0.A. 4-10-91

IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER 76,565

JAMES F. COY, M.D., SIDNEY R. STEINBERG, M.D., and CLAUDE A. BOYD, M.D., on behalf of themselves and all others similarly situated,
Petitioners

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as head of THE FLORIDA DEPARTMENT OF INSURANCE,
Respondents

**APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

INITIAL BRIEF OF PETITIONERS, JAMES F. COY, M.D., SIDNEY R. STEINBERG, M.D. AND CLAUDE A. BOYD, M.D.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE AND OF THE FACTS

A. The Parties

Petitioner, JAMES F. COY, M.D., is a general practitioner licensed to practice medicine in the State of Florida and is a resident and citizen of Deland, Volusia County, Florida. Dr. COY practices general medicine in Orlando, Florida. Petitioner, SIDNEY R. STEINBERG, M.D., is a general and vascular surgeon licensed to practice medicine in the State of Florida and the Commonwealth of Kentucky and is a resident and citizen of Shelbyville, Shelby County, Kentucky. Dr. STEINBERG practices general and vascular surgery in Shelbyville, Kentucky. Petitioner, CLAUDE A. BOYD, M.D., is a dermatologist licensed to practice medicine in the State of Florida and the State of Georgia and is a resident and citizen of Augusta, Georgia. Dr. BOYD practices dermatology in Augusta, Georgia. None of the Petitioners, in either a full-time or part-time capacity, practice obstetrics, perform obstetrical services or intend to perform obstetrical services in any way.

The Respondent, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, is a private association created by the Florida Legislature to administer the Florida Birth-Related Neurological Injury Compensation Plan and the plan of operation. Respondent, TOM GALLAGHER, in his official capacity as head of the Florida Department of Insurance, an agency of the State of Florida, is responsible for approving the plan of operation of the Florida Birth-Related Neurological Injury Compensation

Association, including setting the future levels of mandated "assessments" from non-participating and participating physicians.

B. Issues Raised Below

In February, 1988, the Florida Legislature enacted Chapter 88-1 of the Laws of Florida, which was subsequently amended in July, 1988, by Chapter 88-277, and which is now codified in §766.301 et. seq., Fla.Stat. (1988 Supp.). In Sections 60 through 76 of Chapter 88-1, as amended, the Florida Legislature created the Florida Birth-Related Neurological Injury Compensation Association to administer the newly-created Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"). The Plan provides for compensation, irrespective of fault, for birth-related neurological injury claims occurring on or after January 1, 1989. See, §766.303(1), Fla.Stat. (1988 Supp.)

Petitioners filed a Complaint in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, case number 89-1008, challenging the constitutionality of the aforesaid Florida Birth-Related Neurological Injury Compensation Act. There Petitioners asserted below that certain subsections of Section 73, namely §766.314(4)(b)(1), §766.314(5)(a) and §766.314(7)(b), Fla.Stat. (1988 Supp.), which require, inter alia, all Florida-licensed physicians to pay a Two Hundred Fifty Dollar ($250.00) annual assessment to the Florida Birth-Related Neurological Injury Compensation Association, a private party, and which delegate to the Department of Insurance of Florida the authority to increase the annual assessments to physicians not

practicing obstetrics without the Legislature providing any ceiling thereto or control thereon, violate: 1) the Due Process and Equal Protection clauses of the United States and Florida Constitutions; 2) the Privileges and Immunities clause of the United States Constitution; and 3) Article VII, Section 1, of the Florida Constitution, which prohibits the Florida Legislature from delegating the power to tax to an administrative body.

The specific provisions which the Petitioners sought in their Complaint to have voided are as follows:

Section 766.314(4)(b)1, Fla.Stat. (1988 Supp.), which provides:

> On or before October 15, 1988, **all physicians licensed** pursuant to Chapter 458 or Chapter 459, Florida Statutes, as of October 1, 1988, other than participating physicians, **shall be assessed an initial assessment of $250**, which must be paid no later than December 1, 1988. (Emphasis added)

Section 766.314(5)(a), Fla.Stat. (1988 Supp.), which provides, inter alia:

> Beginning January 1, 1990, all persons and entities listed in paragraphs 4(b) and (c), as of the date determined in accordance with the plan of operation, taking into account persons licensed subsequent to the payment of the initial assessment, shall pay an annual assessment in the amount equal to the initial assessments provided in paragraphs (4)(b) and (c) together with additional assessments made pursuant to subsection (7), in the manner required by the plan of operation, **subject to any increase determined to be necessary by the Department of Insurance pursuant to paragraph 7(b).** (Emphasis added.)

Section 766.314(7)(b), Fla.Stat. (1988 Supp.), which provides:

> If the Department of Insurance finds that the plan cannot be maintained on an actuarially sound basis based on the assessments and appropriations listed in subsections (4) and (5), **the department shall increase the assessments specified in subsection (4) on a proportional basis as needed.** (Emphasis added.)

Petitioners assert--and such is not disputed--that the Plan affords them no protection whatsoever, even though they are required to pay the Two Hundred Fifty Dollar ($250.00) annual assessment. Petitioners also contend--and such is not disputed-that the assessment imposed upon them is a **tax,** the proceeds of which are paid directly to the Florida Birth-Related Neurological Injury Compensation Association, a private party which is not an agency, board or commission of the State of Florida. See, §766.315(1)(a), Fla.Stat. (1988 Supp.). The proceeds are used for the benefit of a special subclass of individuals who have no substantial relationship to Petitioners other than the fact that they are physicians. The Petitioners further contend that §766.314(7)(b), Fla.Stat. (1988 Supp.) delegates the power to tax to the Florida Department of Insurance without adequately setting forth what considerations or factors shall be taken into account in determining the amount of future increases in tax assessments and without definitely limiting the amount of future tax assessments. Finally, the Petitioners contend that the statutory scheme ignores essential differences between Florida-licensed physicians who reside and practice outside of the State of Florida and those who reside and practice within the State of Florida.

C. **The Facts Relative to the Delivery of Health Care Adduced at Trial Below**

At the trial of the within action the Respondents attempted to illustrate that: (1) the health care delivery system is disrupted when one medical subspecialty is adversely affected by a medical liability crisis; and (2) that the health care industry has always had programs where certain classes are financed by payments from those who do not necessarily participate in the benefits thereof. T.R. passim. **Even if relevant, such testimony utterly misses the mark; it clearly does not (and cannot) answer the question of whether or not the statute in question, constitutionally, is a legitimate response to the issue the Florida Legislature sought to address.** At best, the testimony adduced at trial--if relevant at all--underscored the seriousness of the constitutional issues raised by the challenged statute.

Mr. Jay S. Weinstein, an experienced hospital administrator, emphasized in his testimony the salient fact that **only those physicians actually trained in obstetrics can practice obstetrics.** Although the state does not license physicians by specialty or subspecialty, hospitals always "credential" physicians by specialty and subspecialty. One cannot practice obstetrics unless he or she is credentialed at a hospital, and, hospitals will not permit a physician to practice obstetrics unless the physician is granted **delineated** obstetrical privileges upon being properly credentialed. To obtain such **delineated** obstetrical privileges, a physician must illustrate sufficient post-graduate training (residency) in obstetrics. Those qualifications are uniformly assessed by hospital medical staff

departments of obstetrics; i.e. physicians trained in obstetrics. T.R. 267-272. See, 42 C.F.R. §482.1, et. seq.. T.R. 194-199, 267-272. The foregoing testimony was clearly corroberated by the testimony of Byron R. Masterson, M.D., Professor of Obstetrics and Gynocology, University of Florida Medical School. T.R. 185-189.

Nevertheless, those physicians licensed to practice medicine in the State of Florida **who do not practice obstetrics full-time or part-time** are required to pay the annual assessment mandated by §766.314(4)(b)(1), Fla.Stat. (1988 Supp.) as well as the potential increases in said assessments as determined by the Department of Insurance (pursuant to §766.314(5)(a) and §766.314(7)(b), Fla.Stat. (1988 Supp.)) or lose their licenses to practice medicine, even though they will not be able to share in **any** of the benefits of the plan. Respondents claim that such does not matter because many health care financing schemes require contributions from one aspect of the population for the benefit of another. The Respondents have pointed to the federal Medicare program (42 U.S.C. §1395 et. seq.) and the Florida Social and Economic Assistance Act (§409.2663, et. seq, Fla.Stat.) as examples. Such acts, of course, are public health care reimbursement or payment programs, i.e. health care insurance programs; their comparison with the statute at bar does not obtain.

Dr. Elton Scott, an economist at Florida State University, testified that Medicare (42 U.S.C. §1395 et. seq.) is largely paid through taxation and FICA witholdings--and borrowings from

Social Security--and **every American citizen** not only **may** participate but is **required** to participate in the program when he or she reaches the age of sixty-five (65) years. **There is no way one may opt out of Medicare.** T.R. 299-301. Thus, **every American citizen** is theoretically setting his or her money aside for his or her **own** old age health care insurance since such old age insurance (80% of usual, customary and reasonable charge coverage), because of the intervention of Medicare, is no longer available from the private sector. In other words, **every American citizen, not just a tiny group of citizens, must pay for the program, and every American citizen will share in the benefits of the program** at some point in the future.

With respect to the Florida Social and Economic Assistance Act (§409.2663 et. seq., Fla.Stat. (1988 Supp.)), Dr. Scott testified that though hospitals are required to contribute to a fund to pay for hospitalization for indigents, all hospitals, if they choose to increase the availability of their services for Medicaid recipients, could participate by meeting a "threshhold" number of admissions as set out in the statute and thereby participate in the fund. And, if certain hospitals, because of the nature of the services they render, could not participate in the Medicaid program as providers, they, by law, would be exempt from being required to contribute. T.R. 294-298; see also, §409.2663(3)(a)2, Fla.Stat. (1988 Supp.). Of course, the Florida Social and Economic Assistance Act (§409.2613 et. seq., Fla.Stat. (1988 Supp.)) has never been constitutionally challenged, nor have the salient provisions been construed by any court. As

clearly indicated on the witness stand, the effect of said statute remains subject to various interpretations.

There was no testimony adduced at trial that those physicians and surgeons not practicing obstetrics contributed in any way to any of the so-called medical malpractice problems which the challenged act purports to address. Thus, the facts adduced at trial--if relevant at all--indicate that the challenged Florida Birth-Related Neurological Injury Compensation Act, §766.314(4)(b)(1), §766.314(5)(a) and §766.314(7)(b), Fla.Stat. (1988 Supp.), unlike any other statutory scheme, mandates that one class of persons who **cannot** participate in the benefits of the program, subject to the loss of their professional calling, **must pay** into a plan to underwrite the malpractice claims and awards brought only against those in another class who are accorded the privilege, and actually choose, to participate. And, further, the challenged statutory scheme grants to the Department of Insurance the unfettered authority to increase the amount of assessments that that class of non-participants must pay to maintain the malpractice claim and award fund established for the class of eligible persons who actually choose to participate in the benefits of the plan.

To date, 27,922 Florida-licensed physicians have paid the Two Hundred Fifty Dollar ($250.00) assessment; 17,000 have not. **Incredibly, only 535 eligible physicians (obstetricians and family practitioners practicing obstetrics) have determined to "participate" in the Florida Birth-Related Neurological Injury Compensation Plan.** T.R. 305.

D. Course of Proceedings and Disposition Below

The Petitioners, who were the Plaintiffs below, filed this action in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, case number 89-1008, on behalf of themselves and all others similarly situated to have declared unconstitutional, and to enjoin the enforcement of, certain subsections of Section 73 of Chapter 88-1, as amended by Section 39 of Chapter 88-277 of the Laws of Florida, namely, §766.314(4)(b)(1), §766.314(5)(a) and §766.314(7)(b), Fla.Stat. (1988 Supp.), and to recover the annual assessments paid pursuant to Section 73, specifically §766.314(4)(b)(1), Fla.Stat. (1988) Supp.).

On June 2, 1989, this action was consolidated with case number 89-4615 in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, on the motion of the Petitioners herein. The consolidated cases were tried before the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, on June 13, 1989. On September 12, 1989, Judge F.E. Steinmeyer, II entered a Final Order upholding the constitutionality of the challenged statute and denying the relief prayed for by the Petitioners. Petitioners filed their Notice of Appeal from the aforesaid Final Order on September 25, 1989.

The case was argued before the District Court of Appeal, First District, on May 15, 1990. The District Court of Appeal entered an Opinion on June 25, 1990, affirming the Order of the trial court. On July 10, 1990, the Petitioners filed a Motion

for Rehearing and Rehearing En Banc or, in the Alternative, for Certification of the Issues Raised to the Florida Supreme Court. The Motion was denied on July 31, 1990.

On August 28, 1990, Petitioners filed their Petition for Review, and on September 4, 1990, Petitioners filed their Brief on Jurisdiction, requesting this Honorable Court to review the decision of the First District Court of Appeal pursuant to its discretionary jurisdiction under Rule 9.030 of the Florida Rules of Appellate Procedure. On December 18, 1990, this Honorable Court entered its Order accepting Jurisdiction and Setting Oral Argument.

SUMMARY OF THE ARGUMENT

First, Petitioners contend that certain provisions of the Florida Birth-Related Neurological Injury Compensation Act violates the Equal Protection and Due Process Clauses of the United States and Florida Constitutions because said provisions grant special privileges to a discrete group of private individuals. The Petitioners also maintain that the statute fails to comport with Equal Protection and Due Process because it favors one member of a class over other members of the same general class, and that the statute's classifications are manifestly arbitrary.

Second, Petitioners contend that the statutory scheme at issue violates Article VII, Section 1, of the Florida Constitution because it improperly delegates to an unelected official the power to tax without adequate guidance as to the overall level of future assessments and the apportionment of

future increased assessments among those persons and entities covered by the statute.

Finally, Petitioners contend that the statutory scheme fails to take into account the substantial differences which exist between in-state, Florida-licensed physicians and out-of-state Florida-licensed physicians, in violation of the Equal Protection and Due Process Clauses of the United States and Florida Constitutions and the Privileges and Immunities Clause of the United States Constitution.

ARGUMENT

I. SECTION 73 OF CHAPTER 88-1 OF THE LAWS OF FLORIDA, AS AMENDED BY CHAPTER 88-277 OF THE LAWS OF FLORIDA, [§766.314(4)(b)1, FLORIDA STATUTES], VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

In expressly declaring that the Florida Birth-Related Neurological Injury Compensation Act [§§766.314(4)(b)(1), 766.314(5)(a) and 766.314(7)(b), Florida Statutes] ("the Act") comports with equal protection and due process under the United States and Florida Constitutions, the First District's holding directly conflicts with the precedents of this Honorable Court respecting fundamental limitations on legislative power and ignores the salient features of the Act in question. The method chosen by the legislature to correct any alleged "malpractice crisis" blatantly caters to the special interests of a discrete group of Florida-licensed obstetricians who actually choose to participate in the no-fault scheme at the expense of all other physicians who hold licenses in the State of Florida, whether resident or non-resident physicians.

The Fourteenth Amendment to the United States Constitution provides, inter alia:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.CONST., amend. XIV, §1

The Florida Constitution mirrors the United States Constitution by providing that "[A]ll natural persons are equal before the law", FLA.CONST., art. I, §2, and "[N]o person shall be deprived of life, liberty or property without due process of law." FLA.CONST., art I, §9.

A. The Ability of a Physician to Continue to Practice Medicine Free From Arbitrary Interference is a Fundamental Property Right.

Fundamentally, we are dealing with the lawful occupations--the essential property--of physicians. It has long been established that the pursuit of a lawful occupation is a property right within the meaning of the Fourteenth Amendment to the United States Constitution. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928). The practice of medicine carries no less rights than any other calling. Mr. Justice Stephen J. Field, writing for a unanimous Supreme Court of the United States, commented:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such

> restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the "estate", acquired in them--that is the right to continue their prosecution--is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken. (Emphasis added.)

Dent v. West Virginia, 129 U.S. 114, 122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).

Mr. Justice Hugo Black, dissenting in Barsky v. Board of Regents of University of State of N.Y., 347 U.S. 442, 459, 74 S.Ct. 650, 659, 98 L.Ed. 829 (1954), carried Mr. Justice Field's conclusions forward into this century. Clearly, property, such as the pursuit of a lawful profession, is not held "at the mercy of the legislature". Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1876). There are limits to what a state legislature may do to impair or infringe upon that property. The pursuit of a common calling is thus a fundamental right protected from arbitrary interference by the state by the Equal Protection, Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment to the Constitution of the United States (U.S. CONST., amend, XIV, §1) and the comparable provisions of the Florida Constitution (FLA. CONST. art. I, §§2, 9). See, Baldwin v. Fish and Game Comm. of Montana, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); Eslin v. Collins, Fla., 108 So.2d 889 (1959). Accordingly, there remains no doubt that following a lawful occupation is a "fundamental right" in Florida, and any

statute impairing such a right must be strictly construed. See, Florida State Bd. of Dentistry v. Mick, Fla., 361 So.2d 414 (1978); Florida Real Estate Comm v. McGregor, Fla., 336 So.2d 1156 (1976).

B. Section 766.314(4)(b)(1), Fla. Stat. (1988 Supp.) of the Act Creates An Unreasonable Classification in Violation of the Equal Protection Clauses of the United States and Florida Constitutions.

Equal protection, as a standard, is purely a product of the Fourteenth Amendment to the Constitution of the United States and the subsequent state constitutional provisions in accord therewith. Among those powers which the Equal Protection clauses of the United States and Florida Constitutions prohibit the State Legislature from exercising is the power to make unreasonable classifications among persons in carrying out its legislative function. Florida Real Estate Comm. v. McGregor, Fla., 336 So.2d 1156 (1976).

The United States Supreme Court, in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561-562, 64 L.Ed. 989 (1900), articulated the test for determining whether a state classification comported with Equal Protection principles by holding that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." In State ex rel. Vars v. Knott, Fla., 184 So. 752, 754 (1938), appeal dismissed, 308 U.S. 506 (1939), vacated on other

grounds, 308 U.S. 507 (1939), this Honorable Court adopted the above formula for determining whether a statutory scheme imposing a tax related to insurance licenses violated the Equal Protection clauses of the United States and Florida Constitutions, and added that "the attempted classification must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." Id. Subsequent Florida decisions have followed this test to determine whether a statutory tax or regulatory scheme comports with Equal Protection principles. See e.g., In re Advisory Opinion to the Governor, Fla., 509 So.2d 292 (1987); Florida State Board of Dentistry v. Mick, Fla., 361 So.2d 414 (1978).

The Supreme Court of Florida, en banc, in State ex. rel. Watson v. Lee, Fla., 24 So.2d 798 (1946), examined the constitutional validity of the County Officers' and Employees' Retirement Act. Applying the F.S. Royster Guano/Knott Equal Protection test, the court upheld the Act. However, in key dicta, the court indicated that had the retirement plan been **compulsory, with no guarantee to the employee of receiving benefits**, the plan would have run afoul of the Equal Protection clauses (and Due Process clauses) of the United States and Florida Constitutions. The court wrote:

> It is next contended that [the Act] is an invasion of one's right to life, liberty and property as guaranteed by Section 1 of the Declaration of Rights, in that it requires compulsory contribution of a portion of the employee's compensation, requires him to elect within

> six (6) months from the effective date of the act whether he will accept or reject its provisions and penalizes him if he withdraws from it.
>
> We find no basis for this contention. There is nothing whatever compulsory about the act. **Those who elect to comply with its requirements and participate in its benefits do so freely and voluntarily. If the act was [sic] compulsory with no commitment as to benefits to be derived from it there might be substance to relator's contention...** (Emphasis added.)

State ex. rel. Watson v. Lee, Fla., 24 So.2d 798, 800 (1946)

In Eslin v. Collins, Fla., 108 So.2d 889 (1959), this Honorable Court made it clear that the Equal Protection clauses of the United States and Florida Constitutions prohibit arbitrary and unreasonable classifications pertaining to the regulation of the medical profession. Eslin involved a constitutional challenge to the 1957 amendment to the Naturopathy Act which prohibited the issuance of any new license to practice naturopathy, permitted licensed naturopaths in practice for two (2) years prior to the effective date of the amendment to continue such practice upon annual renewal of their licenses, but prohibited those licensed in practice less than fifteen (15) years prior to the amendment from prescribing or administering any drug or medicine. The Supreme Court of Florida held that the legislative classification was unreasonable and arbitrary and thus denied appellant, who was unable to prescribe drugs under the legislative scheme, the equal protection of the law. Id., at 892. The court observed:

> The purpose of the purported "grandfather clause" of the Act was to save the right of naturopaths licensed for more than two years to continue the practice. Assuming without deciding that the Legislature could validly create such a closed class, **we can conceive of**

> **no reasonable basis for the attempt here made to grant special privileges to a limited group, itself a closed class, within the larger closed class.** (Emphasis added.)

Eslin v. Collins, Fla., 108 So.2d 889, 891 (1959)

In Liquor Store v. Continental Distilling Corp., Fla., 40 So.2d 371, 374 (1949), this Honorable Court struck down a Florida statute which fixed the price for certain retail liquor sales, holding that the Equal Protection Clauses of the United States and Florida Constitutions prohibit the Legislature from providing some personal advantage to a discrete group as distinguished from the general public. There the court wrote:

> Our conclusion is that the act is arbitrary and unreasonable and violates the right to own and enjoy property; one economic group may not have the sovereign power of the state extended to it and use it to the detriment of other citizens. In that case the legislation serves a private rather than a public purpose. The sovereign power must not be delegated to a private citizen to be used for a private purpose and especially where there is not state supervision.

Liquor Store v. Continental Distilling Corp., Fla., 40 So.2d 371, 375 (1949)

In Liquor Store, the court rejected the statute's proponents' argument that the price-fixing scheme was a valid exercise of the police power because it was in the interest of the general welfare to protect the property right in the trademark and brand by replying that the owner of a trademark was certainly not entitled to more protection than "afforded by law in common to all other properties". Id., at 374.

In State v. Lee, Fla., 356 So.2d 276 (1978), this Honorable Court held that Section 42 of the Insurance and Tort Reform Act

of 1977 establishing a "Good Drivers Incentive Fund", providing for additional civil penalties to be assessed for certain traffic violations and for such additional penalties to be deposited into the Fund, and providing for the distribution of the fund to "good drivers" who met certain statutory requirements was an improper use of the state's police power and that the statutory classification violated the Equal Protection clauses of the United States and Florida Constitutions. In Lee, the government maintained that Section 42 of the statute served the public welfare "by providing an incentive for those persons operating motor vehicles in [the] state to utilize the privilege in a safe and financially responsible manner, and, at the same time, by providing a disincentive to those who would abuse such privilege", and "that this public purpose protects Section 42 from a successful constitutional attack". Id., at 279.

This Honorable Court rejected such reasoning, holding:

> [T]he state's police powers, however, are not absolute and any legislation resting on the police power, to be valid, must serve the public welfare as distinguished from the welfare of a particular group or class. United Gas Pipe Line Co. v. Bevis, 336 So.2d 560 (Fla. 1976); Liquor Store, Inc. v. Continental Distilling Corporation, 40 So.2d 371 (Fla. 1949). . . .
>
> Our analysis of Section 42 reflects that, no matter how beneficial the public purpose behind its enactment, the distribution of a portion of the fines to a limited group of private persons makes it an improper use of the police power of the state. Section 42 has potential benefit for only a very limited class of private individuals. . . .
>
> [T]he state's police power cannot be invoked to distribute collected funds arbitrarily and discriminatorily to a special limited class of private individuals. For the reasons expressed, Section 42 is in itself unconstitutional.

Id., at 279.

Dept. of Ins. v. Southeast Volusia Hosp. Dist., Fla., 438 So.2d 815 (1983) is instructive in that the statutory scheme established by the challenged §768.54(3)(c), Fla. Stat. (1988 Supp.), which created the Florida Patient's Compensation Fund for all health care providers, **was not mandatory!** Section 768.54(3)(c), Fla. Stat. (1988 Supp.), clearly allowed health care providers to "elect" to join the fund. Those who "elected" to join the fund were required to pay a base or a prorated share of the yearly fees, depending upon when they "elected" to join. Hospitals were required to join the fund **unless** they could demonstrate individual financial responsibility for malpractice claims. There was nothing mandatory about §768.54(3)(c) Fla. Stat. (1988 Supp.); rather it was enacted by the Florida Legislature mindful of the admonition of the Supreme Court of Florida in State ex. rel. Watson v. Lee and Liquor Store.

When compared to §768.54(3)(c), Fla. Stat. (1988 Supp.), and Dept. of Ins. v. Southeast Volusia Hosp. Dist., the challenged statute here presents glaring constitutional deficiencies. In the present case, as in Liquor Store and State v. Lee, the public benefit to be derived from the Plan is nonexistent when compared with the benefits which the Plan bestows on a special subclass of physicians specializing in obstetrics. Physicians practicing obstetrics who actually choose to participate in the Plan are the only sure winners in this statutory scheme; their malpractice premiums are levelled off or decreased while other physicians who do not practice obstetrics pick up the cost.

Manifestly, the benefit and financing scheme of the Act directly benefits only those physicians practicing obstetrics who choose to participate in the plan, and no one else. The fact that physicians practicing obstetrics may choose to participate in the plan and that only 535 eligible physicians have done so to date illustrates the glaring private nature of the Act. Surely, all Florida-licensed doctors should not be required to pay an annual assessment for the benefit of a mere 535 of their fellow practicing physicians. The small number of elgible physicians who have chosen to participate to date is "monumental evidence. . .that the emergencies alluded to" in the statute are "not real but fanciful and that, in the guise of public necessity the police power of this sovereign state has been invoked for purely private purposes". Miles Laboratories v. Eckerd, Fla., 73 So.2d 680, 683 (1954) (Drew, J., concurring).

The private nature of the Act is further exposed by the fact that all Florida-licensed physicians who practice obstetrics are not required to participate in the no-fault scheme even though there is an alleged "malpractice crisis" due to their particular circumstances. There is nothing in the Act to prevent the number of participating obstetricians from decreasing to 100, or even 10. Currently, over 40,000 Florida-licensed physicians are being forced to contribute funds for the financial benefit of 535 obstetricians. There is nothing in the Act to prevent over 40,000 Florida-licensed physicians from being forced to contribute funds in the future for the benefit of as few as 10 obstetricians. Any alleged "public benefit" to be derived from

the Act is thus completely dependent upon the desires of the individual members of the Florida obstetrical community. By not requiring all Florida physicians practicing obstetrics to participate in the Plan, the Florida Legislature has made it abundantly clear that it is the interests of the few that are being furthered, and not the public interest.

The instant case is a classic illustration of a court's warning going completely unheeded. The Supreme Court of Florida, in State ex. rel. Watson v. Lee, clearly warned that a scheme which mandates assessments or forced contributions, but which provides no benefits to the contributors, is suspect. Here, the challenged statute not only mandates assessments, but grants unfettered authority to an unelected official to raise the amount thereof; it not only mandates that those who are required to contribute will receive no benefits therefrom, but places such persons in the position of losing their livelihoods if they do not pay the assessments. Such is class legislation at its worst. Just as the statute at issue in State v. Lee, Fla, 356 So.2d 276, 280 (1978) arbitrarily "divided the licensed drivers of automobiles in Florida into two classes", so too the Act at issue here arbitrarily divides Florida-licensed physicians into two (2) classes. Further, the state's police power is being "invoked to distribute collected funds arbitrarily and discriminatorily to a special limited class of private individuals", those few Florida-licensed physicians practicing obstetrics who actually choose to participate in the Plan and reap its benefits. Id., at 279. Accordingly, §766.314(4)(b)(1) Fla.Stat. (1988 Supp.) is

violative of the Equal Protection clauses of the United States and Florida Constitutions.

C. Section 766.314(6)(b)(1) Fla. Stat. (1988 Supp.) of the Act Violates the Due Process Clauses of the United States and Florida Constitutions.

Many years prior to the ratification of the Fourteenth Amendment, Mr. Justice Samuel Chase wrote, in the celebrated case of Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798), that any law that "takes property from A and gives it to B" is invalid as contrary to "general principles of law and reason", even if it is not "expressly restrained" by the Constitution. From time-to time throughout the nineteenth century the Supreme Court of the United States struck down state statutes which were deemed to exceed those "inherent limits" on legislative power. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 3 L.Ed. 650 (1815).

With the advent of the ratification of the Fourteenth Amendment to the Constitution of the United States those principles found more solid footing in the specific language of the national organic law. In 1875 Mr. Justice Samuel Miller, echoing the language of Calder v. Bull, and speaking for a clear majority of the Supreme Court of the United States, invalidated a tax enacted by the Kansas legislature designed to finance the amortization of bonds established for the purpose of financing certain land acquisitions and construction projects which were to be tendered without consideration to specified private industries

which moved to the City of Topeka, Kansas. Wrote Mr. Justice Miller:

> In the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capitol or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally deserving of the aid of the citizens by **forced contributions.** (Emphasis added.)

Citizen Savings & Loan Ass'n. v. City of Topeka, 87 U.S. (20 Wall) 655, 22 L.Ed. 455, 462 (1875)

Although Mr. Justice Miller did not refer to any specific provision of the United States Constitution in his opinion, he did make explicit reference to the "inherent limitations" on legislative authority recognized in Calder v. Bull when he wrote:

> It must be conceded, that there are such rights in every free government beyond the control of the State...The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere.

Citizens Savings & Loan Ass'n. v. City of Topeka, 87 U.S. (20 Wall) 655, 22 L.Ed. 455, 461 (1875)

The Supreme Court later acknowledged that the holding in City of Topeka was grounded upon the limitations upon state legislative authority embodied in the Fourteenth Amendment. See, Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905)

From the holdings in Calder v. Bull, Fletcher v. Peck, Terrett v. Taylor and Citizens Savings & Loan Ass'n. v. City of Topeka has evolved our concept of "substantive due process of law", a concept which allows a court to determine whether an action, while adhering to forms of law, unjustifiably abridges the Constitution's fundamental constraints upon the content of what government may do to people in the name of law. As stated by the Supreme Court of the United States:

> Law is something more than mere will exerted as an act of power...It excludes, **as not due process of law,** acts of attainder, bills of pains and penalties, acts of confiscation...and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. (Emphasis added.)

Hurtado v. California, 110 U.S. 516, 535-536, 4 S.Ct. 111, 121, 28 L.Ed. 232 (1884)

The Due Process clause of the Fourteenth Amendment (and Fifth Amendment) to the United States Constitution has been held to yield norms of equal treatment indistinguishable from those of the Equal Protection clause discussed hereinabove at Argument IB. Tribe, L., American Constitutional Law, §16-1. The Supreme Court of Florida confirmed this observation by articulating the applicable tests for Due Process **and** Equal Protection in Lasky v. State Farm Insurance Company, Fla., 296 So.2d 9 (1974). In order to comply with the requirements of **Equal Protection,** a statutory classification must be reasonable and not arbitrary and all persons in the same class must be treated alike, while **Due**

Process demands that a statute bear a reasonable relation to a permissible legislative objective that is not discriminatory, arbitrary or oppressive. Id., at 15.

Manifestly, Section 73 of the statute in question [§766.314(4)(b)1, Fla.Stat. (1988 Supp.)] is violative of the Due Process clauses (and Equal Protection clauses) of the United States and Florida Constitutions. The present case--which requires (by means of a tax) physicians to pay into a plan established to underwrite the malpractice claims and awards against **only** those who practice obstetrics and choose to "participate" in said plan--is virtually identical to the situation enunciated in City of Topeka. There, the people were taxed in order to amortize bonds which were established to pay for land and site improvements which were tendered free of consideration to a certain class of manufacturers. Although the Respondents in City of Topeka argued a "public purpose"--jobs, prosperity, economic stability--behind the state enactment, it was not enough to overcome in facial inequity of the State taxing the people generally in order to give said monies raised through taxation to a select class of for-profit manufacturers. City of Topeka has never been overruled; rather it has been favorably cited by the highest court in the land numerous times. See, Everson v. Board of Education of Ewing Township, 330 U.S. 1, 6, 67 S.Ct. 504, 507, 91 L.Ed. 711, 718 (1947) and Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514, 57 S.Ct. 868, 874, 81 L.Ed. 1245, 1256 (1937)

Likewise, the Act in question mirrors the discussion in State ex. rel. Watson v. Lee in which the Supreme Court of Florida, in dicta, indicated that an involuntary retirement insurance plan which provided no benefits to contributors would violate Due Process (and Equal Protection). Further, this Honorable Court's holding in State v. Lee, Fla., 356 So.2d 276 (1978) illustrates that the constitutional prohibition against a state exercising its police power for the benefit of a limited group of private persons continues to enjoy vitality in the State of Florida under the Florida Constitution.

In the case at bar, Florida-licensed physicians who do not practice obstetrics are required to pay into a malpractice insurance plan which provides benefits to only a small group of eligible participants who actually choose to reap the Act's benefits. Such a scheme is patently unreasonable, discriminatory, arbitrary, and oppressive. This Honorable Court should so hold. The Act at issue here fundamentally takes property from one private party and transfers it to the exclusive benefit of another private party without legitimate reason or justification.

A case of persuasive value on this issue is McGuffey v. Hall, Ky., 557 S.W.2d 401 (1977) In McGuffey, the Supreme Court of Kentucky invalidated the Kentucky "Act Relating to Health Care Malpractice Insurance and Claims of 1976". K.R.S. 311.377, et. seq. In spite of the fact that the preamble of the Kentucky "Act Relating to Health Care Malpractice Insurance and Claims of 1976" commented on the unavailability of medical malpractice insurance,

the act, nevertheless, required, **as a condition of licensure,** every Kentucky-licensed physician to purchase a $100/300,000 liability policy and contribute to a patients' conpensation fund. The Supreme Court of Kentucky, utilizing three (3) provisions of the Kentucky Constitution which, together, mirror the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution, struck the Act down. Like the act at issue here, physicians in Kentucky were placed at the mercy of a legislative scheme which mandated the purchase of malpractice insurance subject to loss of licensure even though the act set no restrictions upon the level of premiums charged to physicians by the insurance industry. Wrote the Supreme Court of Kentucky:

> §1 of the Act states in substance that its purpose is to promote the health and general welfare of the general citizenry through adopting reforms in medical malpractice claims, establishing the Fund so as to increase the availability and lower the cost of medical malpractice insurance, and assuring that medical malpractice judgments and settlements will be satisfied. Conceding, therefore, that the payment of malpractice claims is within the stated purposes of the Act, still does not appear to have any reasonable relationship to the problem stated in the preamble or to any other problem or threatened problem shown to exist. Is ther, for example, any problem or threatened problem show to exist. Is there, for example, any problem or threatened problem in the form of unsatisfied claims against doctors and hospitals? Not to our knowledge. If not, and especially when the legislature has not suggested that there is, must its existence be presumed from the bare circumstance that the legislature has acted on the subject? We do not think so. The police power does have limits.

McGuffey v. Hall, Ky., 557 S.W.2d 401, 412-413 (1977)

The Kentucky Legislature did attempt to require **all** Kentucky-licensed physicians to conform to the act and provided that **all** Kentucky-licensed physicians should receive the benefits of the patients' compensation fund. The Kentucky response, however, was not legitimate. See also, Arneson v. Olson, 270 N.W.2d 125, 134-135 (N.D. 1978).

In the case at bar, unlike in the Kentucky (or North Dakota) scheme, **all** Florida-licensed physicians are assessed by the Plan, but **only a small class** of participants may receive the benefits of the Plan. Non-participating physicians are required, as a condition of licensure, to pay $250 to a plan which is established to underwrite the malpractice claims and awards of only those practicing obstetrics who choose to participate. And, those assessments may be increased by the Florida Department of Insurance without any legislative ceiling on said increases. Thus, the Florida Legislature has placed the burden for the malpractice woes of those practicing obstetrics upon all other physicians who not only never caused or contributed to the malpractice problems of obstetricians, but, who, under no set of facts, could **ever** have contributed to any such problems. And, what is most egregious, the non-obstetricians will never be able to take advantage of any of the benefits of the plan for which they are being assessed.

The McGuffey court implicitly recognized that the means chosen to alleviate the alleged "malpractice crisis" in Kentucky were simply too broad and lacking in evidentiary support to save the Act from constitutional infirmity. What the Florida

Legislature has done here is much like what the Kentucky Legislature did in enacting the Kentucky "Act Relating to Health Care Malpractice Insurance and Claims of 1976". In the present case the Florida Legislature has chosen to paint with too broad a brush. Rather than narrowly limit the assessments to those who directly benefit from the Plan, the Florida Legislature has, instead, arbitrarily shifted the burden of support of the Plan to a majority of Florida-licensed physicians who receive absolutely no benefits therefrom and who have never been shown to have been responsible for any of ills the legislature sought to address. The Florida Legislature has thrown **all** Florida-licensed physicians to the mercy of the cost of the Plan for the benefit of a class of "participating" obstetricians alone. It is not likely that the Plan will eliminate the malpractice insurance woes of anybody, but will unequivocally force **all** physicians to share the woes of a small number of "participating" physicians with whom they have no special relationship.

The "fit" between the legislative end of easing the alleged "malpractice crisis" for obstetricians and the means chosen to accomplish that end are also simply too loose to pass muster under Due Process (and Equal Protection) principles. Nowhere in the legislative findings will one find that non-obstetricians in any way contributed to the high malpractice rates paid by Florida obstetricians. Yet, Section 73 [§766.314(4)(b)1, Fla.Stat. (1988 Supp.)] requires non-obstetricians to subsidize the participating obstetricians with absolutely no benefits accruing to the non-obstetricians. Since Florida-licensed physicians practicing

obstetrics are not required to participate in the no-fault scheme, the alleviation of any alleged "malpractice crisis" will be determined by the whim of Florida-licensed physicians practicing obstetrics, not by the legislature. The alleged benefits of the Act will thus inure purely to the benefit of a few physicians, not the health care community as a whole and certainly not the public at large. Accordingly, §766.314(4)(b)1, Fla.Stat. (1988 Supp.)] is violative of the Due Process provisions of the United States and Florida Constitutions.

II. SECTION 73 OF CHAPTER 88-1 OF THE LAWS OF FLORIDA, AS AMENDED BY CHAPTER 88-277 OF THE LAWS OF FLORIDA [766.314(5)(a) AND §766.314(7)(b), FLORIDA STATUTES] IMPROPERLY DELEGATES THE POWER TO TAX TO THE DEPARTMENT OF INSURANCE IN VIOLATION OF ARTICLE VII, SECTION 1 OF THE FLORIDA CONSTITUTION.

In expressly declaring valid the Florida Birth-Related Neurological Injury Compensation Act [§§766.314(4)(b)(1), 766.314(5)(a) and 766.314(7)(b), Florida Statutes], the First District ignored fundamental differences between the statute at issue in Southeast Volusia, supra and the statute at issue in the case at bar, and failed to recognize that the Act at issue here not only gives the Department of Insurance no guidance as to how "actuarially sound" the Plan is to be, but also provides no guidance as to the **apportionment of future increased assessments among those persons and entities covered by the statute.**

A. The Two Hundred Fifty Dollars ($250.00) Annual Assessment Levied Pursuant to §766.314(4)(b)(1), Florida Statutes, Constitutes a Tax.

Section 766.314(4)(b)(1), Fla.Stat. (1988 Supp.) reads as follows:

> On or before October 15, 1988, all physicians licensed pursuant to Chapter 458 or Chapter 459, Florida Statutes, as of October 1, 1988, other than participating physicians, shall be assessed an initial assessment of $250, which must be paid no later than December 1, 1988.

In Tamiami Trail Tours, Inc. v. City of Orlando, Fla., 120 So.2d 170, 172 (1960), the Florida Supreme Court distinguished a **license fee** assessed pursuant to the state's police power from a **tax** assessed pursuant to the state's taxing power when it observed:

> [w]here a license is required and a fee executed **solely for revenue purposes and the payment of such fee gives the right to carry on the business without any further conditions, it is a tax.** [Citations omitted.] [Emphasis added.]

This Honorable Court and the District Courts of Appeal have consistently followed this test to determine whether a forced assessment constitutes a tax. See, e.g., Bateman v. City of Winter Park, Fla., 37 So.2d 362 (1948); Broward County v. Janis Development Corp., Fla.App., 311 So.2d 371 (1975).

The Respondents herein have not contested, and the First District agreed, that the assessment at issue in this case constitutes a tax. The Two Hundred Fifty Dollar ($250) annual assessment is imposed upon "non-participating" physicians solely to fund the Florida Birth-Related Neurological Injury Compensation Plan. The proceeds of the annual assessment are

paid to the Florida Birth-Related Neurological Injury Compensation Association, a private party which is not an agency, board or commission of the State of Florida. §766.315(1)(a), Fla.Stat. (1988 Supp.). Although the Department of Professional Regulation may bring disciplinary action against a physician who fails to pay the annual assessment to the Association, the Department receives none of the proceeds of the assessment. Thus, the annual assessment is by no means used to defer the expense of issuing medical licenses or the cost of regulating and policing the medical profession in Florida, which, of course, is exclusively the province of the Department of Professional Regulation. The purpose of the annual assessment here is, clearly, to generate revenue, and not to defer the cost of reasonable police regulation of the medical profession in the State of Florida. Accordingly, the Two Hundred Fifty Dollars ($250.00) annual assessment levied pursuant to §766.314(4)(b)(1), Fla.Stat. (1988 Supp.) constitutes a tax.

B. Section 73 of Chapter 88-1 of the Laws of Florida, As Amended By Chapter 88-277 of the Laws of Florida, [§766.314(5)(a) and §766.314(7)(b), Florida Statutes, Fails to Definitely Limit the Rate of the Tax to be Assessed and Fails To Set Forth How Any Future Tax Increases Shall Be Apportioned by the Department of Insurance in Violation of Article VII, Section 1 of the Florida Constitution.

Article VII, Section 1, of the Florida Constitution provides, inter alia: "No tax shall be levied except in pursuance of law." The Supreme Court of Florida, in Stewart v. Daytona and New Smyrna Inlet District, Fla., 114 So. 545, 547 (1927), explained the meaning and significance of this constitutional provision by holding that a statute

> ...purporting to authorize an administrative body to levy a tax without definitely limiting the rate of the levy or the amount to be collected, or the indebtedness that may be incurred to be paid by the tax, is an unconstitutional attempt to delegate the legislative power of taxation; and such an enactment is not a law within the meaning of the organic provision that no tax shall be levied except in pursuance of law.

In Conner v. Joe Hatton, Inc., Fla., 203 So.2d 154 (1967), the Supreme Court of Florida reaffirmed the rule set forth in Stewart, holding that a statute permitting the Commissioner of Agriculture to assess every person engaged in production, distribution or handling of sweet corn such person's pro rata share of the necessary expenses incurred in formulating, issuing, administering and enforcing marketing orders issued by the Commissioner was an unconstitutional delegation of the legislature's power to tax. Similarly, the Supreme Court of Florida has held that legislative enactments will not be struck down as unconstitutional delegations of the taxing power so long as the statutes are not drafted "in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts." State Department of Citrus v. Griffin, Fla., 239 So.2d 577, 581 (1970), citing Dickinson v. State of Florida, Fla., 227 So.2d 36 (1969).

In Florida Home Builders Ass'n v. Division of Labor, Fla., 367 So.2d 219 (1979), this Honorable Court held that a statute which assigned to the Bureau of Apprenticeship the duty to accept or reject apprenticeship program applications based on need but which did not provide any standards or policies to guide the

agency unconstitutionally delegated the power to make law. There the court observed:

> Standing alone as it does, the term "need" is susceptible of so many conflicting applications that the agency and the courts cannot ascertain the legislative intent. Cf. Dickinson v. State ex rel. Bryant, 227 So.2d 36, 38 (Fla. 1969) (statute requiring that one wishing to open a cemetary demonstrate tne "need for a cemetary" and the "need for further facilities held unconstitutional because it conferred upon the state comptroller "the authority to grant approval to one yet withhold it from another, at whim, and without guides of accountability"). By granting the agency the ability to choose among many different possible understandings of the statute's requirement without guides of accountability, the legislature unconstitutionally delegated the favor to make law.

Id. at 220.

Section 766.314(4)(b)1, Fla.Stat. (1988 Supp.) provides:

> On or before October 15, 1988, all physicians licensed pursuant to Chapter 458 or Chapter 459, Florida Statutes, as of October 1, 1988, other than participating physicians, shall be assessed an initial assessment of $250, which must be paid no later than December 1, 1988.

Section 766.314(5)(a), Fla.Stat. (1988 Supp.) provides, inter alia:

> Beginning January 1, 1990, all persons and entities listed in paragraphs 4(b) and (c), as of the date determined in accordance with the plan of operation, taking into account persons licensed subsequent to the payment of the initial assessment, shall pay an annual assessment in the amount equal to the initial assessments provided in paragraphs (4)(b) and (c) together with additional assessments made pursuant to subsection (7), in the manner required by the plan of operation, **subject to any increase determined to be necessary by the Department of Insurance pursuant to paragraph 7(b).** (Emphasis added.)

Section 766.314(7)(b), Fla.Stat. (1988 Supp.) provides:

> If the Department of Insurance finds that the plan cannot be maintained on an actuarially sound basis based on the assessments and appropriations listed in subsections (4) and (5), the department shall increase the assessments specified in subsection (4) as a proportional basis **as needed.** (Emphasis added.)

In the present case, as in Conner and Florida Home Builders, the only limitation placed upon the assessments which can be levied by the Department of Insurance is "necessity", as the Department, in its unbridled discretion, must interpret that provision of the statute in the future. The statute, on its face, only sets the minimum assessment to be levied, while leaving the amount of future assessments to the whim of the Department of Insurance. No upper limits are set on any future assessments. See, Davidson v. Johnson, 262 N.W.2d 887, 889 (Mich.App. 1977) (holding, inter alia, that interpreting no-fault insurance statute so as to mean that Commissioner of Insurance could increase deductible under no-fault automobile liability insurance policies without limitation would be unconstitutional delegation of legislative authority without standard and denial of due process).

The Act being challenged here is completely distinguishable from the statute challenged in Dept. of Ins. v. Southeast Volusia Hosp. Dist., Fla., 438 So.2d 815 (1983). In Southeast Volusia, the statutory scheme was **voluntary, not compulsory,** (and, therefore, not a tax) and the statute set **definite limits** on the amount which voluntarily participating physicians could be assessed in the future. In Southeast Volusia, §768.54(3)(c),

Fla.Stat., provided that the basic fees for the **voluntary** Patients Compensation Fund would be "established on an actuarially sound basis" **and** that additional fees may be charged, but shall be "appropriately prorated for the portion of the year for which the health care provider participated in the fund", based upon "past and prospective loss and expense experience in different types of practices in different geographical areas within the state", "prior claims experience of the members covered under the fund", and "risk factors for persons who are retired, semi-retired or part-time professionals". The legislature mandated "that actuarial soundness be determined based on the above enumerated considerations". Tallahassee Mem. v. Fla. Patient's Comp. Fund, 466 So.2d 379, 381 (Fla.App. 1 Dist. 1985), n. 3.

Further, §768.54(3)(c), Fla.Stat., provided that:

> Such base fees may be adjusted downward for any fiscal year in which a lesser amount would be adequate and in which the additional fee would not be necessary to maintain in the solvency of the fund. Such additional fee shall be based on not more than two geographical areas with three categories of practice and with categories which contemplate separate risk ratings for hospitals, for health maintenance organizations, for ambulatory surgical facilities, and for other medical facilities. Each fiscal year of the fund shall operate independently of preceding fiscal years. Participants shall only be liable for assessments for claims from years during which they were members of the fund; in cases in which a participant is a member of the fund for less than the total fiscal year, a member shall be subject to assessments for that year on a pro rata basis determined by the percentage of participation for the year. The fund shall be maintained at not more than $15,000,000 per fiscal year.

Dept. of Ins. v. Southeast Volusia Hosp. Dist., Fla., 438 So.2d 815, 818 (1983)

In Blue Cross and Blue Shield v. Milliken, 367 N.W.2d 1 (Mich. 1985), the Michigan Supreme Court held that a section of that state's Nonprofit Health Care Corporation Reform Act establishing a panel of three (3) actuaries to resolve risk-factor disputes was an unconstitutional delegation of legislative authority. The statute at issue in Blue Cross required the plaintiff health care corporation to assign a risk factor for each line of the corporation's business and that the risk factor "be established in accordance with sound actuarial practices". Id., at 27. The statute then required the Insurance Commissioner to either "approve" or "disapprove" the factors established by the plaintiff health care corporation with no guidelines to follow in making such a decision. Finally, the statute stated that if the Insurance Commissioner disapproved the factors established by the plaintiff health care corporation, a panel of three (3) actuaries were to set a risk factor for each of the plaintiff health care corporation's line of business, with no further directions to guide the panel. The Michigan Supreme Court struck down the statutory scheme, observing:

> [O]f course, determination of risk factors is not a mechanical calculation; there is no **one** correct risk factor because there is no **one** correct actuarially sound method of computation. [Citations omitted.]. . .
>
> [I]f . . . the Insurance Commissioner may reject actuarially sound risk factors proposed by the health care corporation simply because of a preference for alternate risk factors, some criteria must be included to guide the Insurance Commissioner's preference of one risk factor over another.

Id., at 29. (Emphasis in the original.)

In contrast to the statute at issue in Southeast Volusia, and like the statute at issue in Blue Cross, nowhere in §766.314, Fla.Stat. (1988 Supp.) can one find what considerations or factors shall be taken into account in determining "actuarial soundness". What factors shall be taken into account in determining the amount of increases needed to achieve "actuarial soundness" is left to the unbridled discretion of the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION (hereinafter "the Association"), a private entity, and the Department of Insurance. Further, unlike the statute at issue in Southeast Volusia, the Act at issue here does not state the maximum amount which shall be maintained in the Plan for any given fiscal year. The question of **how** actuarially sound the Plan is to be remains an open question. If, for example, Ten Million Dollars ($10,000,000.00) is enough to achieve "actuarial soundness", what is to keep the Department of Insurance from making the Plan more "actuarially sound" and maintaining the Plan at Fifteen Million Dollars ($15,000,000.00) or Twenty Million Dollars ($20,000,000.00) for a given fiscal year, thus further increasing the tax imposed on the Petitioners? The answer is plain: absolutely nothing. Neither Article VII, Section 1, of the Florida Constitution nor the decision of this Honorable Court in Southeast Volusia countenance such an utter lack of guidance for determining future increases in tax assessments.

Even more disturbing than the utter lack of definite limits and standards to guide the overall amount of future tax increases to be levelled by the Department of Insurance is the total lack of any **apportionment** scheme in the Act. Nowhere in the Act can one find how the Department of Insurance will distribute the burdens of any need for increased revenue among the persons and entities who fall within the Act's coverage. Under §766.314(4), Fla.Stat. (1988 Supp.), hospitals providing obstetrical services, "participating" physicians and "non-participating" physicians are required to contribute various sums as "initial annual assessments" to fund the Plan. Under §766.314(5), Fla.Stat. (1988 Supp.), those required to contribute to the Plan under §766.314(4) Fla.Stat. (1988 Supp.) are annually assessed the same amounts specified in §766.314(4) plus any additional amount necessary as determined by the Department of Insurance under §766.314(7)(b), Fla.Stat. (1988 Supp.). Section 766.314(5), Fla.Stat. (1988 Supp.) also authorizes the Department of Insurance to assess casualty insurance companies if the Department of Insurance believes "actuarial soundness" so requires. Finally, §766.314(7)(b), Fla.Stat. (1988 Supp.) authorizes the Department of Insurance to increase the assessments specified in §766.314(4), Fla.Stat., that is, the assessments of hospitals providing obstetrical services, "participating" physicians and "non-participating" physicians (but not any assessments of casualty insurance carriers authorized by §766.314(5), Fla.Stat. (1988 Supp.)), **"on a proportional basis as needed"**. Yet the Act provides absolutely no guidance as to the "proportionality" of

increased assessments and exactly how the burdens of increased assessments are to be distributed among those covered by §766.314(4), Fla.Stat. (1988 Supp.), i.e., hospitals providing obstetrical services, "participating" physicians, and "non-participating" physicians.

In Hialeah, Inc. v. Gulfstream Park Racing Ass'n, 428 So.2d 312, 314 (Fla. 4th DCA 1983), the Fourth District held that the statute authorizing the allocation of winter racing periods by the Pari-Mutual Commission of the Florida Department of Business Regulation constituted an unlawful delegation of legislative power to the executive branch in violation of the Florida Constitution because the statute contained "no guidelines or standards for allocating contested racing periods". In Hialeah, the Fourth District explicitly relied on this Honorable Court's holding in Askew v. Cross Key Waterways, Fla., 372 So.2d 913 (1978), which held that a statute establishing the criteria for designation of an area of critical state concern was constitutionally defective because it reposited in an administrative agency the fundamental legislative task of determining which geographic areas and resources were in the greatest need of protection. In Askew, the court concluded that "[t]he deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest". Id., at 919. Similarly, in High Ridge Management Corp. v. State, Fla., 354 So.2d 377, 380 (1977), this Honorable Court struck down on nondelegation grounds certain subsections of

the Omnibus Nursing Home Reform Act of 1976, holding that "statutes delegating power without adequate protection against unfairness or favoritism should be invalidated and that the exercise of the police power by the Legislature must be clearly defined and limited in scope so that nothing is left to unbridled discretion or whim of the administrative agency responsible for enforcement of the act".

In the New York case of Rego Properties Corp. v. Finance Administrator, 424 N.Y.S.2d 621 (Sup.Ct. 1980), the Supreme Court of Queens County held, *inter alia*, that a section of the New York Real Property Tax Law improperly delegated to administrative officials the power to determine how great a tax burden would be placed on particular pieces of property and improperly gave assessors unlimited discretion to select the rate at which property would be assessed. Wrote the court:

> The power to lay a tax, to determine the proportion thereof to be exacted from specified individuals or groups, to determine its incidence, is exclusively a legislative function. . . .[The statute] is . . . an unconstitutional delegation of legislative power because it in effect gives the assessors unlimited discretion to select the rate at which property will be assessed. The assessors are allowed unfettered discretion to assess each class of property at a ratio which may vary from zero to one hundred percent of its full fair market value. Moreover, the statute does not provide the assessors with any guidelines for assessing one class of property higher than another, nor does the statute establish the proper difference among class ratios. . . .
>
> The Legislature has thus given the assessor the unlimited power to determine what proportionate share of the tax will be raised from different groups, and this is an impermissible delegation of the legislative power.

Id., at 624.

In the present case, the Act provides no guidance as to the what proportion of increased tax assessments will fall upon those persons and entities set forth in §766.314(4), Fla.Stat. (1988 Supp.). Just as the statute at issue in Askew failed to delineate priorities among competing geographic areas, the Act at issue here fails to delineate any priorities, if any, among those covered by §766.314(4), Fla.Stat. (1988 Supp.). Just as the statute at issue in Hialeah failed to set standards for allocating contested race periods between the two race courses, the Act fails to set standards for the distribution of increased tax burdens among hospitals providing obstetrical services, "participating" physicians, and "non-participating physicians". Nothing in the Act prevents the Department of Insurance from apportioning any future need for revenue with favoritism and unfairness.

The power to tax, commented Mr. Chief Justice John Marshall, involves the power to destroy. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Here, the Florida Legislature is requiring all physicians who do not practice obstetrics to contribute to a malpractice award fund subject to loss of licensure, the benefits of which are available only to those who practice obstetrics, and the assessments can be increased by the Department of Insurance to amounts for which there is no legislative ceiling. There is nothing in the statute to prevent the Department of Insurance from raising the future assessments to incredible proportions. Parenthetically, as the

Court will recall, the Supreme Court of Kentucky invalidated the Kentucky "Act Relating to Health Care Malpractice Insurance and Claims of 1976", in part, because there was nothing in the act to prevent insurers from raising the levels of premiums to exhorbitant amounts. See: McGuffey v. Hall, 57 S.W.2d 401, 416 (1977). The Florida Legislature's failure to set definite upper limits on the future assessments to be levied by the Department of Insurance, and the distribution of such future tax burdens, amounts to a legislative abdication of constitutional power of the highest sort. Such abdication of the taxation power is a legislative attempt to insulate itself from political accountability for increased taxes.

Accordingly, this Honorable Court should hold that Section 73 of Chapter 88-1 of the Laws of Florida, as amended by Chapter 88-227 of the Laws of Florida, [§766.314(5)(a) and §766.314(7)(b), Fla.Stat. (1988 Supp.)], constitutes an unconstitutional delegation of the power to tax in violation of Article VII, Section 1, of the Florida Constitution.

III. SECTION 73 OF CHAPTER 88-1 OF THE LAWS OF FLORIDA, AS AMENDED BY CHAPTER 88-277 OF THE LAWS OF FLORIDA [§766.314(4)(b)1 FLORIDA STATUTES] DISCRIMINATES AGAINST THE APPELLANT PHYSICIANS WHO RESIDE AND PRACTICE MEDICINE OUTSIDE OF THE STATE OF FLORIDA, IN VIOLATION OF THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS AND THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In rejecting the Petitioners' contentions relating to the effect of the Act upon out-of-state Florida-licensed physicians, the First District cursorily concluded that such contentions were

meritless. Such was manifest error. In Arguments 1A, B and C, supra, Petitioners have clearly set forth why the challenged statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and the comparable provisions of the Florida Constitution. As the Supreme Court of the United States has acknowledged over the years, "the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] clause". Baldwin v. Montana Fish & Game Comm'n., 436 U.S. 371, 387, 98 S.Ct. 1852, 1862, 56 L.Ed. 354 (1978). Thus, beyond Equal Protection and Due Process, the Privileges and Immunities of two (2) of the Petitioners herein--both non-resident Florida licensees--are clearly offended.

"Taxation without representation" was the primary, underlying cause of the American Revolution. Since that time, taxation by consent, through representatives chosen by local electors, has been deemed a fundamental principle of American Constitutionalism. On its face, Section 73 levies a tax on all Florida-licensed physicians, regardless of citizenship, residency and representation in the Florida Legislature, in violation of that fundamental principle.

In the case at bar two (2) Petitioners, SIDNEY R. STEINBERG, M.D. and CLAUDE A. BOYD, M.D., hold Florida licenses, but one practices general and vascular surgery in Kentucky, while the other practices dermatology in Georgia. If either failed to pay their assessments to the Florida Birth-Related Neurological Injury Compensation Plan he would lose his license to practice

medicine in Florida, and, such would automatically cause the loss of his license in his resident state. See specifically, §766.314(6)(b), Fla.Stat. (1988 Supp.); K.R.S. 311.595 (Kentucky); O.C.G.A. Ch. 34, T. 43, as amended (Georgia). Yet, non-resident Florida licensees-no matter what specialty or subspecialty they practice--will **never** be able to take advantage of the challenged act. Such is true because the purpose of the Act was to take care of the malpractice claims of those who practice obstetrics **in the State of Florida.** §766.301, Fla.Stat. (1988 Supp.) Both SIDNEY R. STEINBERG, M.D. and CLAUDE A. BOYD, M.D. do not enjoy the franchise in Florida; they cannot vote for members of the Florida Legislature. As to them--those who are not franchised in the legislating state--the courts always employ "heightened scrutiny" in the constitutional examination of statutes. The reason is simple: those who do not enjoy the franchise in the legislating state cannot seek the repeal of the challenged law. The court is their **only** resort.

Thus, in the seminal case of United States v. Carolene Products Co., Mr. Chief Justice Harlan Fisk Stone wrote:

> It is not necessary to consider **now** whether legislation which **restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny** under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

304 U.S. 144, 152-53, 58 S.Ct. 778, 783-84, 82 L.Ed. 1234 (1938), n.4

In the present case, the implications of Section 73 [§766.314(4)(b)1, Fla.Stat. (1988 Supp.)] on the political process must be examined in order to analyze the statutory scheme from the perspective of Florida-licensed physicians who do not practice in the State of Florida. Under Section 73 [§766.314(4)(b)1, Fla.Stat. (1988 Supp.)], non-resident Florida licensed physicians are treated the same as their resident counterparts. Obviously, such a scheme runs directly counter to the principle that a legislative classification must have "some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated." Eslin v. Collins, Fla., 108 S.2d 889, 891 (1959); see also, Florida Real Estate Comm. v. McGregor, Fla., 336 So.2d 1156 (1976). From the perspective of non-resident Florida-licensed physicians, the Two Hundred Fifty Dollar ($250.00) assessment of all Florida licensed physicians, regardless of residency, is just as patently overinclusive as the arbitrary classification based on the practice of obstetrics is underinclusive. Non-resident, Florida-licensed physicians cannot receive any conceivable "spillover" benefits from the Plan. Whether or not they practice obstetrics, they do not practice any form of medicine **in Florida**. Even though the non-resident physicians receive absolutely no benefits from the Plan and have no political voice in the legislative process, the Florida Legislature nonetheless chose to tax non-resident, Florida licensed physicians--and threaten them with loss of licensure for their failure to pay the tax--for the exclusive benefit of a

select group of resident physicians who practice obstetrics and choose to "participate" in the Plan. And, there is also nothing in the statute to prevent the Department of Insurance from increasing the tax on non-resident physicians, with the Florida Legislature enjoying absolute immunity at the polls.

The plight of the non-resident physicians here is similar to the plight of the members of the plaintiff union in United Building & Construction Trades Council v. Camden, 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 1984) There, the Union members challenged an ordinance of the City of Camden, New Jersey which required that at least forty percent (40%) of the employees of contractors and subcontractors working in city construction projects be city residents. The New Jersey courts--including the Supreme Court of New Jersey--upheld the ordinance. The Supreme Court of the United States, however, remanded the case back to the trial court for purposes of determining whether the ordinance violated the strictures of the Privileges and Immunities clause of the Fourteenth Amendment. Because, the non-resident plaintiff Union members could not vote for those who ran for office in New Jersey, the challenge to the ordinance mandated a heightened scrutiny. Wrote Mr. Justice William Rehnquist:

> It is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens. And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause. [Citation omitted.] **But New Jersey residents at least have a chance to remedy at the polls any discrimination against them. Out-of-state citizens have no similar opportunity...**

United Building & Construction Trades Council v. Camden, 465 U.S. 208, 217, 104 S.Ct. 1020, 1027, 79 L.Ed.2d 249 (1984)

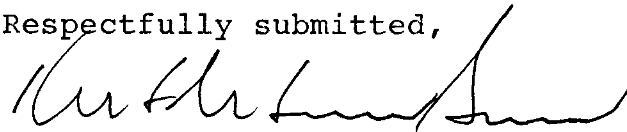
Simply, before a state may discriminate against any non-residents, the non-residents "must somehow be shown to 'constitute a peculiar source of evil at which the statute is aimed'." Id., at 222, 104 S.Ct., at 1020; see also, Florida State Board of Dentistry v. Mick, Fla., 361 So.2d 414 (1978). Obviously, no one--not even the Florida Legislature--could possibly conclude that non-resident physicians were the cause of any alleged malpractice problem among Florida physicians practicing obstetrics. They are taxed simply because they hold Florida licenses. Yet, if they do not pay the tax--and any increases mandated by the Florida Department of Insurance-they will lose their licenses in Florida and in their resident states.

In the case at bar, the Florida Birth-Related Neurological Injury Compensation Plan blatantly takes advantage of non resident physicians' inability to remedy the adverse effects of the taxation at the polls. Additionally, the Plan fails to take into account the substantial differences between resident and non-resident, Florida-licensed physicians. Accordingly, this Honorable Court should hold that the facial overinclusiveness of Section 73, as applied to the non-resident physicians, violates the Equal Protection and Due Process clauses of both the United States and Florida Constitutions as well as the Privileges or Immunities clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioners pray that, for all the foregoing reasons, this Honorable Court should reverse the judgment of the Florida Court of Appeal, First District, and hold that §§766.314(4)(b)1, 766.314(5)(a), and 766.314(7)(b), Fla.Stat. (1988 Supp.), are violative of both the United States and Florida Constitutions. Petitioners further pray that, for all the foregoing reasons, this Honorable Court should reverse the judgment of the Florida Court of Appeal, First District, remand this case to the trial court with instructions for it to enter an order enjoining the Respondents from enforcing §§766.314(4)(b)1, 766.314(5)(a), and 766.314(7)(b), Fla.Stat. (1988 Supp.), and award those "non-participating" physicians who have paid the annual assessment the recovery of the said sums paid.

Respectfully submitted,



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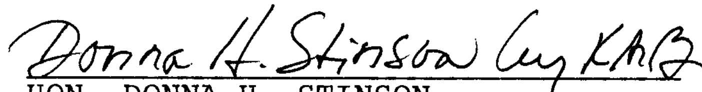

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CERTIFICATE OF SERVICE

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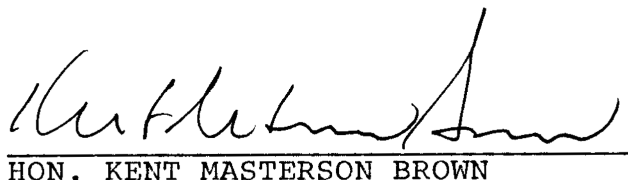

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