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March 26, 2010

\*BOARD CERTIFIED IN LABOR AND EMPLOYMENT LAW

\*CERTIFIED CIRCUIT MEDIATOR

Alex Sink for Governor Campaign  
Post Office Box 75590  
Tampa, Florida 33675-059

Re: Healthcare Lawsuit

To the Alex Sink for Governor Campaign:

You have requested that we review section 16.52, Florida Statutes to determine its impact on the lawsuit filed by Attorney General Bill McCollum challenging the recently passed federal healthcare legislation. You also have requested that we review the applicable statutory provisions and caselaw to determine whether the common law authorizes the Attorney General to circumvent the requirements of section 16.52, Florida Statutes.

Section 16.52, Florida Statutes states:

1) In order to provide for independent action and cooperative participation by the state in a program of concerted action among the states, and independent procedure to oppose any existing or proposed federal legislative encroachments upon constitutional state powers, it is hereby made a duty of the Department of Legal Affairs to make a study of federal legislation--existing and proposed--to determine whether such legislation has resulted, or may result, in objectionable or harmful encroachments upon the constitutional integrity of state governments, and with due regard to this state's full contribution to the national war effort, in cooperation with the attorneys general of other states, or alone, to pursue that course best calculated to preserve and safeguard the constitutional state powers of the government of this state. **It shall furnish to each of the several representatives in the Congress from this state, a written statement giving the reasons for any action being considered, or about to be taken hereunder at the time; and if possible, shall procure the assistance of such representatives therein and therefor.**

(2) It shall be the duty of the Department of Legal Affairs of this state to render opinions to the representatives in Congress from this state, on any question arising within the scope of the subject matter of this act.

(3) In performing the duties imposed upon it under the provisions of this section, the Department of Legal Affairs is hereby authorized to employ therefor the services of the Council of State Governments, a national conference organization, or its successors in name or organization, or any other similar organization, in such manner not inconsistent with its powers and duties, as it may deem desirable; provided, that the cost of such employment, if any, shall be paid from the necessary and regular appropriation of the Department of Legal Affairs.

(Emphasis added).

There is no caselaw or other authority interpreting this provision. The provision appears to require the Department of Legal Affairs to submit a written statement to Florida's Congressional delegation prior to initiating any type of legal action challenging the constitutionality of a federal legislative act that the Department has determined encroaches on the constitutional integrity of state government. Hence, it appears that under the statute, Attorney General McCollum should have conducted an impact study and provided a written statement to Florida's Congressional delegation explaining the reasons for his lawsuit challenging the recently enacted healthcare legislation, since the lawsuit alleges that the healthcare bill encroaches on state's rights under the U.S. Constitution.

An issue has been raised as to whether the common law authorizes the Attorney General's lawsuit regardless of the requirements of section 16.52, Florida Statutes. It is our opinion section 16.52, Florida Statutes overrules the common law.

In several cases, the Florida Courts have recognized that the Attorney General's powers and duties derive not just from statute, but also from the common law. *See State ex. rel. Shevin v. Exxon Corp.*, 526 F. 2d 266 (5<sup>th</sup> Cir. 1976); *State ex. rel. Shevin v. Yarborough*, 257 So. 2d 891 (Fla. 1972); *State ex. rel. Landis v. S.H. Krees & Co.*, 155 So. 823 (Fla. 1934). Thus, the Courts have found that under the common law, the Attorney General may challenge the constitutionality of a state statute. *See State ex. rel. Landis v. S.H. Krees & Co.*, 155 So. 823 (Fla. 1934).

However, the Courts also have recognized the limitations on the exercise of common law powers. Specifically, the Courts have held that if the common law conflicts with Florida's constitutional or statutory law, Florida's constitutional or statutory law overrules the common law on that point. *See State ex. rel. Shevin v. Exxon Corp.*, 526 F. 2d 266 (5<sup>th</sup> Cir. 1976); *State ex. rel. Landis v. S.H. Krees & Co.*, 155 So. 823 (Fla. 1934). Moreover, section 2.01, Florida Statutes expressly states that the common law applies only to the extent that it is not inconsistent with Florida's constitutional and statutory law.

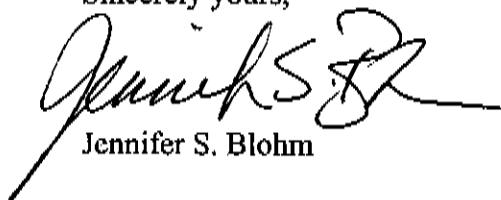
Section 16.52, Florida Statutes prescribes a certain procedure that the Attorney General's office is to follow in challenging federal legislation that encroaches on the constitutional integrity of the state government. In our opinion, the statute acts as a legislative restriction on the Attorney General's common law power to file a lawsuit challenging federal legislation on the basis that the legislation encroaches on state's rights under the U.S. Constitution. The issue is not whether the lawsuit can be filed, but whether the Attorney General must comply with the requirements of section

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16.52 prior to filing the lawsuit. It is our opinion that he clearly must comply with the statutory law. As the Courts have consistently held, statutory law overrules the common law.

In sum, in our opinion, section 16.52, Florida Statutes appears to apply to the Attorney General's recent lawsuit challenging the federal healthcare reform legislation, and the Attorney General must comply with the statute's requirements since the statute controls over any common law powers the Attorney General may have.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jennifer S. Blohm", with a long, sweeping underline that extends to the left and then curves back to the right.

Jennifer S. Blohm