official declaration of the sufficiency of the petition and after the Board made that declaration that the law was actually suspended.[7]

Furthermore, subsequent to its comment in *Wolverine Golf Club*, the Supreme Court in *In Re Proposals D & H, supra,* more accurately stated that the law at issue in *Farm Bureau* was suspended only after the referendum petition was certified:

> This Court has stated that art 2, s 9 does not bar re-enactment by the legislature of the same or similar measures after the effectiveness of a prior measure has been suspended by the *certification* of a petition for referendum. *Michigan Farm Bureau, supra,* p 396.

In Re Proposals D & H, supra, p 421 [emphasis added.]

Similarly, the Federal District Court for the Western District of Michigan cited *Farm Bureau* for the same proposition in *Kanagur* v *Hare*, 284 F Supp 426, 427 (WD Mich 1968):

> This Court now concludes that Article II, section 9 of the Michigan Constitution was properly invoked through the certification of petitions for referendum.*Michigan Farm Bureau* v *Hare*, 379 Mich 387, 151 NW2d 797 (1967).

It is thus evident that while the Supreme Court in *Wolverine Golf Club* stated that the law being challenged was suspended by the "filing" of the petition, it was, in fact, only after the petition was certified by the Board of Canvassers that the petition was given that effect.[8]

In summary, the Attorney General's 1988 letter opinion is contrary to both Michigan law and the practice of Michigan government.[9] The opinion was wrongly decided and should not be followed in the context of the extant petition.

3.The 1908 Constitution Also Supports The View That A Referendum Petition Suspends The Challenged Law Only After It Has Been Certified As Meeting All Requirements Imposed By Law.

The powers of initiative and referendum reserved to the people in article 2, s 9 were carried forward from article 5, section 1 of the Constitution of 1908 with only minor changes of substance not relevant here. *See*, Nord, "The Michigan Constitution of 1963," 10 Wayne 2 Rev 309, 320.In their address to the People, the delegates to the Constitutional Convention explained that the revisions contained in article 2, s 9 were intended to eliminate language of a "purely statutory characters" and leave "[m]atters of legislative detail" to the Legislature.[10]

That a formal determination as to the sufficiency of the petition was required before it suspended the effectiveness of a law is evident from the pertinent language of the 1908 Constitution:

> If the secretary of state or such other person or persons hereafter authorized by law to receive and canvass the same determines that the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, he shall then submit to the electors for approval or rejection such act or section or part of any act at the next succeeding general election; and no such act shall go into effect until and unless approved by a majority of the qualified and registered electors voting thereon.

1908 Const, art 5, s 2.There is no indication whatsoever that the framers of the 1963 Constitution had any intention of altering the sequence established by the 1908 Constitution. Surely a change as significant as allowing uncertified petitions to suspend a

law adopted by the Legislature would have been clearly delineated in the delegate's Address to the People. The absence of any indication that a change was intended strongly suggests that the procedures contemplated by the 1963 Constitution are the same as those established by the 1908 Constitution.

B. Certification Of The Petition Must Occur Prior To The Ninetieth Day After *Sine Die* Adjournment

Article 2, s 9 provides that the power of referendum "must be invoked in the manner prescribed by law within 90-days following the final adjournment of the legislative session at which the law was enacted." While the issue was not addressed in the Attorney General's 1988 letter ruling, a question may also arise as to whether a referendum petition must be certified by the Board of Canvassers before the end of the ninety day period after final adjournment or whether it is sufficient merely for the petition to be filed by the end of that period. It is our view that the referendum process is not invoked until the Board of Canvassers has certified the petition as sufficient, and, further, that the certification must occur by the end of the 90-day period. We believe this view is consistent not only with the plain language of the Constitution but also with the historical context in which it was adopted.

The referendum process is not invoked merely by the filing of a petition. The Constitution provides that "[t]o invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required." 1963 Const, art 2, s 9.Until it is determined that the requisite number of signatures have been obtained, the constitutional requirement has not been met and the power of referendum has not been invoked. Indeed, if certification by the Board of Canvassers must occur before a law is suspended, as it must, certification must also occur before the referendum power has been invoked because the constitutional language pertaining to suspension of the challenged law and constitutional language setting the deadline for exercising the right of referendum is virtually the same.

This interpretation is consistent with the historical context in which the 1963 Constitution was adopted. Under both the 1908 and the 1963 constitutions, the general rule was that laws would not be effective until 90 days following *sine die* adjournment. 1963 Const, art 4, s 24; 1908 Const, art 5, s 21 and art 5, s 1.Under the 1908 Constitution, exceptions could be made by a two-thirds vote of each house of the Legislature in order to provide immediate effect to acts making appropriations or to acts immediately necessary to preserve the public peace, health or safety. The 1963 Constitution broadened the Legislature's immediate effect powers somewhat by providing that any act could be given immediate effect upon a two-thirds vote of each house.But under both constitutions, it was expected that most laws would not take effect until 90 days after *sine die* adjournment. *See*, 2 Official Record, Constitutional Convention 1961, pp 2955-2956. The obvious purpose of the requirement that the referendum process be invoked within 90 days after *sine die* adjournment is so that laws challenged through referendum would

generally be suspended *before* they took effect. As the Supreme Court noted in *Frey* v *Department of Management and Budget*, 429 Mich 315, 333 (1978), several delegates at the 1961 Constitutional Convention expressed concern that granting the Legislature power to give immediate effect to any law would endanger the referendum because it would not give people time to gather signatures for petitions to prevent the law from going into effect. In response to this concern, Delegate Hutchinson, the sponsor of the amendment to broaden the Legislatures immediately effect authority, stated that the power of referendum would still apply to laws given immediate effect. He went on to state, however, that this would not alter the fact that in other cases, the power of referendum would still be invoked before a new law went into effect. The following exchange took place

MISS ANDRUS: Mr. Hutchinson, many bills are passed the very last days of the legislature. Now, when they are given immediate effect, how much time would the people have to get petitions? You have to have 5 percent of those voting for governor in the last election. How much time would they have to get those before they went into effect?

MR. HUTCHINSON: Mr. President, of course before it went into effect, they wouldn't have, but they would still — hopefully the constitution would so provide that they would still have their 90 days from the *sine die* adjournment of that session in order to file their 5 percent petitions, you see.

MISS ANDRUS: Then an act that had gone into effect could be revoked?

MR. HUTCHINSON: Could be suspended and should be suspended as soon as the petitions are filed.

MISS ANDRUS: What I mean is, we would start it in operation and then we would suspend it?

MR. HUTCHINSON: That would be the situation. But, as a matter of fact, the number of times that that would happen compared with the number of times that the public interest demands an immediate effect provision to act [sic] is so rare that the public interest would be more inconvenienced by continuing this present restriction than to meet the situation that you indicate.

2 Official Record, Constitutional Convention, 1961, p 2956.

It is evident from this exchange that the delegates contemplated that the referendum process be invoked in time to prevent laws which had not been given immediate effect — that is, laws effective 90 days after final adjournment — from taking effect.

It has been suggested that this interpretation is inconsistent with language contained in 1908 Const, art 5, s 1 and section 477 of the Elections Code, MCL 168.477, which provides that a petition does not have to be certified until two months prior to the election at which the question will be presented. This suggestion ignores the fact that a referendum petition may be filed during the legislative session at which the law was

adopted. *See, Farm Bureau, supra*. Thus, the petition may well be certified before the legislative session is adjourned *sine die*. In such cases, the two month requirement operates to prevent a petition from being certified within two months of a general election held during the legislative session at which the challenged law was adopted.[11] However, it does not alter the requirement that if a petition is presented after the close of a legislative session, it must be certified before the end of the 90-day period specified in the Constitution.

The delegates to the 1961 Constitutional Convention were obviously concerned about the problems associated with allowing an act to take effect only to have its effect interrupted by a referendum petition. That is why they proposed a constitutional system designed to avoid that result in all cases except those in which the challenged law is given immediate effect. That their concern was well founded is illustrated by the harm that could be caused by allowing PA 143 to become effective only to have it suspended several months later. If the Board of Canvassers is able to put off its determination as to the sufficiency of the petition until two months prior to the November general election, it would mean that Act 143 would go into effect on April 1, 1994, subject to being suspended on or before September 8, 1994.By August, approximately 830,000 Michigan policyholders will have selected new medical and liability limitations, received their rate rollbacks, and, be subject to most of the new law's provisions. Other policyholders whose policies are due for renewal in September and October will have received notices as to new premium rates and coverage options, and many of them will have selected the options they prefer. In addition, all lawsuits filed on or after August 1, 1994 will be subject to the tort reform provisions of the new law. Suspension of the new law would leave the rights of policyholders who have already been converted to the new system in limbo. It would also raise serious questions with wide-reaching implications for parties involved in litigation initiated after August 1, 1994.And it would cause massive confusion for those policyholders who receive notices about their new rates and coverage terms, only to be confronted later by policies issued under the old law. In short, the automobile insurance industry will be in chaos.

V. REQUEST FOR A DECLARATORY RULING

Section 63 of the Administrative Procedures Act permits interested parties to request a declaratory ruling "as to the applicability to an actual state of facts of a statute administered by the agency . . . " Since provisions of the Insurance Code are administered by the Insurance Bureau, we believe that the Bureau is authorized to issue a declaratory ruling in this context to clarify the rights of the public and the responsibilities of automobile insurance companies operating in Michigan. Accordingly, we respectfully request your declaratory ruling as to the following questions:

1.In the absence of certification by the Board of Canvassers of the sufficiency of a petition calling for a referendum on 1993 PA 143 which has been filed within 90 days of the adjournment *sine die* of the current legislative session, will automobile insurance companies operating in Michigan be subject to provisions of the Insurance Code as amended by

1993 PA 143, or will they be subject to provisions of the Insurance Code as if those provisions have not been amended by 1993 PA 143?

2.Upon the certification by the Board of Canvassers of the sufficiency of such petition sometime after the ninetieth day following the adjournment *sine die* of the current legislative session, will automobile insurance companies operating in Michigan be subject to provisions of the Insurance Code as amended by 1993 PA 143, or will they be subject to provisions of the Insurance Code as if those provisions have not been amended by 1993 PA 143?

Our purpose in requesting a ruling on these questions from the Insurance Bureau is to start a process which hopefully provides definitive and timely answers about our responsibilities to our policyholders and the public. Opinions of the Attorney General are not binding on the public or the courts. However, they rightfully command the respect of other Executive Branch officers unless they are overturned by the courts. If in answering the questions we have posed, the Bureau adopts the position set forth in the Attorney General's 1988 letter opinion, it is our intention to seek judicial review of the issue as provided in section 63 of the Administrative Procedures Act. In this manner, we hope to obtain a definitive ruling from the Bureau or from the courts upon which we and our policyholders can rely.

We appreciate your anticipated cooperation and look forward to your early response. An Appendix is filed with this declaratory ruling request which contains: applicable 1963 Constitutional provisions (Tab A); applicable 1908 Constitutional provisions (Tab B); the Michigan Election Code (Tab C); relevant Michigan case law (Tab D); relevant Michigan Attorney General letter rulings (Tab E); miscellaneous authority (Tab F); and various exhibits (Tabs G, H and I).

There are approximately five million automobile insurance policies in effect in Michigan. Nearly all are subject to renewal every six months.

The Board of Canvassers is comprised of four members. With some degree of frequency, the Board has deadlocked on tie votes without being able to take action one way or the other. *See*, for example, *Michigan Citizens Lobby* v *Chase*, Court of Appeals No. 29921 (September 2, 1976), attached here as Appendix, Tab D.

At the time *Thompson* was decided, the Secretary of State performed the function now performed by the Board of Canvassers in certifying the sufficiency of a petition.

See, for example, Plaintiffs' and Appellants' brief on the merits on appeal (attached here as Appendix, Tab G), pp 2-3

See, for example, "Supreme Court Ruling Near on Daylight Time," *Detroit News*, June 9, 1967 (attached here as Appendix, Tab F).

Id.See also, Farm Bureau, supra, p 400.

The procedure followed in *Farm Bureau* was also followed with respect to the referendum petition considered in *County Road Association of Michigan* v *Board of State Canvassers*, 87 Mich App 299 (1979) *aff'd in part, rev'd in part*, 407 Mich 101 (1979). According to documents filed with the Court of Appeals in that case, referendum petitions challenging two related laws which levied additional gas taxes and license plate fees were filed on January 2 and January 9, 1979.The filing of the petitions did not suspend the laws and the additional tax and fees continued to be collected. Thereafter, the Court of Appeals issued a stay preventing the Board of Canvassers from determining the sufficiency of the petitions which enabled the tax and fees to continue to be collected during the pendency of the litigation. *See*, excerpts from Joint Brief of Plaintiffs of Consolidated Case in Support of Complaint for Mandamus, attached here as Appendix, Tab H. It is also evident from an affidavit filed in the case that state election officials were of the view that laws challenged through the referendum process are stayed only upon their certification by the Board of Canvassers. *See*, Affidavit of Bernard J. Apol, dated January 3, 1979, attached here as Appendix, Tab I.
The Attorney General's 1988 letter opinion also seems to be inconsistent with another letter opinion issued to Representative H. Lynn Jondahl on May 7, 1976 (attached here as Appendix, Tab E).In the Jondahl opinion, the Attorney General ruled that the Legislature's duty to enact or reject a law proposed by an initiative petition begins only after each house of the Legislature has been notified that the petition has been certified as sufficient.

The statutory previsions implementing the initiative/referendum section of the Constitution of 1908 were not changed after the 1963 Constitution was adopted.
The 60-day provision must also be considered in light of past legislative history. The Michigan Legislature used to adjourn *sine die* early in the year (*e.g.*, April, May, June or July).If the Legislature adjourned *sine die* on July 1st, the 90-day period for the filing of petitions would run until October 1st, which would be less than 60-days before the November election. The 60-day provision was thus designed to ensure sufficient time before an election so that the Board could complete the necessary work (ballot letter designation, ballot language, etc.) in a manner to allow an issue's placement on the ballot.

ATTACHMENT B

Honorable David J. Dykhouse
Commissioner
Michigan Insurance Bureau
Second Floor
Ottawa Building North
611 West Ottawa
P.O.Box 30220
Lansing, MI 48909

December 2, 1993

Dear Commissioner Dykhouse:

Please consider this document as a supplement to our declaratory ruling request, which was filed with you on November 24, 1993.This supplement should be made a part of and considered in connection with the November 24, 1993 request.

The undersigned, pursuant to 1985 AACS R 500.1041(a), (b), hereby certify that:

1. 1993 PA 143 makes significant changes in the no-fault and essential insurance provisions of the Michigan Insurance Code.

2. 1993 PA 143 was signed by Governor John Engler on August 6, 1993.

3. 1993 PA 143 will take effect upon the expiration of ninety days from the end of the current legislative session.

4. Opponents of 1993 PA 143 appeared before the State Board of Canvassers on November 7, 1993 to advise the Board of their intention to circulate a petition calling for a referendum on 1993 PA 143 on November 8, 1994.Upon information and belief, that petition is being circulated for signature.

5. The following statutes and rules are known to the applicants and relevant to this declaratory request: 1993 PA 143; MCL 168.471 to 168.486; MSA 6.1471 to 6.1486; MCL 24.263; MSA 3.560(163); 1963 Const, art 2, s 9; 1963 Const, art 4, s 24; 1908 Const, art 5, s 1; 1908 Const, art 5, s 2; 1908 Const, art 5, s 21.The applicants have also cited additional authority in their November 24, 1993 letter. The above Statutes and rules, coupled with the statutes and rules cited in the November 24, 1993 letter, are all of the statutes and rules which the applicants seek to have considered by the Commissioner in making the declaratory ruling.

ATTACHMENT C
NO-FAULT INSURANCE ISSUES IF REFERENDUM PETITIONS REMAIN UNCERTIFIED AFTER APRIL 1, 1994

If the Constitution requires a referendum petition to be filed *and* certified by the Board of Canvassers prior to the 90th day following final legislative adjournment, then the degree of certainty as to which version of the no-fault law is in effect is maximized. By April 1, 1994, it will be known whether Act 143 is effective or whether the prior law remains in effect, subject only to judicial reversal of the Board's determination. Any of the other possible interpretations — all of which would permit a delayed determination by the Board of Canvassers — would create substantial — even insurmountable — problems for the insurance industry, insurance regulators and the public. Furthermore, under any of the interpretations permitting a delayed determination, the Board, under section 477 of the

Elections Code, presumably would have until two months prior to the general election — approximately September 8, 1994 — to certify or refuse to certify the petition. If the Board is legally entitled to take until September 8, 1994 to make its determination, it is unlikely that a court would order an earlier determination. Accordingly, in each of the four scenarios discussed below, it is assumed that the Board would take all of its allotted time.

Other than interpreting the Constitution as requiring both filing and certification prior to April 1, 1994, there are four problematic scenarios which could be caused by the filing — without certification — of a referendum petition prior to April 1, 1994: (1) Act 143 is suspended as of its effective date — April 1, 1994 — but is later reinstated on or about September 8, 1994 on a prospective basis; (2) Act 143 is suspended as of its effective date — April 1, 1994 — but is reinstated on or about September 8, 1994 on a retroactive basis; (3) Act 143 becomes effective on April 1, 1994, but is suspended on or about September 8, 1994 on a prospective basis; and (4) Act 143 becomes effective on April 1, 1994 but is suspended on or about September 8, 1994 on a retroactive basis. Some of the problems associated with each of these scenarios are as follows:

Scenario One: Act 143 is suspended as of its effective date but is reinstated on a prospective basis on or about September 8, 1994.

This scenario (advocated by the 1988 Attorney General's opinion) is the least problematic. The most significant effect would be to substantially delay the rate rollbacks and other benefits conferred by the new law. The major benefits tied to the effective date of Act 143 which would be delayed are set forth in Exhibit A (attached).All policies renewed on or before January 8, 1995, will have to wait an additional six months before they receive the benefits of Act 143 if the old law is reinstated on September 8, 1994.For many policyholders, the length of the delay in actually receiving many of the new law's benefits would not be commensurate with the length of the delay in the effective date. For example, a one month delay in the effective date would cause a seven month delay in recovering the rate rollback for those policyholders due for renewal in August, 1994, because their first renewal under the new law after the 120-day implementation period would be during January, 1995.

Scenario Two: Act 143 is suspended as of its effective date of April 1, 1994, but is reinstated on or about September 8, 1994, on a retroactive basis.

This scenario would be disastrous for consumers and insurance companies alike. Moreover, if it is assumed that Act 143 is suspended upon the filing of an uncertified petition, this scenario becomes a distinct possibility because a petition which is later determined to be deficient could, and perhaps should, be viewed as a legal nullity for all purposes including that of suspending the effectiveness of the new law. In any event, lawsuits asserting that claim would be inevitable.

Under this scenario, if the Board of Canvassers determines on or about September 8, 1994, that the petition is deficient, insurance companies will have been in non-

compliance with, and consumers will have been denied the benefits of, the new law for over five months. Changes which should have been instituted on April 1, 1994, will not have been. Among them:

— Elimination of prior insurance requirements.
— Use of standardized applications and declaration forms.
— Regulation of direct repair shop programs.
—

In addition, policies which were issued or renewed in August and early September, 1994, and which, under the new law, should have provided rate rollbacks, limitations on medical benefits, uniformity between rating territories, and informal dispute resolution procedures will not have any of these features because they will have been issued under the erroneous assumption the old law was still effective. Furthermore, policy renewals due in the last three weeks of September and the entire month of October will be so far along in the renewal process (renewal notices and invoices based on the old law and old rating territories will already have been sent to policyholders) that it will be impossible to issue renewals under the new law. And for new policies issued or renewed before January, 1995, insurance companies will be deprived of the full 120-day implementation period and, as a result, it is highly doubtful that many of those policies could be issued in compliance with the new law.[1] Insurance companies will be confronted with the choice of issuing policies which are known not to comply with the new law or issuing no new or renewal policies at all. If the first option is selected, companies will expose themselves to lawsuits from insureds and licensure or enforcement actions by the Insurance Bureau. If companies select the second option, hundreds of thousands — perhaps millions — of Michigan motorists will be unable to obtain insurance (and new license plates, for that matter) until such time as the companies are capable of issuing policies which comply with the new law.[2]

Scenario Three: Act 143 becomes effective on April 1, 1994, but is suspended on or about September 8, 1994, on a prospective basis.

Many of the problems inherent in the previous scenario would exist under this scenario as well. New and renewal policies issued on or after August 1, 1994, would, among other things, utilize the new rating territories and would incorporate medical coverage limitations selected by the policyholder. Renewal notices for policies expiring in September and the first part of October will already have been issued under the terms of the new law by the date the new law is suspended and the old reinstated. By the time the old law is reinstated, some policyholders will have returned their payments and entered into binding insurance contracts. In addition, policyholders whose policies are due to expire in November and early December will already have received notice of their coverage and premium options.

Among the first of the many issues created by this scenario is whether insurance contracts entered into under the new law but prior to its suspension will be valid as written. If, for example, a policyholder who selected $5,000,000 in medical coverage under the terms of Act 143 is involved in a catastrophic accident, do the terms of the contract control, or

does the old law control? If the suspension is viewed as prospective, the coverage's and premium amounts should be effective, although policyholders may feel entitled and may assert entitlement to such things as the unlimited medical coverage required under the old law. Problems of a much more serious magnitude will develop, however, with respect to policies which have not yet been issued or renewed on the date Act 143 is suspended. Insurance companies cannot change back to the old law overnight. Rating territories consistent with the old law must be reestablished and policyholders assigned to them. Notices containing recalculated rates must be sent and new policy forms developed. The conversion process cannot reasonably be completed in less than 8 to 16 weeks. In the meantime, insurance companies will be confronted — as they would be under the previous scenario — with a choice between entering into contracts which they know to be in violation of the law or declining to issue policies at all until the conversion is completed.

In addition to problems relating to the insurance contracts, serious problems affecting damage claims asserted in lawsuits may arise under this scenario. If Act 143 is in effect, the changes it makes in the tort system will take effect as to lawsuits filed after August 1, 1994.If Act 143 is suspended on or about September 8, 1994, lawsuits filed after that date will presumably be adjudicated under the old system. But what effect will the suspension have on lawsuits filed between August 1, 1994 and the date of the suspension? For example, will a driver who is more than 50% at fault be entitled to partial recovery or won't he? And, if he is not entitled to a partial recovery, what happens if that driver is able to dismiss the lawsuit and refile it after the old law is reinstated?

Scenario Four: Act 143 becomes effective on April 1, 1994, but is suspended on or about September 8, 1994, on a retroactive basis.

This is the worst case scenario. In addition to all of the problems associated with the previous scenario, insurance companies, consumers, and state regulators would be confronted with the situation that all policies issued after August 1, 1994, will have been issued under the wrong law. Policyholders who have received a reduction in their premiums may feel that they are entitled under the law to things such as the unlimited medical benefits provided under the old law. Will insurance companies be obligated to provide unlimited coverage? And if they are, will they be entitled to collect additional premiums from all of the policyholders who were issued policies under the terms of Act 143?

This scenario would bring additional problems as well. For example, doctors and hospitals will have been paid in accordance with the schedules established by the new law. They will likely claim, however, that they should have received the larger payments possible under the old law. But premiums will have been adjusted to reflect the amounts payable under the schedules. If insurance companies are obligated to pay additional amounts to health care providers, where will the funds for those additional payments come from? May policyholders be required to pay additional premiums in the future to make up for the differentials paid to providers?

Most companies issue renewal notices 30-40 days before a policy expires. Because of the new law, new choices of coverage options must be made by the policyholders before such notices may be issued. Policyholders must be notified of their coverage options and premium levels and be given a reasonable time period in which to make their choices known to the company. That leaves, at most, only two months for an insurance company to assign each policyholder to a new insurance company to assign each policyholder to a new territory and to calculate the premium options available.

Most automobile insurance policies in Michigan are renewed every six months. On this basis, we estimate that policies covering approximately one million automobiles are issued each month.

PUBLIC ACT 143

Major things that must be done immediately (Zero day provisions)

- Must use standardized application
- Must use standardized declaration page
- Must give Better Business Bureau phone numbers, etc. to collision claimants
- The new business inspection requirement is reinstated
- Limitations on Direct Repair Shop program began
- Must begin utilization review
- Must increase Mini Tort limit to $500
- Must include fraud language on documents
- Can no longer use prior insurance requirement

OPTION A LEGISLATION

Major Things That Must Be Done Within 120 Days

- Territories must include 60,000 registered vehicles, must be contiguous, must not divide cities (except cities with more than 120,000 vehicles), and must include an agent actively writing business
- Territories must have substantially uniform loss ratios
- Rates must be rolled back 16 percent
- Thirty day notice of rate increases is required
- Industry market assistance plan must be implemented
- We must offer $1,000,000, $2,000,000, $3,000,000, $4,000,000 and $5,000,000 medical coverage options
- We need to have claim dispute procedures in place Medical fee schedule begins (90-days)
- We must begin reporting suspected fraud Major Things That Must Be Done Within 300 Days)
- We must utilize flat dollar surcharges
- MCCA retention increases to $300,000 with subsequent adjustments
- We have to offer a $300, $500, $1,000, and $2,000 deductible for medical and work loss coverage
- We must establish an auto insurance anti-fraud plan per specified requirement

•JUA rates must be self-supporting and comply with Chapter 21
•JUA commissions foe eligibles are five percent
•Safety discounts must be offered

ATTACHMENT D

Mr.Peter H.Ellsworth
Attorney at Law
Dickinson, Wright, Moon,
VanDusen & Freeman
Suite 200
215 S.Washington Square
Lansing, MI 48933-1812

December 20, 1993

Dear Mr.Ellsworth:

During the course of my deliberations with respect to your November 24, 1993, request for declaratory ruling on behalf of MAIC and two insurers, I have determined that a restatement of your questions may more precisely identify critical issues and promote a more cogent analysis of those issues. I suggest that you allow me to restate your questions as follows in the declaratory ruling I plan to issue:

1. Does the mere filing of a referendum petition with the Secretary of State within 90-days following the final adjournment of the legislative session at which 1993 PA 143 was enacted (the "90 day period") properly invoke the power of referendum such that 1993 PA 143 would not become effective, not become a part of Michigan's insurance laws, and, thus, not be applicable to automobile insurance companies unless and until approved by a majority of electors voting thereon at the next general election?

2. If the Board of State Canvassers (the "Board") has within the 90-day period not taken definitive action with respect to the referendum petition, has the power of referendum properly been invoked such that 1993 PA 143 does not become effective unless and until it is approved by a majority of electors voting thereon at the next general election?

3. If not, and if the Board declares the sufficiency of the referendum petition subsequent to end of the 90 day period, would that cause the referendum power to be properly invoked?

4. If yes, as of what date would 1993 PA 143 be ineffective?

5. If the answer to question 2 is yes, and if the Board subsequent to the end of the 90-day period declares the insufficiency of the referendum petition,

would that determination mean that 1993 PA 143 becomes effective, becomes a part of Michigan's insurance laws, and, thus, applicable to automobile insurance companies?
6. If yes, would the effective date of 1993 PA 143 be its originally scheduled effective date of April 1, 1994?

If you concur in this restatement of the questions, please confirm this in writing at your earliest convenience.

ATTACHMENT E

David J.Dykhouse
Commissioner of Insurance
Second Floor, Ottawa Building North
611 West Ottawa
Lansing, MI 48909

December 21, 1993

Dear Commissioner Dykhouse:

Our clients concur in your restatement of the questions in our declaratory ruling request of November 24, 1993.The restated questions do more precisely raise the issues we feel should appropriately be addressed.

We appreciate your cooperation.

ATTACHMENT F

Mr.C.Patrick Babcock, Director
Department of Social Services
8th Floor, Commerce Center
Lansing, MI

March 28, 1988

Dear Mr.Babcock:

Following the filing of petitions seeking to invoke the power of referendum with regard to 1987 PA 59, which amended 1939 PA 280, the Social Welfare Act, by adding section 109(a) you asked when the right of referendum is properly invoked and the effective date of that statute stayed.Section 109(a) states in part: "An abortion shall not be provided with public funds to a recipient of welfare benefits."

Specifical1y you asked if the filing of petitions, which include, if they are valid, a sufficient number of signatures to properly invoke a referendum, stays the effective date of 1987 PA 59 which will otherwise become effective on March 30, 1988.
As my Chief Assistant previously advised you, while we began researching this issue immediately, research did not disclose a case which directly addressed your question.
As you know, In Const 1963, art 2, s 9 the people reserved to themselves:

> [t]he power to approve or reject laws enacted by the legislature, called the referendum.

And provided:

> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next generation election.

Unfortunately, the Constitution does not define "properly invoked" and no Michigan appellate court decision has defined that term nor has any appellate court decision directly addressed whether the "power of referendum (is)…invoked" when a referendum petition is filed or when a determination is made that it contain a sufficient number of valid signatures.

While no Michigan appellate court decision has decided this precise issue, two Michigan Court of Appeals decisions do discuss the validity of petition signatures. In a 1979 case the issue was whether local officials checking a recall petition had to compare each petition signature with the signature on the voter's registration card. The Court of Appeals said:

> [S]ignatures appearing on petitions filed with the Secretary of State for initiative and referendum are presumed valid, and the burden is clearly on the protestant to establish their invalidity by clear, convincing and competent evidence." *Jaffe* v *Allen*, 87 Mich App 281, 285; 274 NW2d 38 (1979).

In a 1968 case where the issue was a city's refusal to act on petitions because they contained the signatures of persons not registered to vote, the Court of Appeals said:

> Initially, the petitions in proper form are presumed to be valid and to have been completed in accordance with the circulatory's affidavit." *Grosse Pointe Firefighters Association* v *Grosse Pointe Clerk*, 11 Mich App 112, 118, *lv den*, 381 Mich 770 (1968).

In addition to the foregoing it should be noted that our Supreme Court has held that the power of referendum should be liberally construed in order to effectuate its purposes.

> "under a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Kuhn* v *Dept of Treasury*, 384 Mich 378, 385; 180 NW2d 796 (1971).

If, as the Court of Appeals said in *Jaffe* v *Allen, supra*, petition signatures are presumed valid, then a referendum petition which apparently has a sufficient number of valid signatures must be presumed valid and, as a result, the power of referendum "properly invoked" when the petition is filed.

This conclusion conforms to the Michigan Supreme Court's comment, in dicta, concerning the filing of a referendum petition in connection with the daylight savings time issue. In a 1971 case, the Supreme Court said:

> "the effect of MCLA s 435.211 *et seq*, *supra* was suspended by the filing of a referendum petitions." *Wolverine Golf Club* v *Secretary of State*, 384 Mich 461; 463; 185 NW2d 392 (1971).

Based on the foregoing, I must conclude that when a petition seeking referendum, which on its face meets legal requirements, is filed the signatures appearing on that petition are presumed valid and the statute at issue is stayed or suspended until either the petitions are found to be invalid or a vote of the people occurs.

ATTACHMENT G

The Honorable H.Lynn Jondahl
State Representative
The Capitol
Lansing, Michigan 48901

May 7, 1976

Dear Representative Jondahl:

Your recent letter quotes the applicable portions of Mich Const 1963, art 2, s 9, which provide in pertinent part that "…any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature…" and asks for my opinion on the question:

> "…whether the 40-day period day begins at the time the petitions are submitted to the Secretary of State for verification, or does the period begin at the time the Secretary of State certifies that there are a sufficient number of signatures?"

I am of the opinion that neither of the times set forth in the question raised in your letter is the time from which the 40 sessions day period commences to run. Rather, I am of the opinion that such time commences when " such petition is received by the legislature ". Although the current constitutional provision and its immediate predecessor, Const 1908, art 5, s 1, as amended, each speak in terms of the *petition* being received by the legislature, it appears that the consistent practice calls for the petitions themselves to remain in the custody of the officials of that executive branch who are responsible for the canvassing thereof, and for the Secretary of State, on behalf of the Board of State Canvassers, to address an official communication simultaneously to The Secretary of the Senate and the Clerk of the House of Representatives advising each of those legislative officers that the petitions have been canvassed and found sufficient, and either enclosing a facsimile sheet from the petition or republishing the entire substance thereof in the notice itself; see 1949 House Journal No. 3, p 64, and 1949 Senate Journal No 2, p 27 (petition for legislation to amend 1901 PA 22, s 1); 1964 House Journal No. 1, p 9-11, and 1964 Senate Journal No. 1, p 6-8 (petition for statewide teacher tenure legislation); 1971 House Journal No. 1, p 68-70, and 1971 Senate Journal No. 1, p 27-29 (petition for legislation repealing 1967 PA 6, subsequently adopted by the people November 7, 1972, published in 1972, PA at page 1155).

I am therefore of the opinion that the 40 session day period begins with the first session day to occur after the date on which the Clerk of the House of Representatives and the Secretary of the Senate receive the Secretary of State's notification that the petitions have been certified as sufficient by the Board of State Canvassers, cf.OAG 1965-1966, no 4531, p 393 (December 27, 1966) at 399.If the mentioned officers do not receive the notification on the same date, the 40 session day period for each house would be governed by the date on which the administrative officer of that particular house received the notification.