

**SENATE
STATE OF LOUISIANA**

Consumer Affairs & Technology
Chairman
Commerce
Vice-Chairman
Judiciary C
Local & Municipal Affairs
Retirement
Greater N.O. Expressway



A.G. CROWE
District 1

195 Strawberry Street
Slidell, LA 70460
(985) 643-3600
Toll Free (866) 762-7693
Fax (985) 645-3566
agc@agcrowe.com
www.agcrowe.com

January 15, 2010

Attorney General James D. "Buddy" Caldwell
Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804

Re: Protection from the Federal Healthcare Legislation

Dear Attorney General Caldwell:

Please consider this a formal request for an Attorney General's Opinion. The United States Congress is considering legislation which, if passed, would require Louisiana to expand the income limits for the Medicaid program and would, thereby, negatively impact the state general fund. Further, the federal legislation would require every Louisiana citizen to purchase private health insurance or participate in a government run health insurance program.

Listed below are the specific areas of concern for which I would like an opinion rendered:

1. Can the federal government force Louisiana to expand the income limits on the medicaid program and is such expansion tantamount to an unfunded mandate?

As you are aware, Medicaid is a grant program from the federal government to the states to provide health care to certain low income individuals and families. For every dollar that Louisiana draws down from the federal government, the state of Louisiana must put up additional dollars as a match to obtain the grant. The U.S. Supreme Court in *Printz v. United States*, 117 S.Ct. 2365, 521 U.S. 898, 138 L.Ed.2d 914 (1997), has declared that the states cannot be required by the federal government to provide services which are not compensated by the federal government. Forcing Louisiana to expand the income limits for the medicaid program would, thereby, negatively impact the state general fund.

A.G. Crowe

Senator

2. If there is a requirement from the federal government that the state's Medicaid program cover elective abortions, which contradicts state law, which statute would prevail, federal law or state statute?

R.S. 40:1299.34.5 prohibits any public funds to be made available to any institution, board, commission, department, agency, official, or an employee of the state of Louisiana, or any political subdivision thereof, whether such funds are made available by the government of the United States, to pay for elective abortions. The only exceptions are to save the life of the mother or in cases of rape incest. The U.S. Senate's version of the health-care-take-over bill has a requirement that the states cover all abortions, which is in direct contradiction to state law. Furthermore, to force Louisiana taxpayers to pay for the taking of innocent life would violate the conscience of more than half of Louisiana citizens.

3. Would coercing individuals to enter into contracts with private companies, particularly health insurers, go beyond the authority of the Commerce Clause in Article I, Section 8, of the U.S. Constitution and, therefore, be unconstitutional?

A. Is there any precedence where federal government has used the Commerce Clause to make individual

citizens do business with a private company? The provisions of the health care bill passed by the U.S. Senate require some individuals to purchase health insurance from private companies. Refusal of those individuals to purchase health insurance would subject those citizens to monetary penalties and/or jail time.

B. The Commerce Clause gives the federal government the ability to regulate *interstate* commerce. The McCarren-Ferguson Act of 1945 (15 U.S.C.A. § 1011, *et seq.*) gives the states authority to regulate the "business of insurance" without interference from federal regulation, unless federal law says otherwise. McCarren-Ferguson was in direct response to the U.S. Supreme Court case, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to the court case, insurance was thought of as a product of commerce which was unregulated by the state government and, therefore, thought to be subject to federal regulation, via the Commerce Clause, including anti-trust laws. Since 1945, every state in the union has set up a state agency to regulate insurance products which are sold in that particular state. For example, allowable provisions in an insurance policy in one state may be forbidden in another state. In your opinion, does the current varying state-by-state regulation of insurance make this an *intrastate* product instead of an *interstate* product, thereby eliminating the federal government's ability to use the Commerce Clause for a wholesale take-over of the business of health insurance?

4. Does requiring the citizens of Louisiana to pay for certain federally mandated services while exempting the taxpayers of certain other states is a violation of the Equal Protection Clause in the Fourteenth Amendment of the U.S. Constitution?

A. As you are aware, U.S. Senator Ben Nelson of Nebraska received a permanent exemption from paying the state's cost of expanding the Medicaid population (known as the "Cornhusker kickback"). This would in essence mean that the taxpayer of Louisiana would be paying more to the federal government to subsidize the taxpayers of Nebraska who are not paying their portion of the increased mandate.

5. Does the federal government violate the Tenth Amendment of the U.S. Constitution by invoking the wholesale takeover of the health insurance industry when neither "health care" nor "health insurance" is even mentioned in the U.S. Constitution, much less delegated to the federal government by the states?

The Tenth Amendment of the U.S. Constitution declares that "The power's not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States relatively, or to the people."

If you find any of these provisions of the proposed health care bill to be a violation of the U.S. Constitution, I would call upon you to file suit against the federal government to protect the tax payer of Louisiana from this unnecessary intrusion by the federal government. I appreciate your reviewing this matter for me and giving me a legal opinion regarding these issues.

Sincerely,



A.G. Crowe
State Senator, District 1

AGC/CR:tf