1998

Session Law 98-113

Florida Senate & House of Representatives

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SB. 1070 4-10 HB. 4749 44-71
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H. Civil Justice Meeting files 1998 19/2834
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(2) 1-20-98 2 tapes *
(1) 3-5-98 1 tape
(1) 3-19-98 1 tape
S. B+I Meeting files 1997-98 3-12-98 18/2385 ✓
Bill files: SB. 1070 18/2386 ✓
SB 1768 bill only 18/2387 ∅
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Meeting files 18/2370
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(1) —— 4-9-98 tape 2 of 2

B+I - tapes 625/867
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AMENDED

NOTICE OF COMMITTEE MEETING
House of Representatives

Civil Justice and Claims

February 17, 1998 1:30 P.M.-5:00 P.M. 102 HOB 19 2834

Consideration of the following Proposed Committee Bill(s):

PCB CJCL 98-01 Premise Liability, Trespass, and Negligent Hiring

PCB CJCL 98-02 Product Liability and Statutes of Repose

PCB CJCL 98-03 Punitive Damages

PCB CJCL 98-04 Rental Car Liability and the Dangerous Instrumental Doctrine

PCB CJCL 98-05 Joint and Several Liability

PCB CJCL 98-06 Litigation Reform, Fast Tracking and Jury Reform

The committee will workshop drafts of the following PCB's on Tort and Litigation Reform issues:

PCB CJCL 98-08 Medical Malpractice

PCB CJCL 98-09 Neurological Injury Compensation Association (NICA)

Tom Warner #87
Chair

Received in the Office of the Sergeant at Arms on February 4 1998 at 9:25 AM (time).
Barbara Kaye
Sergeant at Arms

Filed by me with the Sergeant at Arms and the Clerk on February 4 1998 in compliance with Rules.
Committee Administrative Assistant

Distribution: Sergeant; Clerk (Calendar); Leg. Info.; others as required by Rules.

H-14(1997)

STORAGE NAME: h4749.cjc
DATE: March 18, 1998

HOUSE OF REPRESENTATIVES
COMMITTEE ON
Civil Justice and Claims
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 4749

RELATING TO: Birth Related Injuries

SPONSOR(S): Committee on Civil Justice and Claims

COMPANION BILL(S): SB 1070 by Senator Sullivan (s); SB 1768 by Senator Holzendorf (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 0
(2)
(3)
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I. SUMMARY:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. The bill provides that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under the Florida Birth-Related Neurological Injury Compensation Plan is compensable and prohibits a civil action from being brought until such a determination has been made. Notice requirements to obstetrical patients are revised to clarify that the hospitals with a participating physician on its staff and participating physicians must provide such notice prior to delivery. The hospital or the participating physician may elect to give the patient NICA's notice form and have the patient sign a form acknowledging receipt, which is deemed to be proof that the notice requirements have been met. Exceptions to the notice requirements are provided. The bill provides for investments of funds in authorized securities.

This bill also provides for a study to be conducted by the Auditor General and a technical advisory committee to review the reserve adequacy and funding rates of NICA and to report on the effects of lowering the eligible birth weights. The report would be filed January 1, 1999.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of the obstetric services in Florida. The significant increase in malpractice insurance premiums had caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers. To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related injury is defined in s. 766.302, F.S., to mean:

> an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under chapter 459, F.S., that is subject to disciplinary action, in which case the provision of s. 455.225, F.S., will apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of chapter 395, F.S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by the claimant. Pursuant to s. 766.309, F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

* Whether the injury claimed a birth-related neurological injury;

* Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital; and

* How much compensation, if any, is awardable.

A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s 766.301, F.S., shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal.

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

* Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care, medically necessary drugs, special equipment,

* Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury.

* Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each non-governmental hospital licensed under chapter 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under chapter 458, F.S., or chapter 459, other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to .25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q) F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31 and casualty carriers are authorized to recover their initial and annual assessment through a

surcharge on future policies. Lines of insurance subject to the assessment include: farm owners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding. (1) the notice requirements to patients and (2) determination by a circuit court as to whether a claim is covered by NICA.

In 1996, the Florida Supreme Court ruled in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So 2d 974, that administrative hearing officer (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did not meet the statutory definition of an infant covered by NICA. Upon appeal to the district court, and upon the district court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court. (966 So.2d, at 978).

In Galen of Florida, Inc. v. Braniff, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held "that as a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery." Therefore, if notice is not provided to an obstetrical patient, then a civil action for malpractice would not be barred, even if the birth would otherwise be covered by NICA.

B. EFFECT OF PROPOSED CHANGES:

The bill amends s. 766.301, F.S. to state that the issue of whether a claim is covered by NICA is exclusively determined in the administrative proceeding.

This bill amends s. 766.304, F.S., relating to the administrative law judge's determination of claims, to provide that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under 766.309, F.S., have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303, F.S. An action may not be brought under ss. 766.301 - 766.316, F.S., if the claimant recovers or final judgment is entered. This amendment is in response to the Florida Supreme Court decision in Florida Birth-Related Neurological Injury Compensation Association v McKaughan, explained above.

The bill amends s. 766.315, F.S. to provide that NICA funds be invested in authorized securities in accordance with standards for investments used by the Board of Administration under s. 215.47, F.S.

This bill also amends s 766.316, F.S., relating to notice to obstetrical patients of participation in NICA, to specify that such notice must be provided to the patient any time prior to delivery and authorizes the hospital or the participating physician to elect to give the patient the notice form and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable. This amendment is in response to the Florida Supreme Court decision in Galen of Florida, Inc. v. Braniff, explained above.

This bill provides for a study by the Auditor General and a technical advisory group on the reserve adequacy and funding rates of NICA, which shall also include a study of the effects of lowering the birth weight eligibility for coverage under the act.

The report is due January 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This bill would slightly increase the number of birth-related injuries compensable through NICA

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill amends the following sections of the Florida Statutes: 766.301, 766.304, 766.315, and 766.316.

E. SECTION-BY-SECTION RESEARCH:

Omitted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures.

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth.

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON: Civil Justice and Claims:

Prepared by: Legislative Research Director:

Charles R. Boning Richard Hixson

STORAGE NAME: h4749z cjc ****FINAL ACTION****
DATE: October 20, 1998 ****SEE FINAL ACTION STATUS SECTION****

HOUSE OF REPRESENTATIVES
COMMITTEE ON
Civil Justice and Claims
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 4749 (passed as CS/SB 1070)

RELATING TO: Birth Related Injuries

SPONSOR(S): Committee on Civil Justice and Claims

COMPANION BILL(S): CS/SB 1070 by Senator Sullivan (s), SB 1768 (c); CS/HB 823 (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 0
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I. FINAL ACTION STATUS:

HB 4749 failed to pass the Legislature. However, tied legislation, CS/SB 1070 passed the Legislature and became law without the Governor's signature on May 22, 1998. (Chapter No. 98-113) This bill research statement addresses the Senate Bill.

II. SUMMARY:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. The bill provides that the determination of whether a claim is covered under NICA must be determined exclusively by an administrative proceeding

Under the bill, the hospital or the participating physician may elect to give the obstetrical patient a NICA notice form and have the patient sign a form acknowledging receipt. The form will create a rebuttable presumption that the notice requirements have been met. Patients with certain emergency conditions are not entitled to notice.

The bill provides that the doctrines of res judicata and collateral estoppell may not bar future civil actions. The findings of fact of administrative law judges are not admissible in subsequent civil actions. However, sworn testimony and exhibits introduced into evidence in the administrative proceeding, are admissible in a subsequent action to impeach a witness.

The bill limits NICA to investing money in investments described in s. 215.47, F.S.

The bill requires the Auditor General to conduct a study of the actuarial soundness of NICA and other specified aspects of NICA funding, including an evaluation of the estimated annual cost to lower the birth weight to 2,000 grams or 1,000 grams. The final report must be submitted to the Legislature by January 1, 1999. The bill does not entitle the technical advisory group to any compensation or reimbursement

Finally, this bill provides for an additional study, by the Auditor General and a technical advisory committee, to review the reserve adequacy and funding rates of NICA and to report on the effects of lowering the eligible birth weights. The report would be filed January 1, 1999.

III. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of the obstetric services in Florida. The significant increase in malpractice insurance premiums had caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related injury is defined in s 766.302, F.S., to mean:

> an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under chapter 459, F.S., that is subject to disciplinary action, in which case the provision of s. 455.225, F.S., will apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of chapter 395, F.S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by the claimant. Pursuant to s. 766.309,

F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

* Whether the injury claimed a birth-related neurological injury;

* Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital; and

* How much compensation, if any, is awardable.

A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F.S., shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal.

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

* Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care, medically necessary drugs, special equipment,

* Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury.

* Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each non-governmental hospital licensed under chapter 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under chapter 458, F.S., or chapter 459, other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to .25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as

defined in s. 624.605(1)(b), (k), and (q) F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31 and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farm owners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients and (2) determination by a circuit court as to whether a claim is covered by NICA.

In 1996, the Florida Supreme Court ruled in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So.2d 974, that administrative hearing officer (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did not meet the statutory definition of an infant covered by NICA. Upon appeal to the district court, and upon the district court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court. (966 So.2d, at 978).

In Galen of Florida, Inc. v. Braniff, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held "that as a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their

participation in the plan a reasonable time prior to delivery." Therefore, if notice is not provided to an obstetrical patient, then a civil action for malpractice would not be barred, even if the birth would otherwise be covered by NICA.

B. EFFECT OF PROPOSED CHANGES:

The bill provides that the issue of whether a claim is covered by NICA must be determined exclusively in an administrative proceeding. Essentially, the bill would overturn the McKaughan decision. Additionally, the bill provides that if the administrative law judge determines that the claimant is entitled to compensation under the NICA plan, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of ss. 766.301-766.316, F.S. In no case may a civil action be brought until an administrative judge has determined that the claimant is not entitled to compensation under the NICA plan.

The bill allows a hospital or participating physician to provide patients with notice forms informing patients of patient's rights and responsibilities under the NICA plan. If the patient signs this form, the form may by used by physician to create a rebuttable presumption that notice was given to the patient. Without providing a patient with adequate notice a physician may not assert NICA immunity. Galen of Florida, Inc. v. Braniff, 696 So.2d 308, (Fla, 1977).

The bill provides that the doctrines of res judicata and collateral estoppel do not apply to bar a claimant's ability to seek damages in a civil action should the injured infant not fall into the class of infants covered by the NICA system. In many circumstances, when an administrative agency, acting in a judicial capacity, resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose. University of Miami v. Zepada, 674 So.2d 765 (Fla. 3d DCA 1996)(which applies this principle in a NICA action); United States Fidelity and Guar. Co v. Odoms, 444 So 2d 78, 80 (Fla. 5th DCA 1984) (citing Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So.2d 35 (Fla.3d DCA), cert. denied, 267 So.2d 833 (Fla.1972)). Several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made. Donahue v. Davis, 68 So.2d 163, 169 (Fla.1953). It is now well settled that res judicata may be applied in administrative proceedings. Yet the principles of res judicata do not always neatly fit within the scope of administrative proceedings. Thus, K. Davis, *Administrative Law Treatise*, Sec. 18.01, at 545-46 (1958), explains:

> Courts normally apply law to past facts which remain static--where res judicata operates at its best--but agencies often work with fluid facts and shifting policies. The regularized procedure of courts conduces to application of the doctrine of res judicata; administrative procedures are often summary, parties are sometimes unrepresented by counsel, and permitting a second consideration of the same question may frequently be supported by other similar reasons which are inapplicable to judicial proceedings. The finality of unappealed judgments of courts is ordinarily well understood in advance, whereas statutory provisions often implicitly deny finality or fail to make clear whether or when administrative action should be considered binding.

The doctrine of res judicata is applied with "great caution" in administrative cases. Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648 (Fla. 3d DCA 1982).

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. Mobil Oil Corp. v. Shevin, 354 So.2d 372 (1978)(Emphasis added.). The rule of collateral estoppel (or estoppel by judgment) requires that the matter sought to be interposed as a bar must have been litigated and determined by the judgment, or if not expressly adjudicated, essential to the rendition of the judgment. Pennsylvania Insurance Co. v. Miami National Bank, 241 So.2d 861 (Fla. 3d DCA 1970).

The bill provides that the findings of fact and conclusions of law made by an administrative judge during an administrative proceeding are not admissible in a subsequent civil action. Also, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible only for impeachment purposes against a party to the administrative proceeding. Presumably, in the absence of this provision, sworn testimony and exhibits introduced into evidence in the prior administrative case would be admissible for any purpose permissible under the Evidence Code.

Section 90.401, F.S., defines relevant evidence as "evidence tending to prove or disprove a material fact." Section 90.402, F.S., explains that "all relevant evidence is admissible, except as provided by law." Section 90.403, F.S., provides for the exclusion of relevant evidence on grounds of prejudice or confusion stating that "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Under this provision of this amendment, prior sworn statements and exhibits introduced in the administrative proceeding would not be admissible for reasons other than impeachment, even if relevant and otherwise admissible under the Evidence Code.

Under the Evidence Code, any party, including the party calling the witness, may attack the credibility of a witness by:

> Introducing statements of the witness which are inconsistent with the witness's present testimony;
> Showing that the witness is biased.
> Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610, F.S.;
> Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified; or
> Proof by other witnesses that material facts are not as testified to by the witness being impeached.

s. 90.608, F.S. (emphasis supplied)

A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:

> The evidence may refer only to character relating to truthfulness; and
> Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

s. 90.609, F.S.

Conviction of certain crimes may be used for the purpose of impeachment. A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement, regardless of the punishment, with the following exceptions:

Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness; and
Evidence of juvenile adjudications are inadmissible under this subsection.

The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible. s. 90.610, F.S.

Under the bill, the sworn statements of any person and any exhibits entered into evidence during a preceding administrative proceeding are admissible in a subsequent civil action only for the purpose of impeaching a party to the preceding administrative proceeding. The American Heritage Dictionary defines the verb impeach thus: To make an accusation against; to challenge or discredit; attack.

Under the bill, anybody's sworn testimony may be used in a subsequent civil case to impeach a person who was a party to the original administrative proceeding. However, the parties to the administrative hearing are NICA and the parents of the injured child. s. 766.308, F.S. The parties to the subsequent civil action would normally not include NICA. One possible interpretation of the bill's language is that, during the subsequent civil proceeding, the plaintiff could be impeached with the sworn testimony of anyone (subject to the rules of evidence), but the defendant could not be so impeached. In other words, the defendant could offer proof by other witnesses that material facts are not as testified to by the plaintiff, but the plaintiff would not be afforded the same opportunity. If this is not the intent of this provision, some clarification should be made to avoid needless litigation over the issue

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This bill would slightly increase the number of birth-related injuries compensable through NICA.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      N/A

   b Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

      N/A

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      N/A

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      N/A

5. Family Empowerment:

   a. If the bill purports to provide services to families or children:

      (1) Who evaluates the family's needs?

         N/A

      (2) Who makes the decisions?

         N/A

      (3) Are private alternatives permitted?

         N/A

      (4) Are families required to participate in a program?

         N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill amends the following sections of the Florida Statutes: 766.301, 766 304, 766.315, and 766.316.

E. SECTION-BY-SECTION RESEARCH:

Omitted.

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

4. Total Revenues and Expenditures:

   N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   N/A

2 Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   N/A

2. Direct Private Sector Benefits.

   N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

VI. COMMENTS:

N/A

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 4749 was originally a Proposed Committee Bill produced by the Committee on Civil Justice and Claims. On April 23, 1998, CS/SB 1070 was substituted for HB 4749. CS/SB 1070 passed the Senate by a vote of 40 to 0, on April 21, 1998. On April 27, 1998, it passed the House of Representatives by a vote of 111 to 0. CS/SB 1070 became law without the Governor's signature on May 22, 1998. (Chapter No. 98-113) (See also, CS/HB 823 - Chapter No. 98-409)

VIII. SIGNATURES:

COMMITTEE ON: Civil Justice and Claims:
Prepared by: Legislative Research Director:

Charles R. Boning Richard Hixson

FINAL RESEARCH PREPARED BY COMMITTEE ON Civil Justice and Claims:
Prepared by: Legislative Research Director

Charles R. Boning Richard Hixson

By Senators Sullivan, Williams, Horne and Cowin

22-199D-98

A bill to be entitled

An act relating to medical malpractice insurance; amending s. 766.301, F.S.; clarifying legislative intent; amending s. 766.302, F.S.; modifying definitions; amending s. 766.304, F.S.; providing exclusive jurisdiction of administrative law judges in claims filed under ss. 766.301-766.316, F.S.; providing a limitation on bringing a civil action under certain circumstances; amending s. 766.316, F.S.; providing hospitals and physicians with alternative means of providing notices to obstetrical patients relating to the no-fault alternative for birth-related neurological injuries; prescribing conditions under which notice need not be given; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (1) of Section 766.301, Florida Statutes, is amended to read:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. <u>The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.</u>

Section 2. Subsection (2) of section 766.302, Florida Statutes, is amended to read:

766.302 Definitions.--As used in ss. 766.301-766.316, the term:

(2) "Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 1,800 ~~2,500~~ grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

Section 3. Section 766.304, Florida Statutes, is amended to read:

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered.The division may adopt rules to promote the efficient

administration of, and to minimize the cost associated with, the prosecution of claims.

Section 4. Section 766.316, Florida Statutes, is amended to read:

766.316 Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients any time prior to delivery ~~thereof~~ as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to give the patient the association's notice form and to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been satisfied. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when providing the notice is not practicable.

Section 5. This act shall take effect July 1, 1998.

****

SENATE SUMMARY

Amends statutes relating to medical malpractice insurance. Clarifies legislative intent related to exclusive remedy. Redefines birth-related neurological injury. Provides that an administrative law judge has exclusive jurisdiction to determine if a claim for compensation under the Florida Birth-Related Neurological Injury Compensation Plan is justified. Provides hospitals and physicians with alternative means of providing notice to obstetrical patients relating to no-fault alternatives to birth-related neurological injuries. Notice is not required if the patient has an emergency condition or if providing the notice is not practicable.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below)

Date: March 4, 1998 Revised: 18 2336

Subject: Medical Malpractice Insurance

	Analyst	Staff Director	Reference	Action
1.	Johnson JJ	Deffenbaugh DD	BI	
2.			JU	
3.				
4.				
5.				

I. Summary:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. Senate Bill 1070 expands the number of infants eligible for compensation by revising the definition of birth-related neurological injury from infants weighing at least 2,500 to at least 1,800 grams. The bill provides that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under ss 766.301- 766 316, F S., the Florida Birth-Related Neurological Injury Compensation Plan is compensable. Notice requirements to obstetrical patients are revised to clarify that the hospitals with a participating physician on its staff and participating physicians must provide such notice prior to delivery. The hospital or the participating physician may elect to give the patient NICA's notice form and have the patient sign a form acknowledging receipt, which is deemed to be proof that the notice requirements have been met Exceptions to the notice requirements are provided

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28 5 million per year.

This bill substantially amends the following sections of the Florida Statutes: 766.301, 766.302, 766.304, and 766.316.

II. Present Situation:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability

of the obstetric services to the women of Florida. The significant increase in malpractice insurance premiums had caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers. To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related injury is defined in s. 766.302, F.S., to mean:

> an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under chapter 459, F.S., that is subject to disciplinary action, in which case the provision of s. 455.225, F.S., will apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of chapter 395, F S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by the claimant. Pursuant to s. 766.309, F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

- Whether the injury claimed a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; and
- How much compensation, if any, is awardable.

A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s 766 309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F S., shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

- Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care, medically necessary drugs, special equipment,
- Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury.
- Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988 In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each non-governmental hospital licensed under chapter 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under chapter 458, F.S., or chapter 459, other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to .25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q) F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31 and casualty carriers are authorized to recover their initial and annual

assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farmowners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients and (2) determination by a circuit court as to whether a claim is covered by NICA.

In 1996, the Florida Supreme Court ruled in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So.2d 974, that administrative hearing officer (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did *not* meet the statutory definition of an infant covered by NICA. Upon appeal to the district court and that court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court. (966 So.2d, at 978).

In Galen of Florida, Inc. v. Braniff, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held "that as a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when

practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery." Therefore, if notice is not provided to an obstetrical patient, then a civil action for malpractice would not be barred, even if the birth would otherwise be covered by NICA.

III. Effect of Proposed Changes:

Section 1. Amends s. 766.301, F.S., relating to legislative intent to provide that the issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. See Section 3, below.

Section 2. Amends s. 766 302, F.S., relating to definitions, to lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams. This change would provide compensation through NICA for more infants (See Private Sector Section for further discussion of impact.)

Section 3. Amends s. 766.304, F.S., relating to administrative judge law determination of claims, to provide that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under 766 309, F.S., have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s 766 303, F.S. An action may not be brought under ss 766.301 - 766 316, F.S., if the claimant recovers or final judgment is entered. This amendment is in response to the Florida Supreme Court decision in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, explained above.

Section 4. Amends s. 766.316, F.S., relating to notice to obstetrical patients of participation in NICA, to specify that such notice must be provided to the patient any time prior to delivery and authorizes the hospital or the participating physician to elect to give the patient the notice form and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable This amendment is in response to the Florida Supreme Court decision in Galen of Florida, Inc. v. Braniff, explained above.

Section 5. This act takes effect July 1, 1998.

IV. Constitutional Issues:

A Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

By providing that signature of a patient acknowledging receipt of the notice form is *proof* that the notice requirements have been met may raise a constitutional question of due process if this creates an irrebuttable presumption that cannot, under any circumstances, be overcome by a claimant.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues

See Private Sector Impact for the estimated impact of changes in the bill on the assessments on hospitals and physicians and casualty carriers.

B. Private Sector Impact:

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11 3 - $28.5 million per year. The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full 25 percent assessment in the second year and each subsequent year against the casualty insurers. It is estimated that the .25 assessment against carriers would generate $5.4 million, based on 1995 net direct written premium. In addition, the department would be required to increase assessments paid by hospitals and physicians by an estimated 78 percent.

The actuary assumed that 22 additional births in the range of the birth weight of 1,800 - 2,499 grams would be anticipated and used the current average cost per selected/accepted claim of approximately $1.3 million to establish the high range estimate of $28.5 million.

The low range estimate of $11.3 million was determined by adjusting the high range estimate of $28.5 million by 40 percent of compensable claims filed with NICA (i.e., approximately 9 additional claims based on an estimated 60 percent of births compensable not filed with NICA, based on NICA's claims history)

VII. Related Issues:

None.

VIII. Amendments:

None.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below)

Date. March 4, 1998 Revised: 3/13/98

Subject. Medical Malpractice Insurance

	Analyst	Staff Director	Reference	Action
1	Johnson	Deffenbaugh	BI	Fav/ 6 amendments
2.			JU	
3.				
4.				
5				

I. Summary:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries Senate Bill 1070 expands the number of infants eligible for compensation by revising the definition of birth-related neurological injury from infants weighing at least 2,500 to at least 1,800 grams. The bill provides that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under the Florida Birth-Related Neurological Injury Compensation Plan is compensable and prohibits a civil action from being brought until such a determination has been made. Notice requirements to obstetrical patients are revised to clarify that the hospitals with a participating physician on its staff and participating physicians must provide such notice prior to delivery. The hospital or the participating physician may elect to give the patient NICA's notice form and have the patient sign a form acknowledging receipt, which is deemed to be proof that the notice requirements have been met. Exceptions to the notice requirements are provided.

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11 3 - $28 5 million per year.

The Banking and Insurance Committee adopted six amendments: 1) striking the provisions of the bill that lower the birth rate of covered infants; 2) providing that a determination that a claim is not compensable under NICA does not prohibit the claimant from pursuing other civil remedies, 3) allowing NICA to invest plan funds under the same limitations that apply to the State Board of Administration; 4) revising the notice requirements to provide that the signature of a patient acknowledging receipt of notice raises a rebuttable presumption that the notice requirements have been met; 5) requiring the Auditor General to study, with the assistance of a technical advisory group, the actuarial soundness of NICA, including an evaluation of lowering the birth rate to

specified levels; and 6) revising the effective date, including a retroactive application of the provisions regarding exclusive jurisdiction of administrative law judges to determine compensability of claims under NICA.

This bill substantially amends the following sections of the Florida Statutes: 766.301, 766.302, 766.304, and 766.316.

II. Present Situation:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of the obstetric services to the women of Florida. The significant increase in malpractice insurance premiums had caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers. To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related injury is defined in s. 766.302, F.S , to mean:

> an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance and the medical advisory review panel provided for in s. 766 308, F.S

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under chapter 459, F S , that is subject to disciplinary action, in which case the provision of s. 455.225, F S., will apply The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of chapter 395, F S , the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by the claimant Pursuant to s. 766.309, F S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

- Whether the injury claimed a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; and
- How much compensation, if any, is awardable.

A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F.S., shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal.

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for·

- Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care, medically necessary drugs, special equipment,
- Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury
- Reasonable expenses incurred in connection with the filing of a claim under ss. 766 301-766.316, F.S

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766 315, F.S Each non-governmental hospital licensed under chapter 395, F.S , is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under

chapter 458, F.S., or chapter 459, other than participating physicians, are required to pay an annual assessment of $250 Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to 25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q) F S All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31 and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farmowners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s 766 314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients and (2) determination by a circuit court as to whether a claim is covered by NICA.

In 1996, the Florida Supreme Court ruled in Florida Birth-Related Neurological Injury Compensation Association v McKaughan, 668 So 2d 974, that administrative hearing officer (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did *not* meet the

statutory definition of an infant covered by NICA Upon appeal to the district court and that court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court. (966 So.2d, at 978).

In Galen of Florida, Inc v. Braniff, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held "that as a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery." Therefore, if notice is not provided to an obstetrical patient, then a civil action for malpractice would not be barred, even if the birth would otherwise be covered by NICA.

III. Effect of Proposed Changes:

Section 1. Amends s. 766 301, F.S , relating to legislative intent to provide that the issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. See Section 3, below.

Section 2. Amends s. 766.302, F.S., relating to definitions, to lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams. This change would provide compensation through NICA for more infants. (See Private Sector Section for further discussion of impact)

Section 3. Amends s. 766.304, F.S., relating to administrative judge law determination of claims, to provide that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under 766.309, F.S., have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303, F.S. An action may not be brought under ss. 766.301 - 766 316, F S , if the claimant recovers or final judgment is entered. This amendment is in response to the Florida Supreme Court decision in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, explained above.

Section 4. Amends s. 766.316, F.S., relating to notice to obstetrical patients of participation in NICA, to specify that such notice must be provided to the patient any time prior to delivery and authorizes the hospital or the participating physician to elect to give the patient the notice form and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have

been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable. This amendment is in response to the Florida Supreme Court decision in Galen of Florida, Inc. v. Braniff, explained above.

Section 5. This act takes effect July 1, 1998.

IV. Constitutional Issues:

A Municipality/County Mandates Restrictions:

None

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

By providing that signature of a patient acknowledging receipt of the notice form is *proof* that the notice requirements have been met may raise a constitutional question of due process if this creates an irrebuttable presumption that cannot, under any circumstances, be overcome by a claimant.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

See Private Sector Impact for the estimated impact of changes in the bill on the assessments on hospitals and physicians and casualty carriers

B. Private Sector Impact:

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full .25 percent assessment in the second year and each subsequent year against the casualty insurers. It is estimated that

the .25 percent assessment against carriers would generate $5.4 million, based on 1995 net direct written premium. In addition, the department would be required to increase assessments paid by hospitals and physicians by an estimated 78 percent.

The actuary assumed that 22 additional births in the range of the birth weight of 1,800 - 2,499 grams would be anticipated and used the current average cost per selected/accepted claim of approximately $1.3 million to establish the high range estimate of $28.5 million. The low range estimate of $11.3 million was determined by adjusting the high range estimate of $28.5 million by 40 percent of compensable claims filed with NICA (i.e., approximately nine additional claims based on an estimated 60 percent of births compensable not filed with NICA, based on NICA's claims history)

VII. Related Issues:

None.

VIII. Amendments:

#1 by Banking and Insurance:
Strikes the provisions of the bill (Section 2) which lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams, and returns to the current law definition. This amendment removes the fiscal impact described above. (WITH TITLE AMENDMENT)

#2 by Banking and Insurance:
Specifies that if it is determined that a claim filed under NICA is not compensable, neither the doctrine of collateral estoppel or res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. However, sworn testimony and exhibits introduced into evidence in the prior determination may be admissible in subsequent actions as impeachment evidence. (WITH TITLE AMENDMENT)

#3 by Banking and Insurance.
Authorizes the NICA board to invest plan funds under the same limitations that apply to the State Board of Administration under s. 215.47. Currently, the NICA law requires that plan funds be invested in interest-bearing investments.

#4 by Banking and Insurance:
Strikes the notice provisions of the bill and, instead, provides that a hospital or participating physician may elect to have the patient sign a form acknowledging receipt of the notice form, which would raise a rebuttable presumption that the notice requirements of this section have been met. It also provides that notice need not be given when the patient has an emergency medical condition as defined in s. 395.002(8)(b), F.S., or when notice is not practicable. This amendment removes the constitutional issue raised by the bill, summarized above

#5 by Banking and Insurance:

Requires the Auditor General to conduct a study of the actuarial soundness of NICA and other specified aspects of NICA funding, including an evaluation of the estimated annual cost to lower the birth weight to 2,000 grams or 1,000 grams. The Auditor General must contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of NICA. To assist the Auditor General, a technical advisory group must be appointed by various professional and trade associations specified, including health care providers, insurers, and attorneys. The final report must be submitted to the Legislature by January 1, 1999. The amendment has a fiscal impact on the Office of the Auditor General, but no appropriation is made. The amendment does not entitle the technical advisory group to any compensation or reimbursement. (WITH TITLE AMENDMENT)

#6 by Banking and Insurance:
Amends the effective date to provide that the amendments to ss 766.301 and 766 304, relating to the exclusive jurisdiction of an administrative law judge to determine whether a claim filed birth is compensable under NICA and the prohibition against bringing a civil action until such a determination has been made. These provisions would apply to claims filed on or after July 1, 1998, and to that extent shall apply retroactively, regardless of the date of birth.

The amendments to the notice provisions would take effect July 1, 1998, and apply only to causes of action accruing on or after such date. (WITH TITLE AMENDMENT)

18/2385

A G E N D A

COMMITTEE ON BANKING AND INSURANCE

Senator Mario Diaz-Balart, CHAIRMAN
Senator Betty Holzendorf, VICE CHAIRMAN

DATE: Thursday, March 12, 1998
TIME: 1:00 P.M. - 3:00 P.M.
PLACE: Room EL, Senate Office Building

MEMBERS: Senator Bill Bankhead
Senator W.D. Childers
Senator Charles W. Clary III
Senator John Grant
Senator Katherine Harris
Senator Tom Rossin
Senator Jim Scott
Senator Don Sullivan
Senator Pat Thomas
Senator Charles Williams

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 1056 Kurth (Identical CS/ H 0823)	State Moneys/Investments; revises standards that certain corporate obligations & state & local government obligations must meet to be qualified for such investment; authorizes investment in certain foreign bonds & certain convertible debt obligations of corporations domiciled in United States. Amends 18.10. BI 03/12/98 GO WM	FAV/2
2	SB 1372 Williams (Compare S 0766)	Insurance; requires agents to be appointed; clarifies application of fees for title insurance agents; revises definition of term "life agent"; defines term "variable contract agent" & prescribes requirements for soliciting or selling variable life insurance, variable annuity contracts, & other indeterminate value contracts; includes customer representatives within & deletes claims investigators from application, etc. Amends Chs. 624, 626, 627, 634, 642. BI 03/12/98 WM	FAV/CS

03/09/98
1:34 PM

COMMITTEE ON BANKING AND INSURANCE

DATE: Thursday, March 12, 1998 TIME: 1:00 P.M. - 3:00 P.M.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
7	SB 0818 Horne (Similar CS/H 3295) 105	Fire Protection Contractors; changes expiration & renewal of certificates of competency for fire protection contractors from annual to biennial basis; revises continuing education requirements & provides transitional continuing education requirements, to conform; increases renewal fee, to conform; amends certain provision re engaging in business or acting in capacity of contractor of automatic fire sprinkler systems, to conform. Amends 633.537,.524,.60. BI 03/12/98 WM	FAVCS
8	SB 1070 Sullivan et al (Compare S 1768) 6 AM	Medical Malpractice Insurance; clarifies legislative intent; modifies definitions; provides exclusive jurisdiction of administrative law judges in claims filed under specific provisions; provides limitation on bringing civil action under certain circumstances; provides hospitals & physicians with alternative means of providing notices to obstetrical patients re no-fault alternative for birth-related neurological injuries, etc. Amends Ch. 766. BI 03/12/98 JU	fav/6

COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

3/12/98 (date)

1070 (Bill No.)

Name GREG BARNHART

Address 2139 PALM BEACH LAKES BLVD., W.P.B.

Representing ACADEMY OF Fla. Trial Lawyers

Lobbyist (Registered with Senate) Yes_____ No_____

Speaking: For_____ Against_____ Information ✓

Subject NICA

If state employee-- Time: from_____ .m. to_____ .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

18 2385

COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

March 12/98 (date)

SB 1070 (Bill No.)

Name BELITA MORETON

Address 215 S. MONROE ST., Suite 315

Representing Fl. League of Health Systems

Lobbyist (Registered with Senate) Yes ✓ No_____

Speaking: For ✓ Against_____ Information_____

Subject NICA

If state employee-- Time: from_____ .m. to_____ .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

3/12/98 (date) 1070 (Bill No.)

Name Bill Bell

Address 120 S Monroe TLH FL

Representing Fla. Hospital Assn

Lobbyist (Registered with Senate) Yes ✓ No

Speaking: For ✓ Against Information

Subject

If state employee-- Time: from .m. to .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

3/12/98 (date) SB 1070 (Bill No.)

Name Mark Delegal

Address Tallahassee

Representing Physicians Protective Trust Fund a statutory Teaching Hospitals

Lobbyist (Registered with Senate) Yes ✓ No

Speaking: For ✓ Against Information

Subject

If state employee-- Time: from .m. to .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

SENATE COMMITTEE ATTENDANCE

COMMITTEE ON: Banking and Insurance

DATE: March 12, 1998

TIME: 1:00 PM -- 3:00 PM

PLACE: EL

Present	Absent	Senators
X		Diaz-Balart, CHAIRMAN
X		Holzendorf, VICE CHAIRMAN
	EXCUSED	Bankhead
	EXCUSED	Childers
X		Clary
X		Grant
X		Harris
X		Rossin
X		Scott
X		Sullivan
X		Thomas
X		Williams
10	2	Totals

03/12/98 4:20 PM

Banking and Insurance
Thursday, March 12, 1998
1:00 P.M. - 3:00 P.M.
Room EL, Senate Office Building

Start 1:25pm - End

ITEM	SPEAKER/COMMENTS	TAPE/CNTR#
SB 1070	Senator Diaz-Balart	1
SB 1070	Senator Sullivan	1
SB1070	Amendment to SB 1070 Senator Sullivan	1
SB1070	Senator Holzendorf	1
SB1070	explaining amendment Senator Sullivan	1
SB1070	Senator Holzendorf	1
SB1070	Senator (vote)-Diaz-Balart	1
SB1056	Insurance Bill Senator Kurth	1
SB1056	Senator Thurman	1
SB1056	to explain the bill Senator Holzendorf	1
SB1056	w/ Questions Senator-Rossin	1
SB1056	to Answer Rep. Gay	1

ITEM	SPEAKER/COMMENTS	TAPE/CNTR#
SB1C--	Main Bill (...) Sen. Holzendorf	1
SB--	Explain Bill Sen. Holzendorf	1
SB13--	vote (...) Sen. Diaz-Balart	1
SB 818	Explain Bill Sen. Gardner	1
CS/SB 818	Sen. Dir Bill Brief Description	1
SB 744	Sen. Gardner - for Sen. Dawson	1
SB 7--	Explain (...) Sen. Diaz Balart	1
SB 1372	Sen Williams title Rhett O'Dosti	1
SB 1372	Amend. Diaz Balart	1
SB1372	Amend 1,2,3,4,5,6 Rhett O'Dosti	1
SB 1372	DOT Amend #6 Fred Varn	1
SB 1372	Amend #6 - John Hall	1
SB 1372	Amend # 7,8,9, Rhett O'dosti	1
SB 12	Sen. Holzendorf	1
SB 12 12	10th Amend 12 Rhett O'dosti	1

COMMENTS	TAPE/CNTR#
	1
	1
	1

N O T I C E

COMMITTEE MEETING

TO: FAYE W. BLANTON
SECRETARY OF THE SENATE

You are hereby notified that the COMMITTEE ON BANKING AND INSURANCE will meet Thursday, March 12, 1998, from 1:00 P.M. until 3:00 P.M. in Room EL, Senate Office Building and will consider the following:

SB 1056	by Kurth	State Moneys/Investments
SB 1372	by Williams	Insurance
SB 0746	by Williams	Public Records/Auto Jt. Underwriting
SB 1316	by Holzendorf	Eligible Surplus Lines Insurers
SB 0382	by Williams	Secondhand Goods Definition
SB 1350	by Williams	Mortgage Lenders (RAB)
SB 0818	by Horne	Fire Protection Contractors
SB 1070	by Sullivan et al	Medical Malpractice Insurance

Amendment deadline for this meeting is Wednesday, March 11, 1998, at 1:00 P.M.

Banking and Insurance , CHAIRMAN

PRIOR to regular session file 4 copies with Secretary of Senate at least 7 days before meeting (Rule 2.6) and DURING regular session at least 2 days before meeting (Rules 2.1 and 2.8). File 1 copy with Rules Committee, 1 copy with Sergeant-at-Arms, 1 copy each with Majority (Republican) and Minority (Democratic) Offices.

ITEM	SPEAKER/COMMENTS	TAPE/CNTR#
SB1372	Questions Sen. Ross	1
SB1372	DOT Fred V[illegible]	1
SB1372	Sen Clary	1
SB1372	Questions Sen Thomas	1
	Staff Director Brian [illegible]	1
SB1372	DOT John Hall	1
SB372	Fin. Cs Roll Call Sen. Diaz Balart	1
SB846	Sen Horne	1
SB846	Zoning Sen Diaz Bal[illegible]	1
SB382	Explain Sen Williams	1
SB382	FIN [illegible] Diaz Bal[illegible]	1
SB1850	Explain Sen Williams	1

ITEM	SPEAKER/COMMENTS	TAPE/CNTR#
SB[illegible]	[illegible]	1
SB[illegible]	[illegible]	1
SB[illegible]	[illegible]	1

N O T I C E

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By the Committee on Judiciary and Senators Sullivan, Williams, Horne, Cowin and Latvala

308-2081-98

A bill to be entitled

An act relating to medical malpractice insurance; amending s. 766.301, F.S.; clarifying legislative intent; amending s. 766.304, F.S.; providing exclusive jurisdiction of administrative law judges in claims filed under ss. 766.301-766.316, F.S.; providing a limitation on bringing a civil action under certain circumstances; amending s. 766.315, F.S.; authorizing the association to invest plan funds only in investments and securities described in s. 215.47, F.S.; amending s. 766.316, F.S.; providing hospitals and physicians with alternative means of providing notices to obstetrical patients relating to the no-fault alternative for birth-related neurological injuries; prescribing conditions; providing for applicability of amendments; requiring the Auditor General to conduct a study of the effects of expanding eligibility for compensation under the plan; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (1) of Section 766.301, Florida Statutes, is amended to read:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of

a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

Section 2. Section 766.304, Florida Statutes, is amended to read:

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. If it is determined that a claim filed under this act is not compensable, the doctrine of neither collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. The findings of fact and conclusions of law of the administrative law judge shall not be admissible in any subsequent proceeding; however, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible as impeachment in any subsequent civil action only against a party to the administrative proceeding, subject to the Rules of Evidence. An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered.The division

may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosecution of claims.

Section 3. Paragraph (e) of subsection (5) of section 766.315, Florida Statutes, is amended to read:

766.315 Florida Birth-Related Neurological Injury Compensation Association; board of directors.--

(5)

(e) Funds held on behalf of the plan are funds only in the investments and securities described in s. 215.47 and are subject to the limitations on investments contained in that section. ~~Any funds held on behalf of the plan must be invested in interest-bearing investments by the association.~~ All income derived from such investments will be credited to the plan.

Section 4. Section 766.316, Florida Statutes, is amended to read:

766.316 Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients ~~thereof~~ as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient

acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

Section 5. (1) The Auditor General shall conduct an analysis of the reserve adequacy and funding rates in order to determine the actuarial soundness of the Florida Birth-Related Neurological Injury Compensation Plan. The study shall include an evaluation of future medical costs for the existing plan claimants, including life expectancy evaluation, and utilization of appropriate discount rates based on annual funding for expected future losses, estimated annual cost to lower the birth weight to 2,000 grams or 1,000 grams, and the estimated cost for lowering the birth weight for multiple births. The Auditor General shall contract with an actuarial consulting firm that has never previously conducted an actuarial analysis of the NICA program.

(2) To assist the Auditor General in the development and performance of the actuarial analysis of the plan, a technical advisory group shall be appointed which shall be composed of the following members: one selected by the Florida Hospital Association representing general acute care hospitals; one selected by the Academy of Florida Trial Lawyers; one selected by the Florida League of Health Systems representing for-profit hospitals; one selected by the Association of Community Hospitals and Health Systems of Florida representing private not-for-profit hospitals; one selected by the Florida Obstetrical and Gynecological Society; one selected by the Physician Insurers Association of America who provides obstetrical medical malpractice insurance

coverage in Florida; one medical malpractice insurer selected by the Florida Insurance Council; the Board of Regents Vice Chancellor of Health Affairs, or her or his designee; one property and casualty insurer selected by the Florida Association of Insurance Agents; the chairman of the Board of the Florida Birth-Related Neurological Injury Compensation Association, or his or her designee; and one selected by the Florida Medical Association who is a practicing neonatologist. The technical advisory group will assist the Auditor General in developing the specific elements to be studied as part of the actuarial analysis; review an interim report and provide feedback to the Auditor General; and provide a written response that will be included in the final report of the Auditor General.

(3) The Auditor General shall submit the required report to the President of the Senate and the Speaker of the House of Representatives and their designees by January 1, 1999.

Section 6. The amendments to sections 766.301 and 766.304, Florida Statutes, shall take effect July 1, 1998, and shall apply only to claims filed on or after that date and to that extent shall apply retroactively regardless of the date of birth.

Section 7. Amendments to section 766.316, Florida Statutes, shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after that date.

Section 8. Except as otherwise provided in this act, this act shall take effect July 1, 1998.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 1070

The Committee Substitute for Senate Bill 1070:

- Deletes portions of bill that would have lowered infant eligibility weight from 2,500 grams to 1,800 grams;
- Provides that certain testimony and documents may be used in a subsequent civil action for the purpose of impeachment, subject to the rules of evidence;
- Retains current law regarding notice to obstetrical patients as to medical personnel's participation in NICA;
- Specifies approved vehicles for investment of NICA funds;
- Provides for a study by the auditor general to evaluate the NICA reserve adequacy and funding rates; and
- Provides effective dates.

SENATE VOTE RECORD ON BILL NO. Fav IC S 1070

COMMITTEE ON: Banking and Insurance
ACTION: FAV ✓ CS___ UNFAV___ TP___ RECON___ NC___ WD___ NRECVD___ CB___ DIS___
DATE: ______ OTHER COMMITTEE REFERENCES:
TIME: ______ ______
______ GISA
PLACE: ______ ______

FINAL BILL VOTE Final		SENATORS	#1 Am Sullivan P1 Ln 20		#2 Am Holzendorf		#3 Sullivan		Am to Am 4		Amd to Amd 4	
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
—		Bankhead										
—		Childers										
✓		Clary										
✓		Grant										
✓		Harris										
✓		Rossin										
✓		Scott										
✓		Sullivan										
✓		Thomas										
—		Williams										
✓		VICE CHAIRMAN Holzendorf										
✓		CHAIRMAN Diaz-Balart										
		18 2316										
9	0	TOTAL	Fwo		Fwo		Fwo		FWD		FWD	
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay

APPEARANCE: Key Sponsor X Senator ___ Sponsor's Aide ___ Other ___
(File with Secretary of the Senate)

SENATE VOTE RECORD ON BILL NO. ______________________

COMMITTEE ON: Banking and Insurance

ACTION: FAV___ CS___ UNFAV___ TP___ RECON___ NC___ WD___ NRECVD___ CB___ DIS___

DATE: ______________________ OTHER COMMITTEE REFERENCES: ______________________

TIME: ______________________

PLACE: ______________________

FINAL BILL VOTE		SENATORS	#5 Am [illegible]		#6 Am Sullivan		#4/ [illegible] Holz [illegible] S970		#4 Holz			
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
		Bankhead										
		Childers										
		Clary										
		Grant										
		Harris										
		Rossin										
		Scott										
		Sullivan										
		Thomas										
		Williams										
		VICE CHAIRMAN Holzendorf										
		CHAIRMAN Diaz-Balart										
		TOTAL	FWD		FWD		FWD		FWD			
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay

APPEARANCE: Key Sponsor ___ Senator ___ Sponsor's Aide ___ Other ___
(File with Secretary of the Senate)

Bill No. SB 1070
Amendment No. _____

ACTION

ORIGINAL

Senate House

_____

18 2386

_____

Sen./Rep. _____ moved the following amendment:

Amendment

On page 3, lines 5-24,
strike all of said lines

and insert:

766.316 Notice to obstetrical patients of participation in the plan.—Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. [Signature of the patient acknowledging receipt of the notice

Bill No. _____
Amendment No. _____

form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

ORIGINAL

SENATE AMENDMENT

Bill No. SB 1070

Amendment No. ___

3

CHAMBER ACTION

Senate | House

18 2386

Senator Sullivan moved the following amendment:

Senate Amendment

On page 3, lines 16-24, delete those lines

and insert: patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

ORIGINAL
SENATE AMENDMENT

6

Bill No. SB 1070

Amendment No. ___

CHAMBER ACTION

Senate | House

Senator Sullivan moved the following amendment:

Senate Amendment

On page 2, line 28, after "766.303."

insert: In the event that it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel or res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. However, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible in any subsequent civil action to the extent such testimony or exhibits are admissible under the rules of evidence as impeachment evidence.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 9, 1998 Revised: _____ _____ _____ _____

Subject: Medical Malpractice Insurance

	Analyst	Staff Director	Reference	Action
1.	Johnson	Deffenbaugh	BI	Fav/6 amendments
2.	Harkins	Moody	JU	Favorable/CS
3.				
4.				
5.				

I. Summary:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. The bill provides that the determination of whether a claim is covered under NICA must be determined *exclusively* by an administrative proceeding.

Under the bill, the hospital or the participating physician may elect to give the obstetrical patient a NICA notice form and have the patient sign a form acknowledging receipt. If the patient signs the form, the form will create a rebuttable presumption that the notice requirements have been met. Patients with certain emergency conditions are not entitled to notice.

The bill provides that the doctrines of res judicata and collateral estoppell may not bar future civil actions. The findings of fact of administrative law judges are not admissible in subsequent civil actions. Any person's sworn testimony (not necessarily limited to testimony entered into evidence in the administrative proceeding) and any of the exhibits introduced into evidence in the administrative proceeding, are admissible in a subsequent civil action for the purpose of impeaching a party to the administrative action. The parties to the administrative action are the claimant and NICA. Unless NICA is also a party to the subsequent civil action, the aforementioned evidence would be admissible exclusively against claimants and not against the defendant to the civil action.

Limits NICA to investing association money in investments and securities describe in s. 215.47, F.S.

Requires the Auditor General to conduct a study of the actuarial soundness of NICA and other specified aspects of NICA funding, including an evaluation of the estimated annual cost to lower

the birth weight to 2,000 grams or 1,000 grams. The Auditor General must contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of NICA. To assist the Auditor General, a technical advisory group must be appointed by various professional and trade associations specified, including health care providers, insurers, and attorneys. The final report must be submitted to the Legislature by January 1, 1999 The bill does not entitle the technical advisory group to any compensation or reimbursement.

Provides that the amendments to s. 766.316, F.S. shall take effect on July 1, 1998 and shall only apply prospectively.

The bill substantially amends the following sections of the Florida Statutes: 766 301, 766.302, 766.304, and 766.316.

II. Present Situation:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of obstetric services to the women of Florida The significant increase in malpractice insurance premiums caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related neurological injury is defined to mean:

> [I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

s. 766.302, F.S.

The Florida Supreme Court has ruled that in order for an infant to qualify under the above definition, the infant must be both mentally and physically impaired, not just one or the other *Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings*, 686 So 2d 1349, (1997). If the hearing officer finds that the statutory criteria are satisfied, then the infant, as well as the infant's parents or legal guardians, are entitled to the award of specifically defined, but limited, financial benefits without regard to fault.
s 766.31, F.S.

The NICA plan establishes an administrative system that provides compensation on a no-fault basis for an infant who suffers a narrowly-defined birth-related neurological injury. s. 766.301(2), F.S. NICA has been given broad powers to administer the Plan, including payment of claims on behalf of the Plan. s 766.315, F.S. To fund the NICA plan, which the Florida Supreme Court has compared to a form of insurance supported by a tax, the Legislature imposed mandatory yearly assessments on all licensed physicians and hospitals. s. 766 314(4)(a)(b), F.S. Obstetricians are not required to join the NICA plan, and insurance thus is available only if the obstetrician has elected to join. *Coy v. Florida Birth-Related Neurological Compensation Plan*, 595 So.2d 943, 944, (Fla.1992). Obstetricians who decide to participate pay a much higher assessment. s 766 314(4)(c), F S. In return, they are given the benefit of the Plan's exclusive administrative remedy, and thus are immune from malpractice claims for birth-related neurological injuries, except in situations involving "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property." s. 766.303(2), F.S.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance, and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under ch 459, F.S., that is subject to disciplinary action. If it finds such conduct, the provisions of s. 455.225, F.S., apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of ch. 395, F S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set a date for a hearing no sooner than 60 days and no later than 120 days after filing by the claimant. Pursuant to s 766.309, F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

- Whether the injury claimed a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; and
- How much compensation, if any, is awardable.

A determination by the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S , or an award by the administrative law judge pursuant to s. 766.301, F.S., is conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal.

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

- Actual expenses for medically necessary and reasonable medical and hospital rehabilitation and training, residential and custodial care, medically necessary drugs, and special equipment,
- Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury; and
- Reasonable expenses incurred in connection with the filing of a claim under ss. 766 301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each nongovernmental hospital licensed under ch. 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under ch. 458 or ch 459, F.S., other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000 Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to 0.25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q), F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31, and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farmowners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent of current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding whether administrative courts have exclusive jurisdiction to determine NICA eligibility In *Florida Birth-Related Neurological Injury Compensation Association v. McKaughan*, 668 So.2d 974 (1996), the Supreme Court of Florida held that administrative hearing officers (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case, the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did *not* meet the statutory definition of an infant covered by NICA. Upon appeal to the district court, and that court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court.

McKaughan at 978.

III. Effect of Proposed Changes:

The bill provides that the issue of whether a claim is covered by NICA must be determined exclusively in an administrative proceeding Essentially, the bill would overturn the *McKaughan* decision. Additionally, the bill provides that if the administrative law judge determines that the claimant is entitled to compensation under the NICA plan, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of ss 766.301-766.316, F.S. In no case may a civil action be brought until an administrative judge has determined that the claimant is not entitled to compensation under the NICA plan.

The bill allows a hospital or participating physician to provide patients with notice forms informing patients of patient's rights and responsibilities under the NICA plan. If the patient signs this form, the form may by used by physician to create a rebuttable presumption that notice was given to the patient. Without providing a patient with adequate notice a physician may not assert NICA immunity. *Galen of Florida, Inc. v. Braniff*, 696 So.2d 308, (Fla, 1977).

The bill provides that the doctrines of res judicata and collateral estoppel do not apply to bar a claimant's ability to seek damages in a civil action should the injured infant not fall into the class of infants covered by the NICA system. In many circumstances, when an administrative agency, acting in a judicial capacity, resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose. *University of Miami v. Zepada*, 674 So.2d 765 (Fla. 3d DCA 1996)(which applies this principle in a NICA action); *United States Fidelity and Guar. Co. v. Odoms*, 444 So.2d 78, 80 (Fla. 5th DCA 1984) (citing *Jet Air Freight v. Jet Air Freight Delivery, Inc.*, 264 So.2d 35 (Fla.3d DCA), cert. denied, 267 So 2d 833 (Fla.1972)). Several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made *Donahue v. Davis*, 68 So.2d 163, 169 (Fla.1953) It is now well settled that res judicata may be applied in administrative proceedings Yet the principles of res judicata do not always neatly fit within the scope of administrative proceedings. Thus, K Davis, Administrative Law Treatise, Sec. 18.01, at 545-46 (1958), explains:

> Courts normally apply law to past facts which remain static--where res judicata operates at its best--but agencies often work with fluid facts and shifting policies. The regularized procedure of courts conduces to application of the doctrine of res judicata; administrative procedures are often summary, parties are sometimes unrepresented by counsel, and permitting a second consideration of the same question may frequently be supported by other similar reasons which are inapplicable to judicial proceedings. The finality of unappealed judgments of courts is ordinarily well understood in advance, whereas statutory provisions often implicitly deny finality or fail to make clear whether or when administrative action should be considered binding.

The doctrine of res judicata is applied with "great caution" in administrative *cases. Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648 (Fla. 3d DCA 1982)

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents identical parties from *relitigating issues* that have previously been decided between them. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction *Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (1978)(Emphasis added.) The rule of collateral estoppel (or estoppel by judgment) requires that the matter sought to be interposed as a bar must have been litigated and determined by the judgment, or if not expressly adjudicated, essential to the rendition of the judgment. *Pennsylvania Insurance Co. v. Miami National Bank*, 241 So 2d 861 (Fla. 3d DCA 1970).

The bill provides that the findings of fact and conclusions of law made by an administrative judge during an administrative proceeding are not admissible in a subsequent civil action. Also, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible only for impeachment purposes against a party to the administrative proceeding. Presumably, in the absence of this provision, sworn testimony and exhibits introduced into evidence in the prior administrative case would be admissible *for any purpose* permissible under the Evidence Code.

Section 90.401, F.S., defines relevant evidence as "evidence tending to prove or disprove a material fact." Section 90.402, F S., explains that "all relevant evidence is admissible, except as provided by law." Section 90.403, F.S., provides for the exclusion of relevant evidence on grounds of prejudice or confusion stating that "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Under this provision of this amendment, prior sworn statements and exhibits introduced in the administrative proceeding would *not* be admissible for reasons other than impeachment, even if relevant and otherwise admissible under the Evidence Code.

Under the Evidence Code, any party, including the party calling the witness, may attack the credibility of a witness by:

- Introducing statements *of the witness* which are inconsistent with the witness's present testimony;
- Showing that *the witness* is biased.
- Attacking the character *of the witness* in accordance with the provisions of s. 90.609 or s. 90 610, F.S ;
- Showing a defect of capacity, ability, or opportunity *in the witness* to observe, remember, or recount the matters about which the witness testified; or
- Proof by other witnesses that material facts are not *as testified to by the witness* being impeached.

s. 90.608, F.S. *(emphasis supplied)*

A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, *except that*:

- The evidence may refer only to character relating to truthfulness, and
- Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

s. 90.609, F.S.

Conviction of certain crimes may be used for the purpose of impeachment. A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement, regardless of the punishment, with the following exceptions:

- Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness; and
- Evidence of juvenile adjudications are inadmissible under this subsection

The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible. s. 90.610, F.S.

Under the bill, the sworn statements of *any person* and any exhibits entered into evidence during a preceding administrative proceeding are admissible in a subsequent civil action *only for the purpose of impeaching a party to the preceding administrative proceeding.* The American Heritage Dictionary defines the verb impeach thus: To make an accusation against; to challenge or discredit; attack

Under the bill, anybody's sworn testimony may be used in a subsequent civil case to impeach a person who was a party to the original administrative proceeding. However, the parties to the administrative hearing are NICA and the parents of the injured child. s 766.308, F.S. The parties to the subsequent civil action would normally not include NICA. One possible interpretation of the bill's language is that, during the subsequent civil proceeding, the plaintiff could be impeached with the sworn testimony of anyone (subject to the rules of evidence), but the defendant could not be so impeached. In other words, the defendant could offer proof by other witnesses that material facts are not as testified to by the plaintiff, but the plaintiff would not be afforded the same opportunity If this is not the intent of this provision, some clarification should be made to avoid needless litigation over the issue.

The bill takes effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The provision has a fiscal impact on the Office of the Auditor General, but no appropriation is made. The bill does not entitle the technical advisory group to any compensation or reimbursement.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below)

Date: March 25, 1998 Revised. _____ _____ _____ _____

18 2368

Subject: Medical Malpractice Insurance

	Analyst	Staff Director	Reference	Action
1.	Johnson	Deffenbaugh	BI	Fav/6 amendments
2	Harkins	Moody	JU	
3.				
4.				
5.				

I. Summary:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. The bill would expand the number of infants eligible for compensation by changing the definition of birth-related neurological injury from infants weighing at least 2,500 grams (5.5 lbs.) to at least 1,800 grams (3.96 lbs.). The bill provides that the determination of whether a claim is covered under NICA must be determined *exclusively* by an administrative proceeding.

Under the bill, every hospital which has a participating physician on its staff, and every participating physician is allowed to provide their obstetrical patients with notice of the limited no-fault alternative for birth-related neurological injuries *any time prior to delivery*. Under the present law, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan *a reasonable time prior to delivery*.

Under the bill, the hospital or the participating physician may elect to give the obstetrical patient a NICA notice form and have the patient sign a form acknowledging receipt. If the patient signs the form, the form will be deemed proof that the notice requirements have been met. Patients with certain emergency conditions are not entitled to notice.

The bill substantially amends the following sections of the Florida Statutes: 766.301, 766.302, 766.304, and 766.316.

II. Present Situation:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of obstetric services to the women of Florida. The significant increase in malpractice insurance premiums caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers. To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related neurological injury is defined to mean:

> [I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

s. 766.302, F.S.

The Florida Supreme Court has ruled that in order for an infant to qualify under the above definition, the infant must be both mentally and physically impaired, not just one or the other. *Florida Birth-Related Neurological Injury Compensation Association v Florida Division of Administrative Hearings*, 686 So.2d 1349, (1997). If the hearing officer finds that the statutory criteria are satisfied, then the infant, as well as the infant's parents or legal guardians, are entitled to the award of specifically defined, but limited, financial benefits without regard to fault. s. 766.31, F.S.

The NICA plan establishes an administrative system that provides compensation on a no-fault basis for an infant who suffers a narrowly-defined birth-related neurological injury. s. 766.301(2), F.S. NICA has been given broad powers to administer the Plan, including payment of claims on behalf of the Plan. s. 766.315, F.S. To fund the NICA plan, which the Florida Supreme Court has compared to a form of insurance supported by a tax, the Legislature imposed mandatory yearly assessments on all licensed physicians and hospitals. s. 766.314(4)(a)(b), F.S. Obstetricians are not required to join the NICA plan, and insurance thus is available only if the obstetrician has elected to join. *Coy v Florida Birth-Related Neurological Compensation Plan*, 595 So.2d 943, 944, (Fla.1992). Obstetricians who decide to participate pay a much higher assessment. s. 766.314(4)(c), F.S. In return, they are given the benefit of the Plan's exclusive administrative remedy, and thus are immune from malpractice claims for birth-related neurological injuries, except in situations involving "clear and convincing evidence of bad faith

or malicious purpose or willful and wanton disregard of human rights, safety, or property." s. 766.303(2), F.S.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance, and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under ch. 459, F.S., that is subject to disciplinary action. If it finds such conduct, the provisions of s. 455.225, F.S., apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of ch. 395, F.S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set a date for a hearing no sooner than 60 days and no later than 120 days after filing by the claimant. Pursuant to s. 766.309, F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

- Whether the injury claimed a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; and
- How much compensation, if any, is awardable.

A determination by the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F.S., is conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

- Actual expenses for medically necessary and reasonable medical and hospital rehabilitation and training, residential and custodial care, medically necessary drugs, and special equipment;
- Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury; and
- Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each nongovernmental hospital licensed under ch. 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions) All physicians licensed under ch 458 or ch. 459, F.S., other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to 0 25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q), F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31, and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farmowners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent of current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited

no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients, and (2) determination by a circuit court as to whether a claim is covered by NICA.

A. The *McKaughan* Case

In *Florida Birth-Related Neurological Injury Compensation Association v. McKaughan*, 668 So.2d 974 (1996), the Supreme Court of Florida held that administrative hearing officers (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case, the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did *not* meet the statutory definition of an infant covered by NICA. Upon appeal to the district court, and that court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court.

McKaughan at 978.

B. The *Galen* Case

In the case of *Galen of Florida, Inc. v. Braniff*, 696 So.2d 308, (Fla 1997), the Florida Supreme Court held that:

> As a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery.

In so holding, the court observed that:

> The only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316, F.S., requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." This language makes clear that the purpose of the notice is to give an obstetrical

> patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Id at 309. (Citations omitted.)

In *Galen*, the Braniffs brought a medical malpractice action against the obstetrician who delivered their daughter and the hospital where the delivery took place. The Braniffs alleged that their daughter suffered severe neurological impairment and permanent brain damage as a result of the defendants' negligence during the delivery. *Id* The defendants responded with a motion to dismiss, claiming that the Braniffs were limited to an administrative remedy under Florida's Birth-Related Neurological Injury Compensation Plan (NICA). *Id* The Braniffs argued that their civil suit was not precluded because the defendants had failed to comply with the NICA plan's notice provisions

Under the current law, each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), F.S., the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. s. 766.316, F.S.

In *Galen*, the defendants contended that they had notified the patient, Mrs. Braniff, of their participation in the NICA plan prior to delivery. *Galen at 309.* The defendants also maintained that pre-delivery notice is not required under the plan nor is the exclusivity of the NICA remedy conditioned on pre-delivery notice. *Id*

The *Galen* court opined that its construction of the NICA statute was supported by the statute's legislative history. The court cited the 1987 Academic Task Force for Review of the Insurance and Tort Systems. The court observed the Task Force was concerned that the Virginia legislation (after which NICA was fashioned) did not contain a notice requirement and recommended that the Florida plan contain such a requirement. The Task Force believed that notice was necessary to ensure that the plan was fair to obstetrical patients *and to shield the plan from constitutional challenge. Id.* at 310. (Emphasis added.) The Task Force recommended that health care providers who participate under this plan should be required to *provide reasonable notice to patients of their participation. Id* (Emphasis added.)

III. Effect of Proposed Changes:

The bill lowers the birth weight for eligibility for birth-related neurological injury from 2,500 grams (5.5 lbs.) to 1,800 grams (3.96 lbs). This change would make NICA compensation

available for more infants. It follows that the bill would make NICA compensation the exclusive remedy in more situations. (See V., B Private Sector Impact, for further discussion of impact)

The bill provides that the issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. Essentially, the bill would overturn the *McKaughan* decision. Additionally, the bill provides that if the administrative law judge determines that the claimant is entitled to compensation under the NICA plan, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of ss. 766.301-766.316, F.S. In no case may a civil action be brought until an administrative judge has determined that the claimant is not entitled to compensation under the NICA plan.

The bill provides that notice to obstetrical patients of participation in NICA must be provided to the patient *any time prior to delivery* and authorizes the hospital or the participating physician to elect to give the patient the notice form, and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable. Essentially, the bill overturns *Galen*. Under the present law, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan *a reasonable time prior to delivery.*

The bill takes effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The *Galen* opinion suggests, though by no means decides, that constitutional issues are involved in the question of whether a patient is entitled to *reasonable* notice of her physician's participation in the NICA plan (which provides physicians with immunity from suit in situations where a claimant falls under the NICA plan). It is possible that providing notice immediately prior to delivery, especially in non-emergency situations where the

patient and physician have been involved in a doctor/patient relationship for some time, could be construed as *unreasonable notice*.

By providing that signature of a patient acknowledging receipt of the notice form is *proof* that the notice requirements have been met may raise a constitutional question of due process if this creates an irrebuttable presumption that cannot, under any circumstances, be overcome by a claimant.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

See Private Sector Impact for the estimated impact of changes in the bill on the assessments on hospitals and physicians and casualty carriers.

B. Private Sector Impact:

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year. The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full 0.25 percent assessment in the second year and each subsequent year against the casualty insurers. It is estimated that the 0.25 percent assessment against carriers would generate $5.4 million, based on 1995 net direct written premium. In addition, the department would be required to increase assessments paid by hospitals and physicians by an estimated 78 percent.

The actuary assumed that 22 additional births in the range of the birth weight of 1,800 - 2,499 grams would be anticipated and used the current average cost per selected/accepted claim of approximately $1.3 million to establish the high range estimate of $28.5 million. The low range estimate of $11.3 million was determined by adjusting the high range estimate of $28.5 million by .40 percent of compensable claims filed with NICA (i.e., approximately nine additional claims based on an estimated 60 percent of births compensable not filed with NICA, based on NICA's claims history).

VI. Technical Deficiencies:

The bill's effective date is July 1, 1998. If the changes proposed to the notice requirements of s. 766.316, F.S., are adopted, the bill will provide no guidance as to whether the Legislature intends the changes to apply prospectively or retroactively.

The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the Legislature. However, procedural provisions and modifications for the purpose of clarity are not so restricted. *Agency for Health Care Administration v.*

Associated Industries of Florida, Inc , 678 So.2d 1239 (1996); *State Farm Mut Auto Ins. Co. v Laforet*, 658 So.2d 55 (Fla.1995), *Alamo Rent-A-Car, Inc v. Mancusi*, 632 So.2d 1352 (Fla.1994).

The change that would be made to s. 766.316, F.S., might be construed as substantive, or it might be construed as a modification for the purpose of clarity. If it is intended to apply retroactively and it is construed as substantive, it will not without a statement to that effect. If it is construed as a modification for the purpose of clarity, it may apply retroactively even without a statement of intent. If it is not intended to apply retroactively, a statement to that effect should probably be made as well, so as to avoid needless litigation over the issue. Amendment # 6, by Banking and Insurance, addresses this matter.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Banking and Insurance:
Strikes the provisions of the bill (Section 2) which lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams, and returns to the current law definition. This amendment removes the fiscal impact described above. (WITH TITLE AMENDMENT)

#2 by Banking and Insurance:
Specifies that if it is determined that a claim filed under NICA is not compensable, *neither the doctrine of collateral estoppel or res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law*. However, sworn testimony and exhibits introduced into evidence in the prior determination may be admissible in subsequent actions as impeachment evidence.

Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose. *University of Miami v Zepada*, 674 So.2d 765 (Fla. 3d DCA 1996)(which applies this principle in a NICA action); *United States Fidelity and Guar. Co v. Odoms*, 444 So.2d 78, 80 (Fla. 5th DCA 1984) (citing *Jet Air Freight v Jet Air Freight Delivery, Inc.*, 264 So.2d 35 (Fla.3d DCA), cert. denied, 267 So.2d 833 (Fla.1972)). Several conditions must occur simultaneously if a matter is to be made res judicata. identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made. *Donahue v. Davis*, 68 So.2d 163, 169 (Fla.1953). It is now well settled that res judicata may be applied in administrative proceedings.Yet the principles of res judicata do not always neatly fit within the scope of administrative proceedings. Thus, K. Davis, Administrative Law Treatise, Sec. 18.01, at 545-46 (1958), explains:

> Courts normally apply law to past facts which remain static--where res judicata operates at its best--but agencies often work with fluid facts and shifting policies. The regularized procedure of courts conduces to application of the doctrine of res judicata, administrative procedures are often summary, parties are sometimes unrepresented by counsel, and permitting a second consideration of the same question may frequently be supported by other similar reasons which are inapplicable to judicial proceedings. The finality of unappealed judgments of courts is ordinarily well understood in advance, whereas statutory provisions often implicitly deny finality or fail to make clear whether or when administrative action should be considered binding

The doctrine of res judicata is applied with "great caution" in administrative *cases Coral Reef Nurseries, Inc v Babcock Co* , 410 So 2d 648 (Fla. 3d DCA 1982).

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents identical parties from *relitigating issues* that have previously been decided between them. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (1978)(Emphasis added.). The rule of collateral estoppel (or estoppel by judgment) requires that the matter sought to be interposed as a bar must have been litigated and determined by the judgment, or if not expressly adjudicated, essential to the rendition of the judgment. *Pennsylvania Insurance Co. v. Miami National Bank*, 241 So.2d 861 (Fla. 3d DCA 1970). (WITH TITLE AMENDMENT)

#3 by Banking and Insurance:
Authorizes the NICA board to invest plan funds under the same limitations that apply to the State Board of Administration under s. 215.47, F.S. Currently, the NICA law requires that plan funds be invested in interest-bearing investments.

#4 by Banking and Insurance:
Strikes the notice provisions of the bill and, instead, provides that a hospital or participating physician may elect to have the patient sign a form acknowledging receipt of the notice form, which would raise a rebuttable presumption that the notice requirements of this section have been met. It also provides that notice need not be given when the patient has an emergency medical condition as defined in s. 395.002(8)(b), F.S., or when notice is not practicable. This amendment removes the constitutional issue raised by the bill, summarized above.

#5 by Banking and Insurance:
Requires the Auditor General to conduct a study of the actuarial soundness of NICA and other specified aspects of NICA funding, including an evaluation of the estimated annual cost to lower the birth weight to 2,000 grams or 1,000 grams. The Auditor General must contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of NICA To assist the Auditor General, a technical advisory group must be appointed by various professional and trade associations specified, including health care providers, insurers, and attorneys. The

final report must be submitted to the Legislature by January 1, 1999. The amendment has a fiscal impact on the Office of the Auditor General, but no appropriation is made. The amendment does not entitle the technical advisory group to any compensation or reimbursement. (WITH TITLE AMENDMENT)

#6 by Banking and Insurance:
Amends the effective date to provide that the amendments to ss. 766.301 and 766 304, F.S., relating to the exclusive jurisdiction of an administrative law judge to determine whether a claim filed birth is compensable under NICA and the prohibition against bringing a civil action until such a determination has been made These provisions would apply to claims filed on or after July 1, 1998, and to that extent shall apply retroactively, regardless of the date of birth.

The amendments to the notice provisions would take effect July 1, 1998, and apply only to causes of action accruing on or after such date. (WITH TITLE AMENDMENT)

The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the Legislature. However, procedural provisions and modifications for the purpose of clarity are not so restricted. *Agency for Health Care Administration v. Associated Industries of Florida, Inc* ,.678 So.2d 1239 (1996); State *Farm Mut. Auto. Ins. Co v. Laforet*, 658 So.2d 55 (Fla.1995); *Alamo Rent-A-Car, Inc. v Mancusi*, 632 So.2d 1352 (Fla.1994).

The bill's amendment to the notice requirements of s. 766.316, F.S., would probably not apply retroactively without an expression of legislative intention to make the amendment apply retroactively. However, amendment 6 makes it clear that the changes are not intended to apply retroactively, and, if adopted could prevent needless litigation over that issue.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below)

Date: March 25, 1998 Revised: 4/7/98

Subject: Medical Malpractice Insurance 18 2368

	Analyst	Staff Director	Reference	Action
1.	Johnson	Deffenbaugh	BI	Fav/6 amendments
2.	Harkins	Moody	JU	
3.				
4.				
5.				

I. Summary:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. The bill would expand the number of infants eligible for compensation by changing the definition of birth-related neurological injury from infants weighing at least 2,500 grams (5.5 lbs.) to at least 1,800 grams (3.96 lbs.). The bill provides that the determination of whether a claim is covered under NICA must be determined *exclusively* by an administrative proceeding.

Under the bill, every hospital which has a participating physician on its staff, and every participating physician is allowed to provide their obstetrical patients with notice of the limited no-fault alternative for birth-related neurological injuries *any time prior to delivery*. Under the present law, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan *a reasonable time prior to delivery*.

Under the bill, the hospital or the participating physician may elect to give the obstetrical patient a NICA notice form and have the patient sign a form acknowledging receipt. If the patient signs the form, the form will be deemed proof that the notice requirements have been met. Patients with certain emergency conditions are not entitled to notice.

The bill substantially amends the following sections of the Florida Statutes: 766.301, 766.302, 766.304, and 766.316.

II. Present Situation:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of obstetric services to the women of Florida. The significant increase in malpractice insurance premiums caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related neurological injury is defined to mean:

> [I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

s 766.302, F.S.

The Florida Supreme Court has ruled that in order for an infant to qualify under the above definition, the infant must be both mentally and physically impaired, not just one or the other. *Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings*, 686 So.2d 1349, (1997). If the hearing officer finds that the statutory criteria are satisfied, then the infant, as well as the infant's parents or legal guardians, are entitled to the award of specifically defined, but limited, financial benefits without regard to fault. s. 766.31, F.S.

The NICA plan establishes an administrative system that provides compensation on a no-fault basis for an infant who suffers a narrowly-defined birth-related neurological injury. s. 766.301(2), F.S. NICA has been given broad powers to administer the Plan, including payment of claims on behalf of the Plan. s. 766.315, F.S. To fund the NICA plan, which the Florida Supreme Court has compared to a form of insurance supported by a tax, the Legislature imposed mandatory yearly assessments on all licensed physicians and hospitals. s. 766 314(4)(a)(b), F.S. Obstetricians are not required to join the NICA plan, and insurance thus is available only if the obstetrician has elected to join. *Coy v. Florida Birth-Related Neurological Compensation Plan*, 595 So.2d 943, 944, (Fla.1992). Obstetricians who decide to participate pay a much higher assessment. s. 766.314(4)(c), F.S. In return, they are given the benefit of the Plan's exclusive administrative remedy, and thus are immune from malpractice claims for birth-related neurological injuries, except in situations involving "clear and convincing evidence of bad faith

or malicious purpose or willful and wanton disregard of human rights, safety, or property." s. 766.303(2), F.S.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance, and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under ch. 459, F.S., that is subject to disciplinary action. If it finds such conduct, the provisions of s 455.225, F.S., apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of ch. 395, F.S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set a date for a hearing no sooner than 60 days and no later than 120 days after filing by the claimant. Pursuant to s. 766.309, F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

- Whether the injury claimed a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; and
- How much compensation, if any, is awardable.

A determination by the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F.S., is conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal.

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

- Actual expenses for medically necessary and reasonable medical and hospital rehabilitation and training, residential and custodial care, medically necessary drugs, and special equipment;
- Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury; and
- Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each nongovernmental hospital licensed under ch. 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under ch. 458 or ch. 459, F.S., other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to 0.25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q), F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31, and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farmowners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent of current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited

no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients, and (2) determination by a circuit court as to whether a claim is covered by NICA.

A. The *McKaughan* Case

In *Florida Birth-Related Neurological Injury Compensation Association v. McKaughan*, 668 So.2d 974 (1996), the Supreme Court of Florida held that administrative hearing officers (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case, the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did *not* meet the statutory definition of an infant covered by NICA. Upon appeal to the district court, and that court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court.

McKaughan at 978.

B. The *Galen* Case

In the case of *Galen of Florida, Inc v. Braniff*, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held that:

> As a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery.

In so holding, the court observed that:

> The only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316, F.S., requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." This language makes clear that the purpose of the notice is to give an obstetrical

> patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Id at 309. (Citations omitted.)

In *Galen*, the Braniffs brought a medical malpractice action against the obstetrician who delivered their daughter and the hospital where the delivery took place. The Braniffs alleged that their daughter suffered severe neurological impairment and permanent brain damage as a result of the defendants' negligence during the delivery. *Id* The defendants responded with a motion to dismiss, claiming that the Braniffs were limited to an administrative remedy under Florida's Birth-Related Neurological Injury Compensation Plan (NICA). *Id* The Braniffs argued that their civil suit was not precluded because the defendants had failed to comply with the NICA plan's notice provisions.

Under the current law, each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), F.S., the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. s. 766.316, F.S.

In *Galen*, the defendants contended that they had notified the patient, Mrs. Braniff, of their participation in the NICA plan prior to delivery. *Galen at 309* The defendants also maintained that pre-delivery notice is not required under the plan nor is the exclusivity of the NICA remedy conditioned on pre-delivery notice. *Id.*

The *Galen* court opined that its construction of the NICA statute was supported by the statute's legislative history. The court cited the 1987 Academic Task Force for Review of the Insurance and Tort Systems. The court observed the Task Force was concerned that the Virginia legislation (after which NICA was fashioned) did not contain a notice requirement and recommended that the Florida plan contain such a requirement. The Task Force believed that notice was necessary to ensure that the plan was fair to obstetrical patients *and to shield the plan from constitutional challenge*. *Id.* at 310. (Emphasis added.) The Task Force recommended that health care providers who participate under this plan should be required to *provide reasonable notice to patients of their participation. Id* (Emphasis added.)

III. Effect of Proposed Changes:

The bill lowers the birth weight for eligibility for birth-related neurological injury from 2,500 grams (5.5 lbs) to 1,800 grams (3 96 lbs) This change would make NICA compensation

available for more infants. It follows that the bill would make NICA compensation the exclusive remedy in more situations. (See V., B. Private Sector Impact, for further discussion of impact.)

The bill provides that the issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. Essentially, the bill would overturn the *McKaughan* decision. Additionally, the bill provides that if the administrative law judge determines that the claimant is entitled to compensation under the NICA plan, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of ss. 766.301-766.316, F.S. In no case may a civil action be brought until an administrative judge has determined that the claimant is not entitled to compensation under the NICA plan.

The bill provides that notice to obstetrical patients of participation in NICA must be provided to the patient *any time prior to delivery* and authorizes the hospital or the participating physician to elect to give the patient the notice form, and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable. Essentially, the bill overturns *Galen*. Under the present law, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan *a reasonable time prior to delivery*.

The bill takes effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The *Galen* opinion suggests, though by no means decides, that constitutional issues are involved in the question of whether a patient is entitled to *reasonable* notice of her physician's participation in the NICA plan (which provides physicians with immunity from suit in situations where a claimant falls under the NICA plan). It is possible that providing notice immediately prior to delivery, especially in non-emergency situations where the

patient and physician have been involved in a doctor/patient relationship for some time, could be construed as *unreasonable notice*.

By providing that signature of a patient acknowledging receipt of the notice form is *proof* that the notice requirements have been met may raise a constitutional question of due process if this creates an irrebuttable presumption that cannot, under any circumstances, be overcome by a claimant.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

See Private Sector Impact for the estimated impact of changes in the bill on the assessments on hospitals and physicians and casualty carriers.

B. Private Sector Impact:

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year. The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full 0.25 percent assessment in the second year and each subsequent year against the casualty insurers. It is estimated that the 0.25 percent assessment against carriers would generate $5.4 million, based on 1995 net direct written premium. In addition, the department would be required to increase assessments paid by hospitals and physicians by an estimated 78 percent.

The actuary assumed that 22 additional births in the range of the birth weight of 1,800 - 2,499 grams would be anticipated and used the current average cost per selected/accepted claim of approximately $1.3 million to establish the high range estimate of $28.5 million. The low range estimate of $11.3 million was determined by adjusting the high range estimate of $28 5 million by .40 percent of compensable claims filed with NICA (i.e., approximately nine additional claims based on an estimated 60 percent of births compensable not filed with NICA, based on NICA's claims history).

VI. Technical Deficiencies:

The bill's effective date is July 1, 1998. If the changes proposed to the notice requirements of s. 766.316, F.S., are adopted, the bill will provide no guidance as to whether the Legislature intends the changes to apply prospectively or retroactively.

The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the Legislature. However, procedural provisions and modifications for the purpose of clarity are not so restricted. *Agency for Health Care Administration v.*

Associated Industries of Florida, Inc , 678 So 2d 1239 (1996); *State Farm Mut. Auto. Ins Co v. Laforet*, 658 So.2d 55 (Fla.1995); *Alamo Rent-A-Car, Inc. v Mancusi*, 632 So.2d 1352 (Fla.1994).

The change that would be made to s. 766.316, F.S., might be construed as substantive, or it might be construed as a modification for the purpose of clarity. If it is intended to apply retroactively and it is construed as substantive, it will not without a statement to that effect. If it is construed as a modification for the purpose of clarity, it may apply retroactively even without a statement of intent. If it is not intended to apply retroactively, a statement to that effect should probably be made as well, so as to avoid needless litigation over the issue. Amendment # 6, by Banking and Insurance, addresses this matter.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Banking and Insurance:
This amendment strikes the provisions of the bill (Section 2) which lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams, and returns to the current law definition.
This amendment removes the fiscal impact described above. (WITH TITLE AMENDMENT)

#2 by Banking and Insurance:
This amendment specifies that if it is determined that a claim filed under NICA is not compensable, *neither the doctrine of collateral estoppel or res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law*. This amendment also provides that *the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible in any subsequent civil action to the extent such testimony or exhibits are admissible under the rules of evidence as impeachment evidence*.

a. Res Judicata & Collateral Estoppel

Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose. *University of Miami v. Zepada*, 674 So.2d 765 (Fla. 3d DCA 1996)(which applies this principle in a NICA action); *United States Fidelity and Guar. Co v. Odoms*, 444 So.2d 78, 80 (Fla. 5th DCA 1984) (citing *Jet Air Freight v Jet Air Freight Delivery, Inc.*, 264 So.2d 35 (Fla.3d DCA), cert. denied, 267 So.2d 833 (Fla.1972)). Several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made. *Donahue v. Davis*, 68 So.2d

163, 169 (Fla.1953). It is now well settled that res judicata may be applied in administrative proceedings. Yet the principles of res judicata do not always neatly fit within the scope of administrative proceedings. Thus, K. Davis, Administrative Law Treatise, Sec. 18.01, at 545-46 (1958), explains:

> Courts normally apply law to past facts which remain static--where res judicata operates at its best--but agencies often work with fluid facts and shifting policies. The regularized procedure of courts conduces to application of the doctrine of res judicata; administrative procedures are often summary, parties are sometimes unrepresented by counsel, and permitting a second consideration of the same question may frequently be supported by other similar reasons which are inapplicable to judicial proceedings. The finality of unappealed judgments of courts is ordinarily well understood in advance, whereas statutory provisions often implicitly deny finality or fail to make clear whether or when administrative action should be considered binding.

The doctrine of res judicata is applied with "great caution" in administrative *cases Coral Reef Nurseries, Inc v. Babcock Co* , 410 So.2d 648 (Fla. 3d DCA 1982).

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents identical parties from *relitigating issues* that have previously been decided between them. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. *Mobil Oil Corp v Shevin*, 354 So.2d 372 (1978)(Emphasis added.). The rule of collateral estoppel (or estoppel by judgment) requires that the matter sought to be interposed as a bar must have been litigated and determined by the judgment, or if not expressly adjudicated, essential to the rendition of the judgment. *Pennsylvania Insurance Co. v. Miami National Bank*, 241 So.2d 861 (Fla. 3d DCA 1970).

b. Impeachment Evidence

This amendment also provides that sworn testimony and exhibits introduced into evidence in the prior administrative case may be admissible in subsequent actions to the extent that such evidence is admissible *as impeachment evidence.*

Presumably, in the absence of this provision, sworn testimony and exhibits introduced into evidence in the prior administrative case would be admissible *for any purpose permissible under the Evidence Code.* Section 90.401, F.S., defines relevant evidence as "evidence tending to prove or disprove a material fact." Section 90.402, F.S., explains that "all relevant evidence is admissible, except as provided by law." Section 90.403, F.S., provides for the exclusion of relevant evidence on grounds of prejudice or confusion stating that "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Under this provision of this amendment, prior sworn statements and exhibits introduced in the administrative proceeding *would not be admissible* for reasons other than impeachment, even if relevant and otherwise admissible under the evidence code.

Under the Evidence Code, any party, including the party calling the witness, may attack the credibility of a witness by:

- Introducing statements *of the witness* which are inconsistent with the witness's present testimony;
- Showing *that the witness* is biased.
- Attacking the character *of the witness* in accordance with the provisions of s. 90.609 or s. 90.610, F.S.;
- Showing a defect of capacity, ability, or opportunity *in the witness* to observe, remember, or recount the matters about which the witness testified; or
- *Proof by other witnesses that material facts are not as testified to by the witness being impeached.*

s. 90.608, F.S. *(Emphasis Added.)*

A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, *except that*:

- The evidence may refer only to character relating to truthfulness; and
- Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

s. 90.609, F.S.

Conviction of certain crimes may be used for the purpose of impeachment. A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement, regardless of the punishment, with the following exceptions:

- Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness; and
- Evidence of juvenile adjudications are inadmissible under this subsection.

The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible. s. 90.610, F.S.

The Evidence Code does not provide for a method of impeaching a witness by the admission of an inconsistent statement of a person *other than the witness himself.* Under the Evidence Code, one may not impeach a person with the sworn testimony of another person or exhibits offered into evidence by a person other than the witness being impeached. This amendment allows sworn testimony and exhibits from the administrative case to be admitted for impeachment *subject to the Evidence Code*. Therefore, no novel methods of impeachment are created by this amendment. (WITH TITLE AMENDMENT)

#3 by Banking and Insurance:
Authorizes the NICA board to invest plan funds under the same limitations that apply to the State Board of Administration under s. 215.47, F.S. Currently, the NICA law requires that plan funds be invested in interest-bearing investments.

#4 by Banking and Insurance:
Strikes the notice provisions of the bill and, instead, provides that a hospital or participating physician may elect to have the patient sign a form acknowledging receipt of the notice form, which would raise a rebuttable presumption that the notice requirements of this section have been met. It also provides that notice need not be given when the patient has an emergency medical condition as defined in s. 395.002(8)(b), F.S., or when notice is not practicable. This amendment removes the constitutional issue raised by the bill, summarized above.

#5 by Banking and Insurance:
Requires the Auditor General to conduct a study of the actuarial soundness of NICA and other specified aspects of NICA funding, including an evaluation of the estimated annual cost to lower the birth weight to 2,000 grams or 1,000 grams. The Auditor General must contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of NICA. To assist the Auditor General, a technical advisory group must be appointed by various professional and trade associations specified, including health care providers, insurers, and attorneys. The final report must be submitted to the Legislature by January 1, 1999. The amendment has a fiscal impact on the Office of the Auditor General, but no appropriation is made. The amendment does not entitle the technical advisory group to any compensation or reimbursement. (WITH TITLE AMENDMENT)

#6 by Banking and Insurance:
Amends the effective date to provide that the amendments to ss. 766.301 and 766.304, F.S., relating to the exclusive jurisdiction of an administrative law judge to determine whether a claim filed birth is compensable under NICA and the prohibition against bringing a civil action until such a determination has been made. These provisions would apply to claims filed on or after July 1, 1998, and to that extent shall apply retroactively, regardless of the date of birth.

The amendments to the notice provisions would take effect July 1, 1998, and apply only to causes of action accruing on or after such date. (WITH TITLE AMENDMENT)

The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the Legislature. However, procedural provisions and modifications for the purpose of clarity are not so restricted. *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*,.678 So.2d 1239 (1996); State *Farm Mut Auto. Ins. Co. v Laforet*, 658 So.2d 55 (Fla.1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla.1994).

The bill's amendment to the notice requirements of s. 766.316, F.S., would probably not apply retroactively without an expression of legislative intention to make the amendment apply

retroactively However, amendment 6 makes it clear that the changes are not intended to apply retroactively, and, if adopted could prevent needless litigation over that issue.

By Senator Holzendorf

2-587A-98

A bill to be entitled

An act relating to the Florida Birth-Related Neurological Injury Compensation Association; amending s. 766.301, F.S.; providing legislative intent; amending s. 766.304, F.S.; providing that the administrative law judge determines the jurisdiction of a claim under ss. 766.301-766.316, F.S.; prescribing circumstances in which an action may not be brought under ss. 766.301-766.316, F.S.; amending s. 766.315, F.S.; revising the restrictions upon investments; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (1) of section 766.301, Florida Statutes, is amended to read:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault, and the issue of whether such claims are covered by ss. 766.301-766.316 must be determined exclusively in an administrative proceeding.

Section 2. Section 766.304, Florida Statutes, is amended to read:

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall

exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under ss. 766.301-766.316 is compensable. A civil action may not be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, a civil action may not be brought or continued in violation of the exclusive-remedy provisions of s. 766.303. An action arising out of a birth-related neurological injury may not be brought under ss. 766.301-766.316 if the claimant has recovered compensation for that injury from any source or if a final judgment has been entered in a legal action arising out of that injury.The division may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosecution of claims.

Section 3. Paragraph (e) of subsection (5) of section 766.315, Florida Statutes, is amended to read:

766.315 Florida Birth-Related Neurological Injury Compensation Association; board of directors.--

(5)(e) Funds held on behalf of the plan are funds of this state, and the association may invest plan funds only in the investments and securities described in s. 215.47 and is subject to the limitations on investments contained in that section.~~Any funds held on behalf of the plan must be invested in interest-bearing investments by the association.~~All income derived from such investments will be credited to the plan.

Section 4. This act shall take effect upon becoming a law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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SENATE SUMMARY

Relates to the Florida Birth-Related Neurological Injury Compensation Association. Provides legislative intent. Provides that an administrative law judge is to determine the jurisdiction of a claim under ss. 766.301-766.316, F.S. Provides that an action may not be brought under ss. 766.301-766.316, F.S., if the claimant has already recovered from any source or if a final judgment has been entered in a legal action. Revises restrictions placed upon investments.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

TORT REFORM TRUE UNITED EFFORT

TO: THE HONORABLE LAWTON CHILES, GOVERNOR, STATE OF FLORIDA
MEMBERS, THE FLORIDA LEGISLATURE
INTERESTED PARTIES

FROM: TORT REFORM UNITED EFFORT

SUBJECT: CIVIL JUSTICE REFORM PROPOSALS

DATE: SEPTEMBER 15, 1997

19 2534 mtg 9-15-97

Please find enclosed a list and brief discussion of the major tort reform issues sought by the business community and its umbrella organization, TRUE.

We have attempted to present these issues in a simple and brief format with our specific positions on each issue. It is our hope you will use this document as a handy reference as you confront the issue of tort reform in the coming months.

The current civil litigation system is out of balance and TRUE believes that meaningful tort reform will benefit consumers, families and the economic climate.

P . O . B O X 1 0 5 5 • T A L L A H A S S E E , F L 3 2 3 0 2

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Florida Medical Association
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National Federation of Independent Business
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Florida Retail Federation
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TORT REFORM UNITED EFFORT

CIVIL JUSTICE REFORM

BUSINESS ISSUES

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SEPTEMBER 15, 1997

TORT REFORM TRUE UNITED EFFORT

TO: **THE HONORABLE LAWTON CHILES, GOVERNOR, STATE OF FLORIDA**
MEMBERS, THE FLORIDA LEGISLATURE
INTERESTED PARTIES

FROM: **TORT REFORM UNITED EFFORT**

SUBJECT: **CIVIL JUSTICE REFORM PROPOSALS**

DATE: **SEPTEMBER 10, 1997**

The message of Florida TRUE has been heard. Florida's businesses and consumers are calling for lawsuit abuse reform from the Florida Legislature.

Florida TRUE has become a beacon to all who want lawsuit abuse reform. The need and desire among Florida's businesses and families for lawsuit abuse reform is broader and wider than Florida TRUE has suspected. We are surrounded by supporters.

They bring with them new ideas to make sense of our civil justice system in Florida. Florida TRUE has listened to all who want lawsuit abuse reform, and we believe public policymakers should be made aware of the most complete and current catalog of lawsuit abuse reform issues.

Florida TRUE has been solidly unified in our support for the FAIR Act. We continue our unwavering support for the FAIR Act.

Similarly, Florida TRUE affirms our unified support for the package of the lawsuit abuse reforms contained in this document.

The mission of Florida TRUE is to seek passage of all of these issues in the Florida Legislature at the earliest opportunity to provide relief to the business owners and consumers of Florida.

We look forward to a fruitful debate in the Florida Legislature on these issues, and Florida TRUE intends to demonstrate to you the fair, practical, and beneficial effects these changes will bring to our civil justice system, our economy, businesses and consumers.

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Florida Retail Federation
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CIVIL JUSTICE REFORM BUSINESS ISSUES

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The Issue

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT (NICA)

In 1988, the Florida Legislature created NICA to help stabilize and reduce malpractice insurance premiums for physicians providing obstetric services. The NICA provides compensation, on a no-fault basis, for certain birth-related neurological injuries. Compensation under NICA is an exclusive remedy, therefore providing immunity to covered providers from medical malpractice claims, with certain exceptions.

Business and Consumer's Position

Business and consumers **support** amending the NICA to clarify that a determination as to the applicability of NICA should be an issue of law for the administrative law judge to decide, rather than an issue of fact to be decided by a jury

A bill to be entitled

An act relating to birth related injuries; amending s. 766.302, F.S.; redefining the term "birth-related neurological injury"; amending s. 766.304, F.S.; providing exclusive jurisdiction of administrative law judges in claims filed under ss. 766.301-766.316, F.S.; providing a limitation on bringing a civil action under certain circumstances; amending s. 766.316, F.S.; providing for certain notices to obstetrical patients relating to no-fault alternative for birth-related neurological injuries; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 766.302, Florida Statutes, is amended to read:

766.302 Definitions.--As used in ss. 766.301-766.316, the term:

(2) "Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 1,800 ~~2,500~~ grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Section 2. Section 766.304, Florida Statutes, is amended to read:

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered. The division may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosecution of claims.

Section 3. Section 766.316, Florida Statutes, is amended to read:

766.316 Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients any time prior to delivery thereof as to the limited no-fault alternative for birth-related neurological injuries. Such

notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to give the patient the association's notice form and to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been satisfied. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when providing the notice is not practicable.

Section 4. This act shall take effect October 1 of the year in which enacted.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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LEGISLATIVE SUMMARY

Redefines the term "birth-related neurological injury." Provides that an administrative law judge has exclusive jurisdiction to determine if a claim for compensation under the Florida Birth-Related Neurological Injury Compensation Plan is justified. Provides forms for disclosure notice to obstetrical patients relating to no-fault alternative to birth-related neurological injuries.

STORAGE NAME: pcb09a.cjc
DATE: March 18, 1998

HOUSE OF REPRESENTATIVES
COMMITTEE ON
Civil Justice and Claims
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: PCB 9

RELATING TO: Birth Related Injuries

SPONSOR(S): Committee on Civil Justice and Claims

COMPANION BILL(S): SB 1070 by Senator Sullivan (s); SB 1768 by Senator Holzendorf (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 0
(2)
(3)
(4)
(5)

19 2535

I. SUMMARY:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. This bill expands the number of infants eligible for compensation by revising the definition of birth-related neurological injury from infants weighing at least 2,500 to at least 1,800 grams. The bill provides that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under the Florida Birth-Related Neurological Injury Compensation Plan is compensable and prohibits a civil action from being brought until such a determination has been made. Notice requirements to obstetrical patients are revised to clarify that the hospitals with a participating physician on its staff and participating physicians must provide such notice prior to delivery. The hospital or the participating physician may elect to give the patient NICA's notice form and have the patient sign a form acknowledging receipt, which is deemed to be proof that the notice requirements have been met. Exceptions to the notice requirements are provided.

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION.

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of the obstetric services in Florida. The significant increase in malpractice insurance premiums had caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers. To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related injury is defined in s. 766.302, F.S., to mean:

> an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under chapter 459, F.S., that is subject to disciplinary action, in which case the provision of s. 455.225, F.S., will apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of chapter 395, F.S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by the claimant. Pursuant to s. 766.309, F.S , the administrative law judge is charged with making the following determinations, based upon all available evidence:

* Whether the injury claimed a birth-related neurological injury;

* Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital, and

* How much compensation, if any, is awardable.

A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F.S., shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

* Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care, medically necessary drugs, special equipment,

* Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury.

* Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s 766.315, F.S. Each non-governmental hospital licensed under chapter 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under chapter 458, F.S., or chapter 459, other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to .25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q) F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31 and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farm

owners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients and (2) determination by a circuit court as to whether a claim is covered by NICA.

In 1996, the Florida Supreme Court ruled in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So.2d 974, that administrative hearing officer (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did not meet the statutory definition of an infant covered by NICA. Upon appeal to the district court, and upon the district court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court. (966 So.2d, at 978).

In Galen of Florida, Inc. v. Braniff, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held "that as a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery." Therefore, if notice is not provided to an obstetrical patient, then a civil action for malpractice would not be barred, even if the birth would otherwise be covered by NICA.

B. EFFECT OF PROPOSED CHANGES:

This bill amends s. 766.302, F.S., relating to definitions, to lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams. This change would provide compensation through NICA for more infants

This bill amends s. 766 304, F S., relating to the administrative law judge's determination of claims, to provide that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under 766 309, F.S., have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s 766.303, F.S. An action may not be brought under ss. 766.301 - 766 316, F.S., if the claimant recovers or final judgment is entered. This amendment is in response to the Florida Supreme Court decision in Florida Birth-Related Neurological Injury Compensation Association v McKaughan, explained above.

This bill also amends s. 766.316, F.S., relating to notice to obstetrical patients of participation in NICA, to specify that such notice must be provided to the patient any time prior to delivery and authorizes the hospital or the participating physician to elect to give the patient the notice form and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable. This amendment is in response to the Florida Supreme Court decision in Galen of Florida, Inc. v Braniff, explained above.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This bill would slightly increase the number of birth-related injuries compensable through NICA.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full .25 percent assessment in the second year and each subsequent year against

the casualty insurers. In addition, the department would be required to increase assessments paid by hospitals and physicians

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

This bill would increase the number of families eligible to participate in NICA. NICA would provide the exclusive remedy under certain circumstances.

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill substantially amends the following sections of the Florida Statutes: 766.301, 766.302, 766.304, and 766.316.

E. SECTION-BY-SECTION RESEARCH:

Omitted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

A $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs.

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures

   N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   N/A

2. Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth.

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

1. Direct Private Sector Costs.

   If the Department of Insurance finds that NICA cannot be maintained on an actuarially sound basis, based on the assessments and appropriations, the department may increase the assessments on hospitals and physicians. The department would be required to assess the full .25 percent assessment in the second year and each subsequent year against the casualty insurers

2. Direct Private Sector Benefits:

   This bill could reduce litigation by diminishing the number of birth related injuries which are not covered by NICA

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year. The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full .25 percent assessment in the second year and each subsequent year against the casualty insurers. It is estimated that the .25 percent assessment against carriers would generate $5.4 million, based on 1995 net direct written premium. In addition, the department would be required to increase assessments paid by hospitals and physicians by an estimated 78 percent.

The actuary assumed that 22 additional births in the range of the birth weight of 1,800 - 2,499 grams would be anticipated and used the current average cost per selected/accepted claim of approximately $1.3 million to establish the high range estimate of $28.5 million. The low range estimate of $11.3 million was determined by adjusting the high range estimate of $28.5 million by .40 percent of compensable claims filed with NICA (i.e., approximately nine additional claims based on an estimated 60 percent of births compensable not filed with NICA, based on NICA's claims history).

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION.

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON: Civil Justice and Claims.

Prepared by: Legislative Research Director.

Charles R. Boning

Richard Hixson

HOUSE AMENDMENT FOR COMMITTEE PURPOSES

Bill No. PCB CJCL 98-9

Amendment No. 1 (for drafter's use only)

COMMITTEE ACTION

ADOPTED	Y (9)	N	FAILED TO ADOPT	Y	N
ADOPTED AS AMENDED	Y	N	WITHDRAWN		
ADOPTED w/o OBJECTION	4		OTHER		

Committee hearing bill: Civil Justice & Claims

Representative(s) Cosgrove offered the following:

Amendment (with title amendment) 19 2835

Remove from the bill: Everything after the enacting clause

and insert in lieu thereof:

Section 1. Paragraph (d) of subsection (1) of Section 766.301, Florida Statutes, is amended to read:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

Section 2. Section 766.304, Florida Statutes, is amended to read:

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss.766.301-866.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act

is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. In the event that it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. The findings of fact and conclusions of law of the ~~hearing officer~~ ALJ shall not be admissible in any subsequent proceeding; however, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible as impeachment in any subsequent civil action, subject to the limitations of ss. 90.401, 90.402, and 90.403. An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered. The division may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosection of claims.

Section 3. Paragraph (e) of subsection (5) of section 766.315, Florida Statutes, is amended to read:

766.315 Florida Birth-Related Neurological Injury Compensation Association; board of directors.--

(5)(e) Funds held on behalf of the plan are funds of this state, and the association may invest plan funds only in the investments and securities described in s. 215.47 and is subject to the limitations on investments contained in that section. ~~Any funds held on behalf of the plan must be invested in interest-bearing investments by the association.~~ All income

derived from such investments will be credited to the plan.

Section 4. Section 766.316, Florida Statutes, is amended to read:

766.316 Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

Section 5. (1) The Auditor General shall conduct an analysis of the reserve adequacy and funding rates in order to determine the actuarial soundness of the Florida Birth-Related Neurological Injury Compensation Plan. The study shall include an evaluation of future medical costs for the existing Plan claimants including life expectancy evaluation, and utilization of appropriate discount rates based on annual funding for expected future losses, estimated annual cost to lower the birth weight to 2,000 grams or 1,800 grams; and the

estimated cost for lowering the birth weight for multiple births. The Auditor General shall contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of the NICA program.

(2) To assist the Auditor General in the development and performance of the actuarial analysis of the Plan, a technical advisory group shall be appointed, which shall be composed of the following members: one selected by the Florida Hospital Association representing general acute care hospitals; one selected by the Academy of Florida Trial Lawyers; one selected by the Florida League of Health Systems representing for-profit hospitals; one selected by the Association of Community Hospitals and Health Systems of Florida representing private not-for-profit hospitals; one selected by the Florida Obstetrical and Gynecological Society; one selected by the Physician Insurers Association of America who provides obstetrical medical malpractice insurance coverage in Florida; one medical malpractice insurer selected by the Florida Insurance Council; one property and casualty insurer selected by the Florida Association of Insurance Agents; the chairman of the Board of the Florida Birth-Related Neurological Injury Compensation Association, or his designee; and one selected by the Florida Medical Association who is a practicing neonatologist. The technical advisory group will assist the Auditor General in developing the specific elements to be studied as part of the actuarial analysis; review an interim report and provide feedback to the Auditor General; and provide a written response which will be included in the final report of the Auditor General.

(3) The Auditor General shall submit the required report to the President of the Senate and the Speaker of the

Amendment No. 1 (for drafter's use only)

House of Representatives, and their designees by no later than January 1, 1999.

Section 6. The amendments to sections 766.301 and 766.304 shall take effect July 1, 1998, and shall apply retroactively regardless of the date of birth.

Section 7. Amendments to section 766.316 shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after said date.

Section 8. Except as otherwise provided in this act, this act shall take effect July 1, 1998.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

On page 1, lines 2 through 13

remove from the title of the bill: All of said lines

and insert in lieu thereof:

An act relating to medical malpractice insurance; amending s. 766.301, F.S.; clarifying legislative intent; amending s. 766.304, F.S.; providing exclusive jurisdiction of administrative law judges in claims filed under ss.766.301-766.316, F.S.; providing a limitation on bringing a civil action under certain circumstances; amending s. 766.315, F.S.; authorizing the association to invest plan funds only in investments and securities described in s. 215.47, F.S.; amending s. 766.316, F.S.; providing hospitals and physicians with alternative means of providing notices to obstetrical patients relating to the no-fault alternative for birth-related neurological injuries; prescribing conditions under which notice need not be given; requiring the Auditor

Amendment No. 1 (for drafter's use only)

General to conduct a study of the impact of expanding eligibility for compensation under the Plan; providing for applicability of amendments made by this bill; providing an effective date.

THE ACADEMY OF
FLORIDA TRIAL LAWYERS

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ACADEMY OF FLORIDA TRIAL LAWYERS
RESPONSE TO
MEDICAL COMMUNITY'S
MEDICAL MALPRACTICE TORT REFORM

.19 2834

mtg 1-20-98

1 **Allowing lawyers for Defendant doctors to hold private discussions with Plaintiff's physicians as well as unlimited access to the plaintiff's private medical information. ("Equal Access to Treating Physician").**

This proposal invades the physician patient relationship and allows defense attorneys to engage in abusive practices, including

A Disrupting the continuity of care between the physician and patient,
B Intimidating a plaintiff's treating physician into taking the defendant doctor's side in a malpractice case through peer pressure and economic coercion,
C Delving into the private and personal medical information of the plaintiff that has no relevance to the issues in the malpractice case, and may be used to harass and intimidate the plaintiff into dropping or settling the case.

The current law provides adequate opportunity and safeguards A defendant's attorney can already discover relevant and non-privileged information from a patient's treating physician through depositions In this context, the plaintiff's attorney can make appropriate objections and protect from disclosure and discussion of confidential information

Patients must be free to fully discuss their medical problems with physicians without fear that their doctor will disclose personal matters with lawyers who are at war with the patient Allowing these discussions will drive a wedge between the treating physician and the patient and will jeopardize the patient's continuity of care This unacceptable situation flies in the face of the Hippocratic oath, and is not justified by a defendant doctor's need to have unfettered access to the confidential medical information of a patient This information should not be open for examination without the patient's knowledge and consent. Additionally, allowing attorneys for a defendant to have unfettered access to a plaintiff's treating physician places an immense ethical burden on the physician

Under current law, discovery of treating physicians' opinions need not be formal or expensive It just has to be done with the patient's knowledge and the opportunity to limit discussion to relevant facts.

The Supreme Court of Washington recently ruled on this matter stating:

" .the harm from disclosure of this confidential information could not be fully remedied by court sanctions Second, the mere threat that a physician might engage in a private interview with

defense counsel would, for some, have a chilling effect on the physician-patient relationship and hinder further treatment Third, the physician has an interest in avoiding inadvertent wrongful disclosures during ex parte interviews. Finally, permitting ex parte interviews might result in disputes at trial if a doctor's testimony differed from the informal statements given to defense counsel, which then might require defense counsel to testify as an impeachment witness . In sum, this court remained unconvinced that any hardship to defendants by having to use formal procedures outweighed the special risks of ex parte interviews."

The Supreme Court of Illinois also recently held an **entire tort reform package unconstitutional.** This package included an **ex parte provision** similar to the one proposed by the medical community, **which the court held violated the separation of powers doctrine, and the right to privacy provisions of the state constitution.**

2. Changes to the Florida Birth-Related Neurological Injury Compensation Plan, (NICA).

A. Notice.--Current notice requirements are appropriate Expectant mothers are provided a brochure about the NICA fund, and form to be signed acknowledging that they understand that NICA provides a limited remedy This information is given to expectant mothers during their first visit to the OB, as part of a check list of items to be signed The current notice law is not intrusive into the physician patient relationship, nor is it burdensome Actual written notice is the least the participating health care providers should be required to provide, given the severe restrictions on the legal rights of parents of severely brain damaged infants.

Instead of providing actual notice to patients, and the opportunity for patients to ask questions about the plan, they propose to simply post a notice and leave it that **Just last session, the legislature determined that the posting of notice by doctors to inform patients of important matters that may impact their choice of physician was not adequate** Formally, physicians could post notice that they do not carry medical malpractice insurance As a result of changes made last session, physicians are now required to give patients actual written notice that they do not have financial responsibility for incidents of malpractice (Laws of Florida Chapter 97-264 s 22.) Given the recent legislative pronouncement against the practice of posting notice, it is inappropriate to consider changing this important notice provision in NICA

Additionally, the constitutionality of this act has not been determined, consequently any changes to the notice provisions might jeopardize the constitutionality of the act.

B. Jurisdiction.--Parents of injured children should not be required to file with NICA prior to circuit court in cases they do not believe fall under the limited purview of NICA. Currently, the NICA statute has very limited application, since by its terms it is limited to cases involving severe mental and physical injury caused by mechanical injury or oxygen deprivation during the delivery Consequently, the vast majority of medical malpractice actions involving children would not come under NICA as a threshold issue.

A plaintiff's attorney has no incentive to bring a case to circuit court first, if they truly believe the case could be compensable under NICA. Since most cases do not fall under the NICA act, it does not make sense to proceed through NICA first, which oftentimes requires as much time and resources as a trial before a court, only to have the case denied There has been no showing that cases that should have gone through NICA have been improperly tried through the court system

The case example given by the medical community involving a fact question of whether an injury took place in the nursery, (not compensable under NICA) or the delivery room (potentially compensable under NICA) does not necessitate changing the law regarding initial determination of NICA jurisdiction This proposal does not streamline the process and erects a substantial barrier for children and their parents attempting to seek redress for their injuries

C. **Birth Weight.-- Because we believe the NICA act unfairly limits the rights of the most severely injured babies and their parents, we oppose any expansion of this act by lowering the birth weight** When NICA was created in 1988, the legislature was concerned about the actuarial soundness of the fund They determined that if premature babies were not disqualified by weight, then every "preemie" who later developed mental or physical impairment would potentially be entitled to recover under the fund For this reason, the legislature limited application of the act to full term babies weighing at least 2,500 grams

3. **Definition Of Health Care Products/Expert Witnesses**

A. **The Definition of Health Care Provider** - The draft language submitted by the medical community contains a change in the definition of health care provider This is a significant change in the law. The current definition of health care provider clearly delineates by statutory section, all health care professionals who fall under the procedures of chapter 766 Notwithstanding this specificity, there has been a tremendous amount of litigation over which health care providers are included in this act

The definition of "health care provider" proposed by the medical community is overbroad and ambiguous in terms of which professionals and facilities would be subject to chapter 766 For example, the proposed definition includes " a licensed practitioner" and "a state authorized facility " Vague terms such as these will create years of litigation over who is covered under the act and will increase the complexity and cost of litigation There is no reason to change the existing class of defendants who are included in chapter 766 litigation procedures

B **Expert Witnesses** - Many years have been spent litigating the issue of who is permitted to give expert testimony in medical malpractice cases under the various provisions contained in chapter 766. To change these qualifications now would create an avalanche of litigation. The proposal by the medical community contains drastic changes regarding who can serve as a medical expert in cases against specialists, general practitioners and ancillary professional (such as nurses and physician assistants), and medical and health care facilities Some of the changes make no sense, some are too restrictive for both sides of a lawsuit and others are unnecessary and will create needless litigation over issues that are currently well settled

As a threshold question, the medical community should be asked to identify the types of professionals they believe should not be permitted to serve as expert witnesses before substantial changes are made to these sections

4. **Medical Malpractice Arbitration.**

A. **Rotation of Arbitrators.--We oppose random selection of DOAH hearing officers.** Medical malpractice litigation is a complex and technical area of the law Only a small percentage of trial lawyers practice in this area due to the intricacies of the law and extent of medical knowledge required Consequently, it is critical that the chief arbitrator be familiar with these

types of cases. It would make little sense for DOAH hearing officers accustomed to handling issues relating to bank expansions, highway designations, and EPA required rulemaking, for example, to occasionally delve into a complex medical malpractice case We recommend eliminating DOAH hearing officer involvement altogether, and instead allowing the plaintiff 's arbitrator and the defendant's arbitrator to select a qualified arbitrator to act as chief

B. **Damages.**--The Academy has proposed changes to the damages provisions in ss 766 207 and 766.209 These provisions are currently overly restrictive and unfair, and the proposals of the medical community make them more so Consider:

- **An injured patient almost never recovers the full $250,000 allowed under the statute for non-economic damages because the law reduces these damages by the percentage of the ability to enjoy life.** Example. If a patient's leg was wrongfully amputated, it would be argued that the patient still has the capacity to enjoy life. Under this scenario, the patient might only be awarded 25 percent of damages - $62,500 for the loss of his leg We propose that the arbitrators should be permitted to award the full $250,000 without the percentage reduction

- **The cap - $250,000 - has been interpreted as the most that can be recovered for the injured patient and her entire family** If negligence causes the death of a wife who is the mother of 3, the husband and 3 children must share compensation for the loss of a member of their family - that amounts to $62,000 each. This is hardly sufficient to even begin to compensate for such a loss The caps should be clarified to apply per claimant

- **The caps apply per incident, not per negligent health care provider** Currently, the more health care providers who commit malpractice on one patient, the less each has to pay for his/her mistake The caps should be clarified to apply per defendant

- **The cap on lost wages of 80 percent is unfair, since it does not take into account the time value of savings the claimant could accumulate.** Additionally, there is no reason to reduce the wages to present value as proposed, given that they are already capped at 80 percent

- **Current law does not set forth appropriate damages for wrongful death.** If the act was intended to include wrongful death cases, the proper elements of damages should be set forth specifically in ss 766 207 and 766 208

C. **Joint and Several Liability.**--The current medical malpractice law providing for arbitration and caps on damages was held to be constitutional by the Florida Supreme Court in University of Miami v. Echarte (618 So. 189, 1993 Fla) The arbitration/caps scheme provides that the parties may agree to arbitrate the issue of damages, and agree that damages for pain and suffering will be capped at $250,000, and damages for lost wages are capped at 80 percent The constitutionality of the arbitration statute hinges on whether the plaintiff receives a sufficient trade off for the loss of their right to recover fully for their loss The Court found that full joint and several liability was one of the benefits to the plaintiff that, in combination with other items, provided the quid pro quo that made the statute constitutional Joint and Several liability only applies when defendants agree to arbitrate, and understand that full joint and several liability will apply. To eliminate this doctrine in this context jeopardizes the constitutionality of the statute

Rather than abolishing joint and several liability in this context, we recommend that defendants be prohibited from offering arbitration unless they are financially responsible. This would ensure that no defendant be required to pay more than their proportionate share of fault, since all defendants would have resources to pay an award Financial responsibility for defendant health care providers in arbitration was urged by Justice Leander Shaw in the Echarte case, as an issue of fundamental fairness to injured victims of medical malpractice He opined that a defendant physician should not have the benefits of caps on damages if they are not prepared to pay the damages as determined by the arbitrators He stated that it was unfair to a plaintiff to be subject to caps without any assurance that the at fault health care provider is prepared to pay the damages Therefore, we urge that health care providers who offer arbitration be required to carry a minimum amount of medical malpractice insurance, obtain a letter of credit, or post a bond sufficient to compensate the plaintiff

D. **Interest.**--The interest rate included in the medical malpractice arbitration statute is also one of the items the Florida Supreme Court cited as a quid pro quo to uphold the constitutionality of limitations on the damages of the plaintiff Current law provides that the regular legal rate of interest, prime plus 5, s 55.03, shall apply if the award is paid within 20 days. s 766 211 The 18 percent interest rate only kicks in if a defendant fails to pay the award after 3 months Although 18 percent interest for failure to pay an arbitration award may, at first glance appear to be high, the context of the imposition of this interest must be understood 18 percent interest is only imposed in situations where both parties have agreed to arbitrate the issue of damages to the plaintiff, i e the defendant recognizes he or she will have to pay damages to the plaintiff, and has agreed to have the matter handled in an expedited proceeding There is no reason a defendant should not pay the plaintiff promptly, within 3 months, as required by law Consequently, a "penalty" rate of interest is fair and just in this instance We oppose lowering the interest rate in cases where payment of arbitration awards are 3 months past due

E. **Discovery of Information Relating to Damages.**--This proposal is unnecessary, given that defendants are already entitled to ask questions regarding the damages aspect of the case during the presuit period Failure to provide this information subjects the plaintiff to sanctions for failure to comply with presuit procedures

We oppose inclusion of a broad provision requiring "access to information" and providing for additional sanctions against the plaintiff The medical community should identify specifically what information they seek, for example, tax returns, medical bills, etc , and if necessary, delineate these items in the statute Separate sanctions are not required, since chapter 766 already provides ample penalties for failing to comply with presuit discovery

A G E N D A

COMMITTEE ON JUDICIARY

Fred Dudley, CHAIRMAN
Daryl Jones, VICE CHAIRMAN

DATE: Thursday, April 2, 1998
TIME: 9:00 A.M. - 11:00 A.M.
PLACE: Room 309, Capitol

MEMBERS: Senator Locke Burt
Senator Skip Campbell
Senator Charlie Crist
Senator Steve Geller
Senator John Grant
Senator Jim Horne
Senator John Ostalkiewicz
Senator Tom Rossin
Senator Ron Silver
Senator Charles Williams

If 2372

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 0544 Dyer (Similar CS/H 3193, Compare H 4129, S 2068)	Homeowners' Associations; prohibits commingling of certain funds; revises language re transition of homeowners' association control in community; provides list of required documents which must be provided to board by developer; provides for prohibited clauses in homeowners' association documents; revises language re disclosure to prospective purchasers; provides for cancellation of certain contracts, etc. Amends 617.303,.307, 689.26; creates 617.3075. CA 03/03/98 FAVORABLE WITH AMEND JU 03/13/98 Temporarily postponed JU 03/19/98 Temporarily postponed JU 04/02/98	2

COMMITTEE ON JUDICIARY

DATE: Thursday, April 2, 1998 TIME: 9:00 A.M. - 11:00 A.M.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
2	SJR 1272 Ostalkiewicz	Justices & Judges/Recall; constitutional amendment to provide that supreme court justices, district court of appeal judges, circuit court judges, & county court judges may be subject to recall election upon submission of petitions signed by specified number of electors. Amends s. 12, Art. V. JU 03/24/98 Not considered JU 04/02/98 EE RC	
3	SJR 1588 Dudley	Judicial Candidate/Public Position; constitutional amendment to allow candidates for judicial offices to take public positions on issues. Amends s. 10, Art. V. JU 03/24/98 Not considered JU 04/02/98 EE RC	
4	SJR 1464 Dudley	Supreme Court Justices & Judges; constitutional amendment to eliminate retention elections for Supreme Court Justices & judges of district courts of appeal & to provide for election of supreme court justices from single-member districts prescribed by law & for election of judges of district courts of appeal. Amends ss. 3 & 10, Art. V. JU 03/24/98 Not considered JU 04/02/98 EE RC	

COMMITTEE ON JUDICIARY

DATE: Thursday, April 2, 1998 TIME: 9:00 A.M. - 11:00 A.M.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
5	SB 1560 Cowin et al (Identical H 3507)	Judicial Nominating Commissions; provides for appointment of members of judicial nominating commissions; prohibits justices or judges from being members of said commissions; prohibits members of said commissions from holding other public office; requires that acts of said commissions be made by concurrence of majority; provides for suspension & removal of commission members pursuant to uniform rules of procedure, etc. Creates 43.295; amends 440.45; repeals 43.29. JU 03/24/98 Temporarily postponed JU 04/02/98 WM	
6	SB 2138 Campbell	Judiciary; increases membership of Supreme Court; authorizes satellite offices for justices of court; creates Sixth District Court of Appeal; redistricts remaining five district courts of appeal; provides for headquarters of new appellate district; provides for number of judges in new district. Creates 35.044; amends 35.03,.042, .05,.06. JU 04/02/98 WM	
7	SJR 1610 Harris (Similar ENG/ H 0125)	Recording of Instruments/County Seat; constitutional amendment to authorize recording of instruments by filing at branch office of county seat. Amends s. 1, Art. VIII. JU 03/24/98 Not considered JU 04/02/98 RC	

COMMITTEE ON JUDICIARY

DATE: Thursday, April 2, 1998 TIME: 9:00 A.M. - 11:00 A.M.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	SB 1466 Dudley (Similar H 3319)	Liens; revises provisions re bond of contractor constructing public buildings; provides for protection for contractors & surety under certain circumstances; provides for written statements to contractor re nature of labor or services performed under certain circumstances; revises provisions re liens of persons not in privity; provides for shortened timeframe for commencement of certain actions to enforce claim against payment bond, etc. Amends 255.05, Ch. 713. JU 03/24/98 Temporarily postponed JU 04/02/98	
9	SB 2170 Dudley	Dependency Proceedings; declares legislative intent to review provisions re Proceedings Relating To Children & re Protection From Abuse, Neglect, & Exploitation as they affect dependency proceedings. CF 03/18/98 WITHDRAWN RC 03/18/98 WITHDRAWN JU 04/02/98 CF RC	
10	SB 1604 Harris (Identical H 4109)	Co. Clerks Public Records Access Act; creates "County Clerks Public Records Access Act"; requires clerks to publish certain public records & public information on internet; provides for security; provides declaration of important state interest. JU 04/02/98 GO WM	

COMMITTEE ON JUDICIARY

DATE: Thursday, April 2, 1998 TIME: 9:00 A.M. - 11:00 A.M.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
11	SB 2158 Dudley	Judiciary/Number of Judges Increased; increases number of judges for specified judicial circuits & specified county courts; provides for filling of vacancies occurring as result creation of judicial offices. Amends 26.031, 34.022. JU 03/24/98 Not considered JU 04/02/98 WM	
12	SJR 1816 Williams et al (Similar CS/H 4003)	Homestead Exemption/Forced Sale; constitutional amendment to prohibit homestead exemption from forced sale from applying to property that is acquired or whose equity value is increased by prepayment of any mortgage debt with intent to defraud creditors. Amends s. 4, Art. X. JU 04/02/98 RC	
13	SB 1070 Sullivan et al (Compare S 1768)	Medical Malpractice Insurance; clarifies legislative intent; modifies definitions; provides exclusive jurisdiction of administrative law judges in claims filed under specific provisions; provides limitation on bringing civil action under certain circumstances; provides hospitals & physicians with alternative means of providing notices to obstetrical patients re no-fault alternative for birth-related neurological injuries, etc. Amends Ch. 766. BI 03/12/98 FAVORABLE WITH AMEND 6 JU 04/02/98	

NOTICE OF COMMITTEE MEETING
House of Representatives

Civil Justice and Claims

19 2834

January 20, 1998 8:00 A.M. 102 HOB

Continued discussion of Tort and Litigation Reform issues including Medical Malpractice.

Committee workshop discussion regarding drafting of proposed legislation on Tort and Litigation Reform issues.

Tom Warner #82
Chair

Received in the Office of the Sergeant at Arms on
January 5 19 97
at 3:40 P.M. (time).
Barbara Payne
Sergeant at Arms

Filed by me with the Sergeant at Arms and the Clerk on
January 5, 19 98
in compliance with Rules.
D Thrift
Committee Administrative Assistant

Distribution: Sergeant; Clerk (Calendar); Leg. Info.; others as required by Rules.

H-14(1997)

COMMITTEE APPEARANCE RECORD

Bill No. med mal proposals Date 1/20/98

Name Debra Zappi

Address 218 S. Monroe St.

City Tall State /Zip Fl. 32301

Phone Number 224-9403

Representing Academy of Florida Trial Lawyers

Lobbyist (registered) Yes ☑ No ☐

State Employee Yes ☐ No ☑

I wish to speak: ☑ Proponent ☐

*I have been requested to speak: ☐ Opponent ☑

Information ☑

Subject matter: medical malpractice proposals / NICA

Committee:

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date 1/20/98

Name ROBERT E. WHITE, JR.

Address 9355 SW 144 ST.

City MIAMI State/Zip FL 33176

Phone Number 800-222-5115

Representing PHYSICIANS PROTECTIVE TRUST FUND

Lobbyist (registered) Yes ☐ No ☑

State Employee Yes ☐ No ☑

I wish to speak: ☐ Proponent ☐

*I have been requested to speak: ☐ Opponent ☐

Information ☐

Subject matter: MEDICAL MALPRACTICE ISSUES

Committee: HOUSE CIVIL JUSTICE & CLAIMS

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date 1/20/98

Name Larry D Hall

Address 1417 E Concord St

City ~~Otl~~ Orlando State /Zip Fl 32803

Phone Number 407 896 0425

Representing No one

Lobbyist (registered) Yes ☐ No ☑

State Employee Yes ☐ No ☑

I wish to speak: ☑ Proponent ☐

*I have been requested to speak: ☐ Opponent ☐

Information ☑

Subject matter: Equal access to Dr's
Damages - Med Mal

Committee: _____

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date _____

Name NEIL BUTLER

Address 322 BEARD STREET

City TALLAHASSEE State /Zip 32303

Phone Number 222-6969

Representing CHH / MMI

Lobbyist (registered) Yes ☑ No ☐

State Employee Yes ☐ No ☑

I wish to speak: ☑ Proponent ☐

*I have been requested to speak: ☐ Opponent ☐

Information ☑

Subject matter: Medical Malpractice Issues

Committee: _____

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date JAN 20, 1998

Name NEAL A. ROTH

Address 2665 S. BAYSHORE DRIVE

City MIAMI State/Zip FLA 33133

Phone Number (305) 442-9666

Representing AFTL

Lobbyist (registered) Yes ☐ No ☑

State Employee Yes ☐ No ☑

I wish to speak: ☑ Proponent ☐

*I have been requested to speak: ☐ Opponent ☐

Information ☑

Subject matter: LITIGATION REFORM ✓

MEDICAL MALPRACTICE

Committee: HOUSE CIVIL JUSTICE & CLAIMS

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date 1/20/98

Name Vince Bill

Address 311 S. Calhoun

City Tallahassee State/Zip 32301

Phone Number 681-6300

Representing State Farm (Representing True)

Lobbyist (registered) Yes ☑ No ☐

State Employee Yes ☐ No ☐

I wish to speak: ☑ Proponent ☐

*I have been requested to speak: ☐ Opponent ☐

Information ☐

Subject matter: Response to trial bar

Committee: _____

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date 1/22/98

Name E.N. Millett, Jr.

Address 1104 Ivanhoe Rd

City Tallahassee State/Zip FL 32312

Phone Number 850/385-5444

Representing Shands Hospital & Univ Med Ctr of Jax

Lobbyist (registered) Yes ☒ No ☐

State Employee Yes ☐ No ☒

I wish to speak: ☐ Proponent ☐

*I have been requested to speak. ☐ Opponent ☐

Information ☐

Subject matter: NICA

Committee: Civil Justice & Claims

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

COMMITTEE APPEARANCE RECORD

Bill No. _____ Date 1-20-98

Name Lynn Dickinson

Address P.O. Box 14567

City Tallahassee State/Zip Fl. 32317-4567

Phone Number 904-488-8191

Representing Florida Birth-Related

Lobbyist (registered) Yes ☐ No ☒

State Employee Yes ☐ No ☒

I wish to speak: ☐ Proponent ☐

*I have been requested to speak: ☐ Opponent ☐

Information ☒

Subject matter: Answer questions re: Florida Birth-Related NICA Fund

Committee: House Civil Justice & Claims

*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair ☐

Approved by _____ Chair

Copies:
Original - Committee
Copy - Person requested to appear

H-16 (1993, Revised)

By the Committee on Civil Justice & Claims and
Representatives Byrd, Cosgrove, Flanagan and Thrasher

A bill to be entitled

An act relating to medical malpractice insurance; amending s. 766.301, F.S.; clarifying legislative intent; amending s. 766.304, F.S.; providing exclusive jurisdiction of administrative law judges in claims filed under ss. 766.301-766.316, F.S.; providing a limitation on bringing a civil action under certain circumstances; amending s. 766.315, F.S.; authorizing the association to invest plan funds only in investments and securities described in s. 215.47, F.S.; amending s. 766.316, F.S.; providing hospitals and physicians with alternative means of providing notices to obstetrical patients relating to the no-fault alternative for birth-related neurological injuries; prescribing conditions under which notice need not be given; requiring the Auditor General to conduct a study of the impact of expanding eligibility for compensation under the plan; providing for applicability of amendments made by this act; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (1) of section 766.301, Florida Statutes, is amended to read:

766.301 Legislative findings and intent.--

(1) The Legislature makes the following findings:

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

Section 2. Section 766.304, Florida Statutes, is amended to read:

766.304 Administrative law judge to determine claims.--The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. In the event that it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. The findings of fact and conclusions of law of the administrative law judge shall not be admissible in any subsequent proceeding; however, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible as impeachment in any subsequent civil action, subject to the limitations of ss. 90.401, 90.402, and 90.403. An action may

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered.The division may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosecution of claims.

Section 3. Paragraph (e) of subsection (5) of section 766.315, Florida Statutes, is amended to read:

766.315 Florida Birth-Related Neurological Injury Compensation Association; board of directors.--

(5)

(e) Funds held on behalf of the plan are funds of this state, and the association may invest plan funds only in the investments and securities described in s. 215.47 and is subject to the limitations on investments contained in that section ~~Any funds held on behalf of the plan must be invested in interest-bearing investments by the association. All income derived from such investments will be credited to the plan~~.

Section 4. Section 766.316, Florida Statutes, is amended to read:

766.316 Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician

may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

Section 5. (1) The Auditor General shall conduct an analysis of the reserve adequacy and funding rates in order to determine the actuarial soundness of the Florida Birth-Related Neurological Injury Compensation Plan. The study shall include an evaluation of future medical costs for the existing plan claimants including life expectancy evaluation, and utilization of appropriate discount rates based on annual funding for expected future losses, estimated annual cost to lower the birth weight to 2,000 grams or 1,800 grams; and the estimated cost for lowering the birth weight for multiple births. The Auditor General shall contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of the NICA program.

(2) To assist the Auditor General in the development and performance of the actuarial analysis of the plan, a technical advisory group shall be appointed, which shall be composed of the following members: one selected by the Florida Hospital Association representing general acute care hospitals; one selected by the Academy of Florida Trial Lawyers; one selected by the Florida League of Health Systems representing for-profit hospitals; one selected by the Association of Community Hospitals and Health Systems of Florida representing private not-for-profit hospitals; one selected by the Florida Obstetrical and Gynecological Society;

one selected by the Physician Insurers Association of America who provides obstetrical medical malpractice insurance coverage in Florida; one medical malpractice insurer selected by the Florida Insurance Council; one property and casualty insurer selected by the Florida Association of Insurance Agents; the chairman of the Board of the Florida Birth-Related Neurological Injury Compensation Association, or his designee; and one selected by the Florida Medical Association who is a practicing neonatologist. The technical advisory group will assist the Auditor General in developing the specific elements to be studied as part of the actuarial analysis, review an interim report and provide feedback to the Auditor General, and provide a written response which will be included in the final report of the Auditor General.

(3) The Auditor General shall submit the required report to the President of the Senate and the Speaker of the House of Representatives, and their designees by no later than January 1, 1999.

Section 6. The amendments to ss. 766.301 and 766.304 shall take effect July 1, 1998, and shall apply retroactively regardless of the date of birth.

Section 7. Amendments to s. 766.316 shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after said date.

Section 8. Except as otherwise provided in this act, this act shall take effect July 1, 1998.