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.