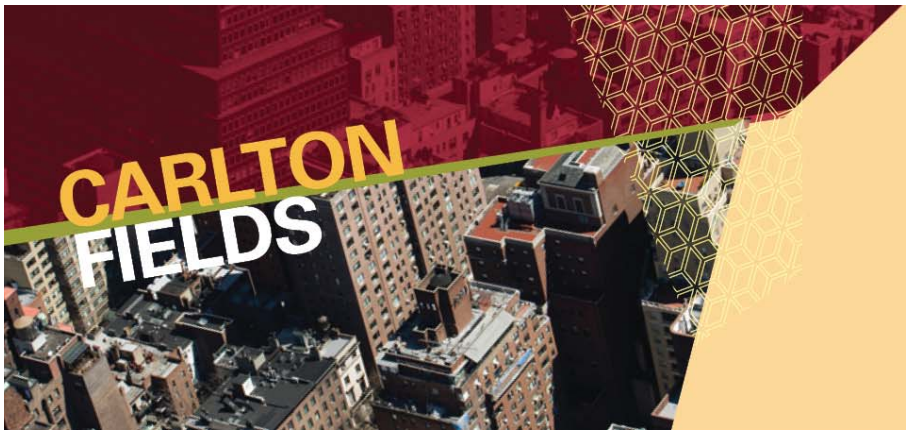

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Claiming NICA Exclusivity: The Florida Supreme Court Clarifies The Law Regarding Notice By Multiple Providers

By Edward J. Carbone

On January 14, 2010, the Florida Supreme Court provided some long-awaited certainty to Florida hospitals and obstetrical providers struggling with years of conflict and confusion in the appellate authority regarding NICA notice and its relationship to NICA exclusivity. With its decision in *Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings*, 35 Fla. L. Weekly S40, 2010 WL 114510, Case No. SC08-1317 (Fla. Jan. 14, 2010) ("*Kocher IV*"),[1] the Supreme Court has established a bright-line rule to help parties and counsel determine their right to claim NICA exclusivity. Although some areas of uncertainty persist

A Brief History of NICA in Florida

First, some context. NICA, of course, is the Florida Birth-Related Neurological Injury Compensation Plan,[2] Florida's statutory no-fault system for compensation of certain birth-related neurological injuries. Enacted in 1988, it was intended as a means to alleviate the high costs of malpractice insurance for obstetrical providers, while also providing compensation for a limited class of severely injured infants without requiring them to prove negligence or causation in a malpractice action.[3] Under the NICA system, if an infant suffers a "birth-related neurological injury" and a NICA "participating physician" delivered obstetrical services in connection with the birth, then an administrative award under the NICA plan is that infant's sole and exclusive remedy for the "birth-related neurological injury.[4]" Absent bad faith, malice, or willful and wanton disregard, no one may sue any person or entity directly involved with the labor, delivery, or postdelivery resuscitation for any malpractice that may have caused the "birth-related neurological injury."[5] This provision even forbids a claim for other negligence – outside of labor, delivery, or postdelivery resuscitation – that allegedly contributed to cause the "birth-related neurological injury."[6] As a result, the exclusivity of the NICA remedy is functionally the same as immunity for the involved health care providers.

The concept of NICA notice stems from section 766.316 of Florida Statutes, which was enacted as part of the creation of the NICA plan. That section initially required that each hospital and each participating physician provide obstetrical patients with notice, on forms furnished by the Association, regarding participation in the NICA plan and explaining a patient's rights and limitations under the plan.[7] In 1989, the legislature limited the requirement to only hospitals with a participating physician on staff, and deleted the requirement that the notice advise of participation in the NICA plan.[8]

Notice as Condition Precedent to NICA Exclusivity

However, the Legislature failed to specify what happens if a physician or hospital failed to provide notice in compliance with section 766.316. Nothing elsewhere in the NICA statutes conditions the exclusivity of the NICA remedy – or anything else – on compliance with section 766.316.[9] From the plain language of the statutes, the notice requirement appeared to be one whose breach carried no penalty.

Next came the expected battle between the plain language of the statutes and common sense. It seemed pointless for the Legislature to go to the trouble of enacting a separate statutory section mandating that a patient be provided with notice about NICA, but not providing for any remedy if that requirement is ignored. In 1997, after it had percolated through the circuit and district courts, that battle was conclusively resolved by the Florida Supreme Court in *Galen of Florida, Inc. v. Braniff*,[10] which held 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. [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."[11] The rationale, explained the court, is that the purpose of the notice provision is to permit the pregnant woman to make an informed choice whether or not to receive care from a participating obstetrician.[12] The *Braniff* court also observed that NICA exclusivity is an affirmative defense that should be raised and resolved in litigation – not NICA administrative proceedings.[13]

The Legislature promptly responded in 1998 by enacting amendments to the NICA statutes, codifying the "practicability" principle of *Braniff*, but reversing both *Braniff* and another Supreme Court decision[14] by making clear its intention that NICA compensability issues be resolved exclusively in NICA administrative proceedings – not in litigation.[15] However, although the Legislature clearly indicated where NICA compensability was to be determined, it failed to specify whether notice and exclusivity issues were to be resolved in NICA administrative proceedings or litigation.

Jurisdiction to Determine Factual Issues Regarding Notice

The district courts attempted to fill in this jurisdictional blank, with uneven results. The Fifth District held in 2000 that notice issues must also be resolved in administrative proceedings in order to avoid the "ping-pong effect" of the trial court and administrative law judge each throwing the case back to the other on the question of notice.[16] The Third District agreed in 2001.[17] The Fourth District added a twist, however, in 2002, holding that NICA administrative jurisdiction was limited to factual issues: nothing in the statutory scheme gave the administrative law judge jurisdiction to rule upon the legal impact of his or her findings upon a claimant's common law rights and remedies.[18] The Second District agreed with Gugelmin regarding the administrative law judge's lack of jurisdiction to rule on legal issues concerning exclusivity of remedies,[19] then went further and held that NICA administrative jurisdiction is limited to compensability and excludes even factual findings regarding notice: "[n]othing in the 1998 amendments to NICA did anything to extend the jurisdiction of the ALJ to the issues of notice and immunity from tort liability."[20] The First District eventually agreed with the Third, Fourth, and Fifth Districts, holding that the NICA administrative law judge has jurisdiction to determine whether the notice requirement was satisfied,[21] but joined the Second and Fourth Districts in holding that NICA administrative jurisdiction did not extend to ruling

upon the legal impact of those findings on NICA exclusivity.[22]

In 2003, the Legislature waded back into this debate, at least prospectively, by amending section 766.309 to make clear that the administrative law judge is permitted to resolve the issue of notice.[23] This amendment was construed to provide for exclusive administrative jurisdiction to decide issues of notice.[24] In 2006, the Legislature made its intent even clearer by adding language explicitly providing that the administrative law judge has exclusive jurisdiction to make factual determinations regarding the notice requirement of section 766.316, and specifically reciting that the administrative law judge has had such exclusive jurisdiction since July 1, 1998.[25] And in 2007, the Florida Supreme Court agreed.[26]

It is therefore now well-settled that all factual issues regarding NICA claims – whether concerning compensability or notice – must be determined in NICA administrative proceedings by the administrative law judge, who enjoys exclusive jurisdiction to do so.

NICA Exclusivity: Joint or Several?

Section 766.316 states that each hospital with a participating physician on its staff and each participating physician must provide NICA notice.[27] Neither the statutory language nor the *Braniff* opinion, however, answers the question of what happens when the hospital provides notice but the physician does not, or vice versa. Must all involved health care providers provide sufficient notice in order for any of them to enforce exclusivity? Or is the exclusivity of remedy only "waived" by those providers who fail to provide sufficient notice? Or can notice by one provider satisfy the notice requirement of other providers?

The administrative law judge originally concluded that NICA exclusivity was joint: if any involved provider failed to provide sufficient notice, no involved provider was entitled to enforce NICA exclusivity.[28] The claimant was free to accept NICA benefits or pursue a civil action at their sole election.[29]

The Fourth District, in its 2002 *Gugelmin* opinion, was the first Florida appellate court to address this question, reversing the administrative law judge and ruling in effect that NICA exclusivity is severable – that is, it can apply to some defendants but not others, even as to the same claim. It ruled that where a hospital properly complied with the pre-delivery notice requirement but the delivering obstetrician did not, the hospital was nonetheless entitled to NICA immunity.[30] The First District later joined the Fourth District on this point, ruling that a health care provider who satisfied the notice requirement may invoke NICA exclusivity even if other involved providers failed to provide sufficient notice.[31]

In 2007, the Second District issued a cryptic opinion that yielded a result opposite to that required by *Gugelmin* without acknowledging conflict – or even citing to *Gugelmin*. In that case, like *Gugelmi*n, the hospital complied with the pre-delivery notice requirement but the delivering obstetrician did not. But unlike in *Gugelmin*, the hospital in *Britt III* was denied the protection of the NICA plan despite having satisfied the statutory notice requirement. The Second District affirmed the administrative law judge's conclusion that because it failed to advise her of the obstetrician's participation in NICA, the notice provided to the patient by the delivering obstetrician was not sufficient to avail the physician – and other health care providers involved in the delivery – of the Plan's immunity from civil suit.[34]

Not long thereafter, the Second District further muddled the issue with three decisions holding that hospitals need not give any notice at all if the delivering obstetrician provides proper notice of

participation in the NICA plan – because additional notice by the hospital in such cases would be meaningless.[35] The First District's 1997 opinion in *Board of Regents of the State of Florida v. Athey*,[36] seemingly holding that notice given by one provider would not satisfy the notice requirement as to other providers, was distinguished as *dicta*.[37] The First District's 2002 opinion in *Schur v. Florida Birth-Related Neurological Injury Comp. Ass'n*,[38] seemingly holding that a party who did not give notice could not use another party's notice as a means to invoke NICA exclusivity, was not addressed.

The Second District also ruled that hospitals have no duty at all to provide pre-delivery notice if they do not actually employ the delivering obstetrician,[39] although it later characterized this statement as merely *dicta*.[40] The Supreme Court then specifically rejected this interpretation of "on its staff" in *Kocher IV*.[41] The duty extends to any hospital that has granted staff privileges to a physician who participates in NICA.[42]

The series of four Second District cases yielded strange results seemingly at odds with the legislative intent: in *Kocher III*, *Glenn III*, and *Anderson*, hospitals that provided no notice at all were permitted to invoke NICA exclusivity, while in *Britt III*, a hospital that complied with its notice obligation was nonetheless denied NICA immunity.

Kocher IV

In *Kocher IV*, the Florida Supreme Court answered a question certified by the Second District as one of great public importance in both *Kocher III* and *Glenn III*: whether the delivering obstetrician's pre-delivery notice to the patient satisfies the notice requirement if the hospital fails to provide notice at all.[43] The Court answered the question in the negative, holding that in order to satisfy the statutory notice requirement of section 766.316, both participating physicians and hospitals with participating physicians on staff must provide obstetrical patients with notice of their participation in the plan.[44]

The Court clarified that its holding does not mean that NICA exclusivity is joint, as originally believed by the administrative law judge.[45] The Court merely intended to convey that both participating physicians and hospitals with participating physicians on staff have a duty to provide notice; neither can rely on the other to provide notice on its behalf.[46]

The Court specifically rejected the proposition that all involved providers must give sufficient notice in order for any provider to enforce NICA exclusivity.[47] Instead, it explicitly held that the notice provision is severable with regard to defendant liability. If either the participating physician or the hospital with participating physicians on its staff fails to give notice, the claimant can either accept NICA remedies and forgo any civil suit against any other person or entity involved in the labor and delivery, or forgo any remedy under NICA and pursue a civil suit – but only against the person or entity who failed to give notice.[48] *Kocher IV* thus explicitly holds that *Kocher III* and *Glenn III* were wrongly decided, and implicitly stands for the proposition that *Britt III* and *Anderson* were wrongly decided while *Gugelmin* and *Macri* were correctly decided.[49]

The Court explained that its holding gives effect to the plain meaning and purpose of NICA by protecting those who give proper and timely notice against civil liability while permitting claimants who do not receive proper and timely notice to pursue civil remedies against those who failed to provide proper and timely notice.[50]

Current Status of NICA Notice and Exclusivity Requirements

In the aftermath of *Kocher IV*, it is easier for obstetrical health care providers to know with greater certainty whether they are entitled to enforce NICA exclusivity.

If a participating physician can prove that he or she provided the form supplied by NICA to a patient during pre-natal care and that the patient was informed of the physician's participation in NICA, the physician should typically be immune from civil suit in the event that the baby suffers a qualifying birth-related neurological injury – no matter what any other involved provider does, or does not, do. Notice to the patient from an obstetrical professional association or other group practice is not required to name each member of the practice individually as long as the patient is notified that all providers in the group participate in NICA.[51]

If a hospital can prove that it provided the form supplied by NICA to a patient prior to delivery – for example, at pre-registration or immediately upon the patient's presentation to the hospital – and informed the patient that the hospital participates in NICA,[52] the hospital should typically be immune from civil suit in the event that the baby suffers a qualifying birth-related neurological injury, even if one or more involved physicians failed to provide sufficient notice.

Of course, *Kocher IV* did not answer all of the lingering questions about NICA notice and NICA exclusivity. Some unresolved issues remain.

For example, the existing caselaw leaves ample room for dispute regarding the timeliness of NICA notice and/or the impracticability of providing notice under given circumstances. The most recent guidance on this point suggests that the NICA notice must be given within a reasonable time after the provider-obstetrical patient relationship begins, unless the occasion of the commencement of the relationship involves a patient who presents in an emergency medical condition or unless the provision of notice is otherwise not practicable.[53] When the patient first becomes an obstetrical patient of the provider, and what constitutes a reasonable time, are issues of fact on which conclusions may vary even upon similar factual situations.[54] It is therefore wise to follow the advice offered by the Fifth District: a prudent provider should furnish the notice at the first opportunity and err on the side of caution.[55]

Another example of an unresolved issue is patient comprehension. Nothing in the NICA statutes requires that a provider ensure that the patient has understood the NICA notice. In fact, such a requirement would seem to be an impossibility. And to date, there is no appellate authority concerning a provider's duty to ensure that patients understand the NICA notice they receive. There is, of course, appellate authority discussing the purpose of the notice requirement, which is to permit the patient an opportunity to make an informed choice of providers – that is, whether or not to use a participating obstetrician.[56] That purpose would seem to be at least potentially frustrated if the patient does not understand the notice she is given.

One plaintiff tried unsuccessfully to avoid NICA exclusivity by arguing that the provision of NICA notice was insufficient[57] in her case because the substance of the notice was insufficient. This case resulted in a specific holding that the NICA "Peace of Mind" brochure satisfies the legislative mandate of providing a clear and concise explanation of a patient's rights and limitations under the plan.[58]

Another argument is that notice was insufficient because the NICA notice was not provided to the patient in her preferred language.[59] There is no direct

appellate guidance, however, regarding which languages other than English – if any – a provider must be able to accommodate. It appears likely that this would be a fact-specific analysis depending on the historical patient mix for a given provider. If a certain provider typically receives a number of patients who speak a foreign language for which NICA has published a brochure, that provider may potentially be found to have a duty to have NICA brochures available in that language to provide to patients who desire them. However, as noted, this question has not yet been passed upon by any Florida appellate court.

Despite the continuing presence of unresolved issues, *Kocher IV* is a landmark NICA case that serves to further settle the legal landscape of NICA notice and NICA exclusivity. Florida obstetrical health care providers, their insurers and counsel no longer need to work with the uncertainty of whether other providers – over whom they may have no control –provided legally sufficient NICA notice in order to properly analyze their own right to enforce NICA exclusivity. It has now been settled by the Florida Supreme Court that each participating provider and hospital is responsible for its own right to enforce exclusivity, and the mistakes of others will no longer be able to negate the immunity of a provider that fully complied with the law.

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1 The short form of "*Kocher*" refers to one of the injured infants whose appeal was consolidated in this decision.

2 The acronym "NICA" more specifically refers to the Florida Birth-Related Neurological Injury Compensation Association (the "Association"), which administers the plan. However, in common usage the term "NICA" has come to be used as a shorthand for the plan itself. See *Kocher* at 3.
3 *See* § 766.301, Fla. Stat.
4 *See* §§ 766.302(2, 7), 766.303(2), 766.309(1)(a-b), Fla. Stat.
5 *See* § 766.303(2), Fla. Stat.
6 *Orlando Reg. Healthcare v. Alexander*, 932 So. 2d 598 (Fla. 5th DCA 2006).
7 *See* § 766.316, Fla. Stat. (1988).
8 Ch. 89-186, §8, Laws of Fla.
9 *See* § 766.303(2), Fla. Stat.
10 696 So. 2d 308 (Fla. 1997).
11 *Id*. at 309-10.
12 *Id.* at 309-10.
13 *Id*. at 311.
14 *Humana of Florida, Inc. v. McKaughan,* 668 So. 2d 974 (Fla. 1996).
15 Ch. 98-113, §1-2, Laws of Fla.; §§766.301(1)(d), 766.304, Fla. Stat. (1998).
16 *O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 757 So. 2d 624, 627-28 (Fla. 5th DCA 2000).
17 *Univ. of Miami v. M.A.*, 793 So. 2d 999, 1000 (Fla. 3d DCA 2001).
18 *Gugelmin v. Div. of Admin. Hrgs.*, 815 So. 2d 764, 767 (Fla. 4th DCA 2002).
19 *Bayfront Med. Ctr. v. Div. of Admin. Hrgs.*, 841 So. 2d 626 (Fla. 2d DCA 2003) ("*Kocher I*"), quashed, 955 So. 2d 531 (Fla. 2007) ("*Kocher II*").
20 *All Children's Hosp. v. Dept. of Admin. Hrgs.*, 863 So. 2d 450, 456 (Fla. 2d DCA 2004)("Glenn I"), *quashed sub nom*. *Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hrgs.*, 948 So. 2d 705 (Fla. 2007) ("Glenn II"); *see also Florida Birth-Related Neurological Injury Comp. Ass'n v. Ferguson*, 869 So. 2d 686 (Fla. 2d DCA 2004).
21 *Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 880 So. 2d 1253, 1258 (Fla. 1st DCA 2004).
22 *Depart v. Macri*, 902 So. 2d 271, 274 (Fla. 1st DCA 2005).
23 Ch. 2003-416, §77, Laws of Fla.
24 *Weinstock v. Houvardas*, 924 So. 2d 982, 985 (Fla. 2d DCA 2006).
25 Ch. 2006-8, §1-2, Laws of Fla.; §766.309(1)(d), Fla. Stat. (2006).
26 *Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hrgs.*, 948 So. 2d 705, 707 (Fla. 2007)("Glenn II").
27 § 766.316, Fla. Stat. There are certain exceptions, including an exception for physicians-in-training, which are not relevant to this article's analysis.
28 *E.g., Florida Health Sciences Center, Inc. v. Div. of Admin. Hrgs.,* 871 So. 2d 1062, 1063 (Fla. 2d DCA 2004) ("*Britt I*"); *Kocher I*, 841 So. 2d at 628; Gugelmin, 815 So. 2d at 768.
29 *Id*.
30 *Gugelmin*, 815 So. 2d at 768.
31 *Macri v. Clements and Ashmore, P.A.*, 15 So. 2d 762, 766 (Fla. 1st DCA 2009).
32 *Florida Health Sciences Ctr. v. Div. of Admin. Hrgs.*, 974 So. 2d 1096 (Fla. 2d DCA 2007) ("*Britt III*").
33 *Id*. at 1099.
34 *Id*. at 1098, 1101.
35 *Bayfront Med. Ctr. v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 982 So. 2d 704, 708 (Fla. 2d DCA 2008) ("*Kocher III*"), *quashed*, 2010 WL 114510 (Fla. 2010); *All Children's Hosp. v. Dep't of Admin. Hrgs.*, 989 So. 2d 2 (Fla. 2d DCA 2008) ("*Glenn III*"), *quashed*, 2010 WL 114510 (Fla. 2010); *Springs Hosp. Found. v. Anderson*, 2009 WL 5125162 (Fla. 2d DCA Dec. 30, 2009).
36 694 So. 2d 46 (Fla. 1st DCA 1997).
37 *Kocher III*, 982 So. 2d at 709.
38 832 So. 2d 188 (Fla. 1st DCA 2002).
39 *Kocher III*, 982 So. 2d at 709.
40 *Anderson* at *8.
41 *Kocher IV* at *5.
42 *Id*.
43 *Id*. at *1.
44 *Id*.
45 *Id*. at *5.
46 *See id*.
47 *Id*.
48 *Id*.
49 This is small solace to the hospital in Britt III, which was wrongly denied NICA immunity, but whose case is the only one of the four erroneous decisions that was not still pending at the time of *Kocher IV*.
50 *Id*.
51 *See, e.g., Jackson v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 932 So. 2d 1125 (Fla. 5th DCA 2006); *Sunlife OB/Gyn Svcs. of Broward County, P.A. v. Million*, 907 So. 2d 624 (Fla. 4th DCA 2005).
52 This requirement seems to be useless, as all Florida hospitals "participate" equally in NICA – there is no option available to hospitals, as it is to obstetricians, to choose not to become a NICA participant – but the Florida Supreme Court gave clear indication in Kocher IV that the requirement to advise of participation falls on all "health care provid-

ers," including hospitals. *Kocher IV* at *4 ("Therefore, our conclusion in *Galen* [*v. Braniff*] – that health care providers must give patients pre-delivery notice of participation in the plan – includes hospitals . . ."). 53 *Weeks v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 977 So. 2d 616, 619-20 (Fla. 5th DCA 2008). 54 *Id.* at 620. 55 *Id.* 56 *Kocher IV* at *4; *Braniff*, 696 So. 2d at 309. 57 *Dianderas v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 973 So. 2d 523 (Fla. 5th DCA 2007) (brochure allegedly did not explain that NICA benefits may be less than a tort recovery). 58 *Id.* at 527. 59 Providers are required to provide notice on forms published by NICA. § 766.316, Fla. Stat. NICA publishes notice brochures in a number of languages – 12 according to NICA's website – but certainly not every conceivable language. *See* Florida Birth-Related Neurological Injury Compensation Ass'n, NICA – Hospitals – Forms & Brochures, http://www.nica.com/hospitals/forms_brochures.html (accessed Feb. 16, 2010). If a patient requires notice in a language for which NICA has not published a notice, it would appear that NICA would bear potential liability if a court were to rule that exclusivity could not be enforced because the language barrier rendered notice insufficient. *See* Florida Birth-Related Neurological Injury Comp. Ass'n v. Feld, 793 So. 2d 1070 (Fla. 4th DCA 2001).