

12 WAYS TO AVOID A DETERMINATION OF NICA COMPENSABILITY IN A MEDICAL MALPRACTICE CASE

By Jon Gilbert

Originally Published in the December 2011 Edition of the [Florida Bar Journal](#).

A medical malpractice claim almost always involves complicated medical and legal issues, years of litigation, a large accumulation of legal costs, and a considerable risk of damages at stake. These factors are enhanced in cases involving a neurological injury to a newborn infant. To say nothing of the emotional impact, infant neurological injury cases involve greater damages: greater lost income, greater loss of net accumulations, and more extensive and lengthy treatment for the alleged injury.

The Florida Legislature recognized these greater risks and created an organization called the Florida Birth-Related Neurological Injury Compensation Association (NICA) in 1988. The purpose of NICA is to provide exclusive no-fault compensation for birth-related neurological injuries to infants.¹ NICA is a statutorily-based organization. It manages the Florida Birth-Related Neurological Injury Compensation Plan (known as “the Plan”). The Plan provides payments from a statutorily-created fund to care for neurologically impaired infants. The NICA statute specifies several requirements for bringing a compensable claim under the Plan.² If a claim is not eligible under NICA, it can be pursued as a lawsuit in the circuit court where the case initiated,³ like any other medical malpractice claim.⁴ However, if the claim falls under the purview of NICA, its resolution is limited in several ways:

1. The claim will be determined in an administrative court by an Administrative Law Judge (ALJ), rather than a jury.⁵

2. The value of a claim will be limited to a recovery of \$100,000.00, regardless of the severity of the injuries or future costs for care.⁶ The value further will be limited to \$10,000.00 in the event the incident results in death to an infant.⁷

As a result of these significant limitations to what could otherwise be a substantial medical malpractice case, it is important for a filing attorney to ensure that a claim under the NICA Plan is the appropriate avenue to recovery for each case. There are at least twelve factors that must be met in order to be properly relegated to NICA compensability. They include the following:

1. The injury must be a **neurological injury**;
2. The injury must have occurred **during birth**;
3. The injury must be due to **oxygen deprivation or mechanical injury**;
4. The injury must be a **substantial mental and physical impairment**;
5. The infant must be **born alive**;
6. The birth and alleged injury must occur **in a hospital**;
7. The alleged injury cannot be due to a **genetic or congenital abnormality**;
8. The infant must weigh **2500 grams or 2000 grams** in the case of multiple gestations;
9. The health care providers must be **participating physicians and hospitals**;
10. The patient must **consent to treatment** by NICA health care providers;
11. The child must be **younger than five** years old at the time of abatement to NICA;
and
12. There must not be **bad faith or malicious purpose or willful and wanton disregard**.

If a defendant claims NICA compensability by filing a motion for abatement of the case to the NICA court, the circuit court judge has little discretion to keep the case.⁸ In fact, a circuit court judge usually is precluded from doing so, as the exclusive jurisdiction for determining the compensability of a NICA claim lies with the ALJ.⁹ Once the circuit court judge abates a claim to NICA, the circuit court case is stayed and the claim begins in the administrative court system.

The plaintiff, however, retains the ability to return the matter to the court system in limited circumstances. If one of the factors listed above is not present, a plaintiff, after filing a Petition for Benefits under NICA, can move for the ALJ to issue a Summary Final Order, which requires the ALJ to determine whether the claim is NICA-compensable.¹⁰ Doing so exhausts the administrative process; thus, if the claim is not NICA-compensable, civil remedies can then be sought in the circuit court case.¹¹ A plaintiff can challenge NICA compensability through a Motion for Summary Final Order challenging the applicability of any one of the above twelve factors.¹²

1. Neurological Injury

A neurological injury is an injury to the brain or spinal cord.¹³ The compensability under this requirement is very particular. As such, there are many situations that may occur during birth that do not qualify for NICA compensability. For instance, a hemorrhage between the skull and scalp sustained by infant during two unsuccessful attempts at a vacuum-assisted delivery was not compensable even though that subsequently caused a brain injury.¹⁴ Additionally, a brachial plexus injury does not qualify for NICA-compensability when it involves a tear rather than an avulsion of the spinal nerve root.¹⁵ Determination on this fact-intensive aspect is almost

always left to an ALJ, but a finding by the ALJ that the claim does not involve a neurological injury means the case is not proper in the NICA court.

2. During Birth

A neurological injury must occur “in the course of labor, delivery, or resuscitation in the immediate postdelivery period.”¹⁶ Thus, if the injury is one that occurs in utero¹⁷ or one that occurs when the baby is a few weeks old, there is no NICA compensability, and the claim should be returned to the original court.¹⁸ However, there is no requirement that the neurological injury actually manifest itself during “labor, delivery, or resuscitation in the immediate postdelivery period.”¹⁹ Moreover, the “immediate postdelivery period in a hospital” may include a period of days when a baby is delivered with a life-threatening condition and requires close supervision.²⁰ The exact beginning and ending of the period of time where NICA will apply is a determination that will be made by the ALJ on a case by case basis.²¹

3. Oxygen Deprivation or Mechanical Injury

This is an either/or situation: a claim is compensable under NICA if there is either oxygen deprivation²² *or* mechanical injury which results in substantial mental and physical impairment. So, to avoid NICA compensability under this section, plaintiff’s counsel must show that neither occurred.²³

4. Substantial Mental and Physical Impairment

The NICA Statute requires that the injury “renders the infant permanently and substantially mentally and physically impaired.”²⁴ The infant must be both substantially mentally *and* physically impaired.²⁵ A “physical impairment” relates to an infant's motor

abnormalities or impairment of his physical functions, which along with the brain injury, significantly affects the infant's mental capabilities so that the infant will not be able to translate his cognitive capabilities into adequate learning or social development in a normal manner.²⁶ A “mental impairment” may include not only significant cognitive deficiencies but also, in a proper case, additional circumstances such as significant barriers to learning and social development.²⁷ However, if a child demonstrates physical impairments and damage on brain scans, but proves to be of normal or above-average intelligence, the claim will not be NICA compensable.²⁸

5. Born Alive

The definition of birth-related neurological injury provided in *Fla. Stat. §766.302(2)* states that the injury must occur to a “live infant”. The term “infant” means a baby that is already born and living outside the mother’s womb. Thus, the prerequisite built into this statutory definition requires that the baby survive the birthing process in order to have a NICA-compensable claim.

6. In a Hospital

The definition of “birth-related neurological injury” provided in section 766.302(2), Florida Statutes, provides that such an injury must occur “in a hospital”. Hospital is also defined in section 766.302(6), Florida Statutes, as “any hospital licensed in Florida.” Births at home and in other non-hospital settings will be excluded from NICA-compensability.

7. Genetic or Congenital Abnormality

Genetic and congenital abnormalities do not qualify within the definition of a "birth-related neurological injury." Thus, despite the Plan's no-fault policy on determination of compensability, a congenital abnormality is not compensable under NICA;²⁹ nor is a genetic abnormality compensable.³⁰

8. 2,500 grams or 2,000 grams

The weight of the infant at the time of birth must be at least 2,500 grams (approximately 5 and a half pounds), or for multiple gestations (e.g. twins) the weight must be at least 2,000 grams (approximately 4 and a half pounds).³¹ Often, when an infant is born prematurely, the infant will not meet the weight requirement in this statute; thus, the claim can avoid NICA compensability.³²

9. Consent

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.³³ Thus, without such a signature acknowledging consent by a patient, a patient may be able to avoid NICA compensability.³⁴

10. Participating Physician and Hospital

NICA requires that participating hospitals *and* physicians give pre-delivery notice to obstetrical patients of their participation in NICA.³⁵ The purpose of the pre-delivery notice requirement is to give an obstetrical patient the opportunity to make an informed choice whether to use a health care provider who participates in NICA or not.³⁶ If a non-participating health care

provider is selected, traditional civil remedies are preserved.³⁷ The pre-delivery notice must be a clear and concise explanation of a patient's rights and limitations under the plan.³⁸ If such notice can be given a month before delivery, notice given one day before delivery is not sufficient.³⁹

A participating physician is “a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time...”.⁴⁰ A Hospital is defined as “any hospital licensed in Florida.”⁴¹ Section 766.316, Florida Statutes, requires both a hospital with a participating physician on its staff and any participating physician to provide pre-delivery notice. This is important because if one of those potential parties fails to satisfy these requirements, the claim against that party can still be brought in the initial court case.⁴²

11. Younger than Five

There is a statute of repose on bringing a claim under NICA beyond a child's fifth birthday.⁴³ This issue can come up where the parents were led to believe a child's condition is due to a genetic issue, but they later find out the condition is something other than genetics, and file a claim after the child's fifth birthday. Normally, a claim for medical malpractice that occurred more than four years before filing suit is barred by the statute of limitations.⁴⁴ However, the statute of repose for a minor is extended until the child's eighth birthday,⁴⁵ the longest of any professional malpractice statute of limitations. Thus, if a motion for abatement to NICA is filed beyond a child's fifth birthday, the claim is not NICA compensable and should be sent back to the circuit court after exhaustion of the administrative remedies.

12. Bad Faith or Malicious Purpose or Willful and Wanton Disregard

Breaches in the standard of care that are done with bad faith, malicious purpose, or willful or wanton disregard of human rights, safety, or property are not compensable under NICA.⁴⁶ There are two requirements for this factor to warrant remanding a matter back to circuit court. First, the bad faith, malicious purpose, or willful or wanton disregard must have been alleged prior to the abatement to NICA.⁴⁷ A plaintiff, however, does not have to raise the issue of willful and wanton conduct until a defendant health care provider raises NICA exclusivity of remedy as a defense in its answer.⁴⁸

Second, the judge must determine that there is *clear and convincing evidence* of the bad faith, malicious purpose, or willful or wanton disregard.⁴⁹ In *Rinella v. Abifaraj*,⁵⁰ the First District held that the ALJ lacked subject-matter jurisdiction to decide applicability of the willful and wanton exception to NICA exclusivity as the statute does not specify whether the ALJ or the court decide the applicability of the exception. Thus, this determination can be made by the circuit court judge.⁵¹ The “clear and convincing evidence” standard for proving willful or wanton conduct is a higher standard than the “preponderance of the evidence” standard typically utilized in tort law.⁵² However, if a plaintiff can prove this heightened standard to a circuit court judge, it is one of the few instances where the plaintiff can avoid NICA abatement altogether.

CONCLUSION

Applying these twelve factors to any infant medical malpractice case will ensure that only those claims which are proper in a NICA court end up there for determination on compensation. The statutorily-capped remedies provided by NICA are significant limitations compared to the potential damages at issue in circuit court, so it is important to verify that each case abated to NICA is appropriately before the ALJ.

¹ Fla. Stat. §766.301(2); Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So.2d 974, 978 (Fla. 1996).

² See Fla. Stat. §§766.301-316.

³ It is assumed for purposes of this article that the case was initially filed in a Florida Circuit Court, although it is also possible a case could be filed in one of the Florida Federal District Courts under diversity jurisdiction or that NICA administrative remedies could be pursued and exhausted prior to initiating a civil suit.

⁴ Fla. Stat. §766.304 ("If 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.").

⁵ Fla. Stat. §766.309.

⁶ Fla. Stat. §766.31(1)(b)(1)

⁷ Fla. Stat. §766.31(1)(b)(2)

⁸ See Fla. Stat. §766.309 (outlining the determinations regarding compensability to be made exclusively by an ALJ).

⁹ Fla. Stat. §766.304 ("The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable"); *Tabb ex rel. Tabb v. Florida Birth-Related Neurological Injury*, 880 So.2d 1253 (Fla. 1st DCA 2004).

¹⁰ See Fla. Stat. §766.309(4) ("The administrative law judge may issue a final order on compensability and notice...")

¹¹ Fla. Stat. §766.304.

¹² A challenge to NICA-compensability can also be made in the circuit civil case at the time defense counsel files a motion for abatement, but because of the ALJ's right to exclusively determine compensability, a circuit civil judge is unlikely to deny the Motion to Abate.

¹³ Fla. Stat. §766.302(2).

¹⁴ *Nagy v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 813 So.2d 155 (Fla. 4th DCA 2002).

¹⁵ See *Wright v. Fla. Birth-Related Neurological Injury*, DOAH Case No.: 08-001066N (July, 2008).

¹⁶ Fla. Stat. §766.302(2)

¹⁷ *Johnston vs. Fla. Birth-Related Neurological*, DOAH Case No.: 09-001712N (June, 2010).

¹⁸ See *Prisco v. Fla. Birth-Related Neurological*, DOAH Case No.: 07-005822N (August, 2008) (finding that an oxygen deprivation or mechanical injury that is not "birth-related" is not subject to NICA compensability).

¹⁹ *St. Vincent's Medical Center, Inc. v. Bennett*, 27 So.3d 65 (Fla.1st DCA 2009).

²⁰ *Orlando Reg'l Healthcare Sys., Inc. v. Fla. Birth-Related Neurological*, 997 So.2d 426 (Fla. 5th DCA 2008).

²¹ Fla. Stat. §766.309(1)(a); *Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological*, 997 So.2d 426 (Fla. 5th DCA 2008) (holding that six days after birth still qualified as "resuscitation in the immediate post-delivery period" due to the circumstances).

²² *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings*, 686 So.2d 1349 (Fla. 1997) (finding NICA compensability where oxygen deprivation was shown to have caused an infant to suffer a focal injury to the basal ganglia, which aids the body in performing "physical functions," and as direct result of the injury, he would not be able to communicate, attend school or otherwise learn and develop intellectually without substantial accommodation).

²³ *Johnston*, DOAH Case No.: 09-001712N.

²⁴ Fla. Stat. §766.302(2).

²⁵ *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings*, 686 So.2d 1349 (1997) (holding that the use of the word "and" in this section provides compensation for those who are "substantially mentally and physically impaired" as result of birth-related neurological injury; thus, in order to obtain coverage, infant must suffer both substantial mental and substantial physical impairments, not just one); see also *Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So.2d 561 (Fla. 5th DCA 2004) (a physical impairment by itself is not enough).

²⁶ *Matteini v. Florida Birth-Related Neurological*, 946 So.2d 1092 (Fla. 5th DCA 2006).

²⁷ *Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So.2d 561 (Fla. 5th DCA 2004).

-
- ²⁸ See *Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So.2d 561 (Fla. 5th DCA 2004); Cf. *Florida Birth-Related Neurological*, 686 So.2d 1349.
- ²⁹ See *Redwine v. Florida Birth-Related Neurological Injury*, DOAH Case No.: 08-002167N (August, 2009).
- ³⁰ *Joyner v. Florida Birth-Related Neurological Injury*, DOAH Case No.: 08-002146N (March, 2009).
- ³¹ *Fla. Stat. §766.302(2)*.
- ³² See *Chattic v. Florida Birth-Related Neurological Injury*, DOAH Case No.: 07-005147N (February, 2008).
- ³³ See *Fla. Stat. §766.316*.
- ³⁴ Cf. *Behan v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 664 So. 2d 1173 (Fla. 4th DCA 1995) (holding that notice need not be given to a patient when the patient has an emergency medical condition as defined in *Fla. Stat. §395.002(9)(b)* or when notice is not practicable).
- ³⁵ See *Galen of Fla., Inc. v. Braniff*, 696 So.2d 308, 309 (Fla.1997); *Macri v. Clements And Ashmore, P.A.*, 15 So. 3d 762 (Fla. Dist. Ct. App. 1st Dist. 2009).
- ³⁶ *Dianderas v. Florida Birth Related Neurological*, 973 So.2d 523 (Fla. 5th DCA 2007).
- ³⁷ See *Galen*, 696 So.2d at 309-10 (citing *Turner v. Hubrich*, 656 So.2d 970, 971 (Fla. 5th DCA 1995)).
- ³⁸ See *Fla. Stat. §766.316*.
- ³⁹ *Tarpon Springs Hospital Foundation, Inc. v. Anderson*, -- So.3d --, 35 FLW D903 (Fla. 2d DCA April 21, 2010) (holding additionally that notice given during a prior pregnancy was not sufficient and would lead to “absurd results”).
- ⁴⁰ *Fla. Stat. §766.302(7)*.
- ⁴¹ *Fla. Stat. §766.302(6)*.
- ⁴² *Tabb ex rel. Tabb v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 880 So.2d 1253 (Fla. 1st DCA 2004).
- ⁴³ *Fla. Stat. §766.313*.
- ⁴⁴ *Fla. Stat. §95.11(4)(b)*.
- ⁴⁵ *Fla. Stat. §95.11(4)(b)*.
- ⁴⁶ *Fla. Stat. §766.303(2)*; See *Cordero v. Florida Birth-Related Neurological Injury Compensation Ass'n*, DOAH Case No.: 08-004917N (June, 2009).
- ⁴⁷ *Id.*
- ⁴⁸ *Macri v. Clements And Ashmore, P.A.*, 15 So.3d 762 (Fla. 1st DCA 2009).
- ⁴⁹ See *Fla. Stat. §766.303(2)*.
- ⁵⁰ 908 So.2d 1126 (Fla. 1st DCA 2005).
- ⁵¹ *Id.*
- ⁵² 5 FLPRAC § 16:1.