

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
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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:

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