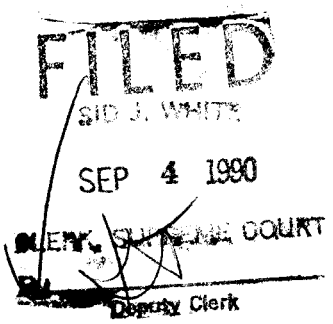
IN THE SUPREME COURT OF FLORIDA



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,
Appellants/Petitioners

vs.

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

CASE NO. 74,565

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONERS' BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

I. The First District's decision conflicts with the decisions of this Honorable Court respecting fundamental limitations on legislative power. The Florida Birth-Related Neurological Injury Compensation Act creates an unreasonable classification among Florida-licensed physicians and grants special privileges to a closed class of Florida practitioners.

II. The First District's decision conflicts with the decisions of this Honorable Court interpreting Article VII, Section 1 of the Florida Constitution because the Florida Birth-Related Neurological Injury Compensation Act does not definitely limit the amount of future tax increases to be imposed on non-participating Florida-licensed physicians or provide specific guidelines for determining "actuarial soundness".

III. The First District's decision ignores essential differences between Florida-licensed physicians who reside and practice outside of Florida and those who reside and practice within Florida.

MAY IT PLEASE THE COURT:

JURISDICTIONAL BASIS

The basis for the Petitioners' invocation of this Court's discretionary jurisdiction is the First District Court of Appeal's opinion expressly declaring valid Section 73 of Chapter 88-1, Laws of Florida, as amended by Sections 39 and 44 of Chapter 88-277, Laws of Florida, and as further amended by Section 6 of Chapter 89-186, Laws of Florida, all codified at Section 766.314, Florida Statutes (1989).

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners, JAMES F. COY, M.D., SIDNEY R. STEINBERG, M.D. and CLAUDE A. BOYD, M.D., who were the Appellants below in case number 89-2569, 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.). A true and correct copy of these provisions is set forth in the Appendix.

Petitioner, JAMES F. COY, M.D., is a Florida-licensed general practitioner and is a resident and citizen of DeLand, Volusia County, Florida, practicing in Orlando, Florida. Petitioner, SIDNEY R. STEINBERG, M.D., is a Kentucky and Florida-licensed general and vascular surgeon and is a resident and citizen of Shelbyville, Kentucky. Dr. Steinberg practices general and vascular surgery in Shelbyville, Kentucky. Petitioner, CLAUDE A. BOYD, M.D., is a Georgia and Florida-licensed

dermatologist and is a resident and citizen of Augusta, Georgia. Dr. Boyd practices dermatology in Augusta, Georgia. None of the aforesaid Petitioners, in a full-time or part-time capacity, practice obstetrics, perform obstetrical services or intend to perform obstetrical services in any way. All object to the enforcement of the aforesaid subsections of §766.314, Fla.Stat. (1988 Supp.) See: T.R. 174-177.

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 and the cases were tried before said court on June 13, 1989. On September 12, 1989, the trial court entered a Final Order upholding the constitutionality of the challenged statute. Petitioners filed a Notice of Appeal 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. 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 on July 10, 1990. The Motion was denied on July 31, 1990.

Under Section 73, all Florida-licensed physicians who **do not participate** in the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN **must pay an initial annual assessment of Two Hundred Fifty Dollars ($250.00)** by December 1, 1988 to the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION. See: §766.314(4)(b)(1), Fla.Stat. (1988 Supp.). **Physicians are obligated to pay the assessment irrespective of whether they practice obstetrics or render any obstetrical services.** Failure to pay the assessment will be grounds for disciplinary action by

the Department of Professional Regulation. See: §766.314(6)(b), Fla.Stat. (1988 Supp.). **Physicians who practice obstetrics or perform obstetrical services, either full time or part time, with certain very limited exceptions, may pay an initial assessment of Five Thousand Dollars ($5,000.00) and thus qualify for "participation"** in the Plan. See: §766.314(4)(c), Fla.Stat. (1988 Supp.). Although **all** Florida licensed physicians are required to pay the Two Hundred Fifty Dollar ($250.00) assessment, those physicians who do not meet the qualifications listed above **may not** "participate" in the Plan. See: §766.302(7), Fla.Stat. (1988 Supp.). To date, 27,922 Florida-licensed physicians have paid the Two Hundred Fifty Dollar ($250.00) assessment; 17,000 have not. **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.**

REASONS FOR ACCEPTING JURISDICTION

I. THE FIRST DISTRICT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT RESPECTING FUNDAMENTAL LIMITATIONS ON LEGISLATIVE POWER.

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] (hereinafter referred to as "the Act"), the First District adopted the holding of the trial court.

The Equal Protection Clauses of the United States and Florida Constitutions prohibit the State legislature from making unreasonable classifications among persons in carrying out its legislative function. Florida Real Estate Comm. v. McGregor, Fla., 336 So.2d 1156 (1976); Eslin

v. Collins, Fla., 108 So.2d 889 (1959) In determining whether a statutory tax or regulatory scheme comports with Equal Protection principles, this Honorable Court has held that "the classification must be reasonable, not arbitrary, and must rest upon some ground having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike" and 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 such basis". 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).

In State ex. rel. Watson v. Lee, Fla., 24 So.2d 798 (1946), the Florida Supreme Court, en banc, examined the constitutional validity of the County Officers' and Employees' Retirement Act. The Court upheld the Act, because participation in the retirement plan **was not compulsory**. The Court indicated, however, that had the retirement plan been compulsory, with no guarantee to the employee of receiving benefits, the plan would have been violative of the Equal Protection (and Due Process) Clauses of the United States and Florida Constitutions. Id., at 800.

In Eslin v. Collins, Fla., 108 So.2d 889 (1959), this Honorable Court held that the 1957 amendment to the Naturopathy Act violated the Equal Protection Clauses of the United States and Florida Constitutions. The 1957 amendment 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 less than fifteen (15) years prior to the amendment from prescribing or administering

any drug or medicine. The Florida Supreme Court held the legislative classification to be unreasonable and arbitrary, and therefore violative of the Equal Protection Clauses of the United States and Florida Constitutions because the Court could "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". Id., at 891. See also: Liquor Store v. Continental Distilling Corp., Fla., 40 So.2d 371, 374 (1949)

Section 73 of the Act [§766.314(4)(b)1, Fla.Stat. (1988 Supp.)] requires (by means of a tax) physicians to pay into a plan established to underwrite the malpractice claims and awards for only those who practice obstetrics **and choose to participate in the Plan.** This has led to the arbitrary, unreasonable and, indeed, absurd result of requiring over forty thousand (40,000) Florida-licensed physicians to underwrite the malpractice premiums of a select group of five hundred thirty five (535) physicians. There is nothing in the Act to prevent this subclass of specially privileged Florida practitioners from decreasing. Over forty thousand (40,000) Florida-licensed physicians could be required to underwrite the malpractice premiums for as few as one hundred (100)--or even ten (10)--practitioners who are eligible and actually choose to participate. The prior pronouncements of this Honorable Court compel the conclusion that such a scheme is manifestly oppressive and arbitrary and grants special privileges to a limited, closed class of practitioners. The Act at issue here fundamentally takes property from one private party and transfers it to the exclusvie benefit of another private party without legitimate reason or justification.

This Honorable Court has never squarely addressed the constitutionality of a statutory scheme such as the one at issue here.

Dept. of Ins. v. Southeast Volusia Hosp. Dist., Fla., 438 So.2d 815 (1983) illustrates this fact. In Southeast Volusia, 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**. The statute clearly permitted 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 **only if** they could not demonstrate individual financial responsibility for malpractice claims. Unlike the Act being challenged in the present case, there was nothing mandatory about §768.54(3)(c). Fla.Stat. (1988 Supp.).

II. THE FIRST DISTRICT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT INTERPRETING 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 concluded:

> The appellants also contend that the statutory authorization for the Department of Insurance to proportionally increase assessments to maintain the Plan is an unlawful delegation of legislative taxing power. They argue that the "actuarially sound" standard set forth in the statute is insufficient to enable the Department of Insurance and the courts to determine whether the legislative intent is being implemented. Because of the Supreme Court's holding in Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984), we must reject the appellants' argument on this point. . . .

A-6, A-7

In Stewart v. Daytona and New Smyrna Inlet District, Fla., 114 So.545, 547 (1927), this Honorable Court explained the significance of

Article VII, Section 1, of the Florida Constitution when it held 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. . . . (Emphasis added.)

In Conner v. Joe Hatton, Inc., Fla., 203 So.2d 154 (1967), this Honorable Court applied the above rule to hold 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 was an unconstitutional delegation of the legislature's power to tax.

The Act being challenged here is completely distinguishable from the statute challenged in Southeast Volusia. In Southeast Volusia, the statutory scheme was **voluntary, not compulsory**, 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 soundess 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 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 contrast to §768.54, Fla.Stat., 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. 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.

III. THE FIRST DISTRICT'S DECISION 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.

In holding that the whole "team" of health care providers stand to benefit from the Act, the First District ignored essential differences between physicians practicing within the State of Florida and those practicing outside of Florida. Out-of-state physicians do not treat any patients in Florida; they do not have offices in Florida; they do not hold hospital privileges in Florida; and they do not pay liability insurance premiums in Florida. Out-of-state physicians can receive no benefits under the Act. Yet they are nonetheless liable for initial assessments and any unlimited future increased assessments. Thus, the First District's holding 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 So.2d 889, 891 (1959); see also, Florida Real Estate Comm. v. McGregor, Fla., 336 So.2d 1156 (1976). As applied to physicians who reside and practice medicine outside of the State of Florida, the Act is "compulsory with no commitment as to benefits to be derived from it". State ex. rel. Watson v. Lee, Fla., 24 So.2d 798, 800 (1946).

In remanding a case back to the trial court for purposes of determining whether Camden, New Jersey ordinance which required at least forty percent (40%) of the employees of contractors and subcontractors working in city construction projects to be city residents violated the Privileges and Immunities Clauses of non-residents, the United States Supreme Court observed:

> 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)

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. Non-resident physicians have no political means by which to remedy their exclusion from the Plan. Additionally, the Plan fails to take into account the substantial differences between resident and non-resident, Florida licensed physicians. Accordingly, the Act offends the Privileges and Immunities of two (2) of the Petitioners herein; both non-resident Florida licensees.

CONCLUSION

For all the foregoing reasons, this Honorable Court should assume jurisdiction.

Respectfully submitted,

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and CLAUDE A. BOYD, M.D.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed on the 4th day of September, 1990 to: William H. Adams, III, Esquire and Robert J. Winicki, Esquire, Post Office Box 4099, Jacksonville, Florida 32201; John Thrasher, Esquire, Florida Medical Association, 760 Riverside Avenue, Jacksonville, Florida 32304; Peter D. Ostreich, Esquire, Department of Insurance and Treasury, 412 Larson Building, Tallahassee, Florida 32399-0300; H. Reynolds Sampson, Esquire, Harper Field, Esquire, Florida Department of Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0750; Julie Gallagher, 204-B South Monroe Street, Tallahassee, Florida 32301; George Waas, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050; J. Riley Davis, Esquire and Wilbur E. Brewton, Esquire, Taylor, Brion, Buker & Greene, 225 S. Adams Street, Suite 250, Tallahassee, Florida 32301; Thomas J. Maida, Esquire, Karl, McConnaughhay, et. al., Post Office Box 229, Tallahassee, Florida 32302 and Neil H. Butler, Esquire, Butler & Johnson, P.A., Post Office Box 839, Tallahassee, Florida 32302.

HON. KENT MASTERSON BROWN

HON. DONNA H. STINSON

APPENDIX

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DR. JAMES T. MCGIBONY, DR. JOSEPH VON THORN, DR. MARK D. ZIFFER and DR. WILLIAM BARFIELD, on behalf of themselves and all others similarly situated,

Appellants,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE and LAURENCE GONZALEZ, in his official capacity as the head of THE FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION,

Appellees.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 89-2569

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., 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,

Appellants,

v.

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

Appellees.

* CASE NO: 89-2593

Opinion filed June 25, 1990.

Appeal from the Circuit Court for Leon County, Ted Steinmeyer, Judge.

William H. Adams, III and Robert J. Winicki of Mahoney, Adams & Criser, P.A., and John E. Thrasher, Florida Medical Association, Jacksonville, for Appellants Dr. James T. McGibony, Dr. Joseph Von Thorn, Dr. Mark D. Ziffer and Dr. William Barfield.

Kent Materson Brown, Lexington, Ky and Donna H. Stinson of Moyle, Flanigan, Katz & Fitzgerald, Tallahassee, for Appellants Association of American Physicians and Surgeons, Inc., James F. Coy, M.D., Sidney R. Steinberg, M.D. and Claude A. Boyd, M.D.

J. Riley Davis, Wilbur E. Brewton, and Kenneth D. Goldberg of Taylor, Brion, Buker & Greene, Tallahassee, for Appellees Florida Birth-Related Neurological Injury Compensation Plan and Florida Birth-Related Neurological Injury Compensation Association.

Thomas J. Maida and Patricia H. Malono of Karl, McConnaughhay, Roland & Maida, Tallahassee, for Amicus Curiae Doctors J. Thomas Atkins, Max Sugar, John A. Tirpak, and Marvin A. Perer.

Neil H. Butler, Tallahassee, for Amicus Curiae Association of Voluntary Hospitals of Florida, Inc.

ALLEN, J.

Physicians licensed by the Florida Department of Professional Regulation brought actions against the appellees challenging the constitutionality of the funding prescribed for the Florida Birth-Related Neurological Injury Compensation Plan (Plan) created by Chapters 88-1 and 88-277, Laws of Florida. The physicians contended that since they did not provide obstetrical services they would receive no more benefit from the Plan than

any other member of the general public. Consequently, they argued that their rights under the due process and equal protection guarantees of the federal and state constitutions were violated when they were called upon to contribute to the Plan, where no such requirement was placed upon the general public. They also alleged that the statute contains an unlawful delegation of the taxing authority. This appeal is from a judgment in favor of appellees on all issues. We affirm.

Chapter 88-1, Section 60, now codified as Section 766.301, Florida Statutes (1989), sets forth findings in support of the legislation as follows:

> 766.301 Legislative findings and intent
>
> (1) The Legislature makes the following findings:
>
> (a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians.
>
> (b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by current medical malpractice problems.
>
> (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.
>
> (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a

> limited system of compensation irrespective of fault.
>
> (2) It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries.

A portion of Chapter 88-1 created the Plan, which provides a no-fault compensation system for certain neurologically injured infants. The Plan's financing scheme, found in Section 73 of Chapter 88-1, as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, codified as Section 766.314, Florida Statutes (1989), calls for payments from hospitals, physicians, the Insurance Commissioner's Regulatory Trust Fund, and, in certain circumstances, casualty insurance carriers. Physicians who practice obstetrics either full-time or part-time can participate in the Plan by paying an initial and annual assessment of $5,000. Physicians, such as the appellants, who do not practice obstetrics and cannot participate, are required to pay an initial and annual assessment of $250. The section also authorizes the Department of Insurance to proportionally increase assessments in order to maintain the Plan on "an actuarially sound basis."

The appellants first contend that they receive no greater benefit from the Plan than other members of the general public. Therefore, they argue that there is no rational basis for singling out their class of nonparticipating physicians for contribution to the Plan. They assert that use of the

classification is arbitrary and discriminatory in violation of the due process and equal protection guarantees of the federal and state constitutions.

In Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), appeal dismissed, 474 U.S. 892, 106 S.Ct. 213, 88 L.Ed.2d 214 (1985), the Florida Supreme Court established the standard of review by which tax legislation, challenged on the same constitutional grounds raised by appellants, is to be evaluated. The court said the following:

> When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. Walters v. City of St. Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. Department of Revenue v. AMREP Corp., 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. Allied Stores v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 321 (1959).

Id. at 314.

Recognizing the standard of judicial review explicated in Eastern Air Lines, Inc. v. Department of Revenue, the court

looked at legislative history and other evidence presented at trial to determine whether there was a rational basis for the legislature to have called upon physicians not practicing obstetrics to contribute to the Plan. In doing so, the trial court found that Chapters 88-1 and 88-277, Laws of Florida, were enacted in response to a medical malpractice crisis which engulfed our state, severely disrupted the delivery of health care services, and adversely affected all Florida physicians. Further, evidence was presented that health care services are delivered by a team of providers, all of whom interact and depend upon one another, and that a breakdown in one area of service impacts other areas. The trial court found and held as follows:

> Since one of the goals of the Plan is to help alleviate the crisis and permit the efficient delivery of health care services by all members of the team, plaintiffs are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization. * * * Thus, the Legislature's decision to require plaintiffs to contribute to the Plan was not wholly unreasonable, arbitrary, or capricious.

We find that there was ample factual basis for the trial court's holding on this issue. Consequently, we reject the appellants' due process and equal protection arguments.

The appellants also contend that the statutory authorization for the Department of Insurance to proportionally increase assessments to maintain the Plan is an unlawful delegation of legislative taxing power. They argue that the "actuarially sound" standard set forth in the statute is insufficient to

enable the Department of Insurance and the courts to determine whether the legislative intent is being implemented. Because of the Supreme Court's holding in Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984), we must reject the appellants' argument on this point. There, the Supreme Court held the "actuarially sound" standard sufficient to satisfy constitutional requirements.

We also find the appellants' remaining arguments to be without merit.

Consequently, the trial court's final judgment upholding Section 73 of Chapter 88-1, as amended by Sections 39 and 41 of Chapter 88-277, and codified as Section 766.314, Florida Statutes (1989), against the various constitutional challenges raised by appellants is affirmed.

ZEHMER and MINER, JJ., CONCUR.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.

DR. JAMES T. MCGIBONY, DR. JOSEPH C. VON THRON, DR. MARK D. ZIFFER AND DR. WILLIAM BARFIELD, on behalf of themselves and all others similarly situated,

Plaintiffs, CASE NO. 88-4615

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE and LAURENCE GONZALEZ, in his official capacity as the head of the FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION,

Defendants,

and

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,

Plaintiffs, CASE NO. 89-1008

vs.

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

Defendants.

_____/

FINAL ORDER

This matter came before the undersigned Circuit Judge for final hearing on June 13, 1989. The Plaintiffs, physicians licensed by the Florida Department of Professional Regulation, have brought an attack alleging Section 73 of Chapter 88-1, Laws of Florida, as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, and codified at Section 766.314, Florida Statutes (1988 Supp.), is unconstitutional and violates the due process and equal protection clauses of the United States

and Florida Constitutions as well as Article VII, Sections 1 and 10 of the Florida Constitution and the privileges and immunities clause of the United States Constitution. Having heard the testimony of witnesses, reviewed the evidence and proposed final orders, the Court finds:

A. BACKGROUND

In 1986, the Legislature created the Academic Task Force for the Review of the Insurance and Tort Systems. See Affidavit of Carl S. Hawkins, attached to Defendant Florida Birth-Related Neurological Injury Compensation Association's Response to Motion for Summary Judgment. The Legislature directed the Task Force to study the problems associated with liability insurance in Florida and report recommendations for change to the Legislature by March 1, 1988. As the Task Force began its investigation, medical malpractice quickly emerged as the most visible and likely the most serious problem within the tort and insurance systems.

The Task Force held fourteen public hearings and gathered extensive technical and statistical data. In July 1987, Governor Bob Martinez informed the Task Force that a special legislative session would probably be held in the fall and requested the Task Force assist the Legislature in any way possible during this special session. On August 14, 1987, the Task Force published a Preliminary Fact Finding Report on Medical Malpractice to assist the Legislature during the upcoming special session. A copy of this report was admitted as a defense exhibit in this cause.

The findings of the Task Force included, in part,:

a) Affordability. The cost of medical malpractice insurance has increased dramatically during the last eight years, with the largest share of this increase coming during the past two years.

b) Cause of Price Increase. The primary cause of increased malpractice premiums has been the substantial increase in lost payments to claimants.

c) Frequency of Claims Payment. The frequency of claims payments has increased 4.6% per year since 1975, but only 1.8% when adjusted for the increase in population.

d) Variations Among Medical Specialities. There are considerable variations both in frequency and severity of paid claims among medical specialities. Obstetrics and gynecology account for 13.6% of all paid claims, while specialities such as endocrinology, psychiatry, and thoracic surgery each account for less than 2% of all paid claims.

e) Effects of Malpractice Liability upon Health Services in the Medical Profession. Medical malpractice insurance problems have many effects on health services in the medical profession, including adverse financial effects on physicians, increased health care provider fees, and potentially deleterious alterations of health care delivery patterns.

See Preliminary Fact Finding Report on Medical Malpractice, August 14, 1987, Pages 3-5 and 236-254.

With respect to obstetrics and gynecology, the Task Force made, in part, the following findings:

a) For the period 1975 to 1986 and particularly for the years 1982 to 1986, obstetrics and gynecology ranked highest in total paid claims.

b) The spread between malpractice premium insurance rates for obstetricians and family physicians has increased significantly between 1983 and 1987.

c) Between 1975 and 1986, the average claims cost for obstetricians rose 1,029%, from $14,173 to $160,555.

d) Since the 1971 to '72 policy year and through the 1986 to '87 policy year, the percentage of an OB/GYN's gross revenues devoted to malpractice insurance premiums has increased from 4.2% to 23.1%; this percentage for all physicians rose less than half as much, from 3.6% to 11.6%.

Id. at 46, 48, 103, 105, 128, 130, and 237.

In November 1987, the Task Force published its Medical Malpractice Recommendations and furnished them to the Legislature. A copy of these recommendations was also admitted as a defense exhibit. Among the major recommendations was a proposal that the Legislature enact a no-fault system for birth-related neurological injuries to provide for the long-term care and treatment of certain neurologically injured infants. See Medical Malpractice Recommendations, November 6, 1987, Page 1, and 30-34.

The Legislature followed the Task Force's recommendations and during its Special Session, in February 1988, enacted Chapter 88-1, Laws of Florida. A portion of Chapter 88-1 created the

Florida Birth-Related Neurological Injury Compensation Plan (hereafter the Plan). The Plan provides a no-fault compensation system for certain neurologically injured infants. The Legislature developed a financing scheme, found in Section 73 of Chapter 88-1, as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, and codified as Section 766.314, Florida Statutes (1988 Supp.), to pay for the Plan which calls for payments from hospitals, physicians, the Insurance Commissioner's Regulatory Trust Fund and, in certain circumstances, casualty insurance carriers. With respect to physicians, those who participate in the Plan pay an initial and annual assessment of $5000; non-participating physicians pay an initial and annual assessment of $250. It is this section that Plaintiffs attack. The section provides for the payment and collection of assessments necessary to operate the Plan and compensate victims.

Plaintiffs, McGibony, et al., are licensed Florida physicians who do not practice obstetrics and who must pay the $250 assessment. One of these physicians resides in Georgia. Plaintiffs were granted certification to represent the class of all non-participating physicians and osteopathic physicians who must pay the $250 assessment.

Plaintiffs, Coy, et al., are Florida licensed physicians who reside out-of-state and who must pay the $250 assessment. Because the issues raised by these Plaintiffs were nearly identical to the claims made by Plaintiffs, McGibony, et al., these matters were consolidated for trial.

Defendants include the Association, which administers the Plan; the Commissioner of Insurance, and the Secretary of the Department of Professional Regulation.

All Plaintiffs sought to have the portion of Section 766.314 which requires the payment of the $250 assessment declared unconstitutional and Defendants enjoined from implementing or enforcing its provisions.

B. Summary of the Parties' Argument

Plaintiffs claim the assessment provision is arbitrary,

unreasonable and therefore unconstitutional. Specifically, Plaintiffs alleged the following:

1) The assessment is in the nature of a tax;

2) The assessment violates the due process clause because there is no rational basis for the imposition of a "tax" on non-participating physicians;

3) The assessment violates the equal protection clause because it singles out non-participating physicians from the rest of the general population to pay a "tax" which benefits a group other than the physician;

4) The assessment improperly pledges the credit of the state and improperly delegates the power to tax to the Department of Insurance because the funds derived from the assessment are paid to a "private" entity and because the Commissioner of Insurance has the authority to levy assessments to maintain the fund on an actuarily sound basis;

5) The assessment discriminates against out of state physicians by making them pay the "tax" when they cannot receive any benefits from the plan.

The Defendants argued:

1) Legislative enactments are presumed valid; all doubts should be resolved in favor of constitutionality and if any possible interpretation exists to uphold the constitutionality of the statute, the court should follow that interpretation;

2) The assessment may in fact be a tax; however, the Legislature has broad discretion in creating revenue raising schemes;

3) The statute is a valid exercise of the police power; it is rationally related to a legitimate state purpose and should be upheld unless clearly arbitrary and unreasonable;

4) The statute does not improperly pledge the credit of the state or delegate the state's power to tax to the Department of Insurance because it contains sufficient guidelines to insure fairness and prevent abuse; and

5) The statute does not discriminate against out-of-state physicians; all physicians who do not participate in the plan must pay the assessment regardless of where they live.

To determine the constitutionality of the statute, the court must decide whether the Legislature's decision to require all physicians to help pay for the plan was a reasonable one. If it was, the statute is deemed constitutional.

C. Judicial Inquiry and the Plaintiffs' Burden of Proof

Statutes are presumed constitutional and should be so construed. Gulf Stream Park Racing Association v. Department of

Business Regulation, 441 So.2d 627 (Fla. 1983). If reasonably possible and consistent with constitutional rights, courts should resolve all doubts regarding the validity of the statute in favor of its constitutionality. Falco v. State, 407 So.2d 203 (Fla. 1981). This is because the state is considered the primary judge of regulation in the interest of public safety and welfare. Powell v. State, 345 So.2d 724 (Fla. 1977).

A party challenging the statute has the burden of establishing its invalidity; Peoples Bank of Indian River County v. State, Department of Banking and Finance, 395 So.2d 521 (Fla. 1981); and such invalidity must be shown beyond a reasonable doubt. Robinson v. Florida Drycleaning and Laundry Board, 194 So. 269 (Fla. 1940); Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981).

If the constitutionality of a statute is questioned and if it is reasonably susceptible of two interpretations, by one of which it will render the statute unconstitutional and by the other valid, the court must adopt the interpretation which will render the statute valid. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983); Florida State Board of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979). Furthermore, where a factual predicate is necessary to the validity of an enactment, it is to be presumed that the necessary facts were before the Legislature at the time of the enactment. Wasserman; Cliento v. State, 377 So.2d 663 (Fla. 1979).

The principle noted in Wasserman and Cliento was enunciated earlier in State v. Bales, 343 So.2d 9 (Fla. 1977). Bales involved a challenge to the constitutionality of a statute which required persons who performed massage for a fee to be licensed by the state. The court upheld the regulation and stated:

> ...any legislative enactment carries a strong presumption of constitutionality, including a rebuttable presumption of the existence of necessary factual support in its provisions. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209, 210, 55 S.Ct. 187, 79 L.Ed. 281 (1934). If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct.

778, 82 L.Ed. 1234 (1938). Questions as to wisdom, need or appropriateness are for the Legislature. Olsen v. State of Nebraska, ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305 (1941).

In Fulford v. Graham, 418 So.2d 1204 (Fla. 1st DCA 1982), the constitutionality of regulations concerning saltwater fisherman was challenged. The court upheld the regulations, citing Bales, and noted "the evidence adduced at trial, including the general comments of experts who testified, does not serve as a sufficient basis to declare the acts unconstitutional in light of the presumption of constitutionality." Id. at 1205.

Plaintiffs have asked the court to review the Legislature's choice of a financing method for the Florida Birth-Related Neurological Injury Compensation Plan. That choice came to the court cloaked in a presumption of validity. All doubts regarding its constitutionality must be resolved in favor of constitutionality. If different reasonable interpretations exist where one would conclude the financing scheme was unfair or unwise, but another would conclude the scheme was reasonable and rational, the latter interpretation must prevail. Further, if a factual predicate is necessary to render the Legislature's choice a reasonable one, or a constitutional one, this court must presume that predicate was before the Legislature when it acted.

Here, the record was replete with the factual information presented to and considered by the Legislature when it enacted this legislation. The Academic Task Force documented and reported the existence and effect of the malpractice insurance crisis. The crisis was far reaching and affected health care providers, insurance carriers and ordinary citizens. The legislation at issue was an attempt to deal with that crisis. The financing scheme chosen by the Legislature to assure the financial viability of the plan is not, as will be further explained, so far afield or so infirm as to overcome the presumption in favor of constitutionality that attaches to any statute.

D. The Assessment is Constitutional Even if it is a Tax

The assessment imposed by the Legislature may be a tax.

As a portion of the funding base for the compensation program created by Section 766.301, et. seq., Florida Statutes (1988 Supp.), the excise levied on the licenses of all physicians authorized to practice in Florida is primarily a revenue mechanism. As such, it may properly be classified as a tax. Bateman v. City of Winter Park, 37 So.2d 362 (Fla. 1948).

In Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), the Florida Supreme Court established the standard of review by which tax legislation, challenged on the same constitutional grounds raised by Plaintiffs, is to be evaluated:

> When the state Legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. Walters v. City of St. Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. Department of Revenue v. AMREP Corp., 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. Allied Stores v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d. 321 (1959).

A tax may even be so high as to restrict or even possibly destroy particular occupations without violating the due process or equal protection clause. A tax will not be nullified unless it is palpably arbitrary or grossly unequal in its application. Pittsburg v. Alco Parking Corporation, 417 U.S. 369 (1974). The presumption of constitutionality of a license tax can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes," Madden v. Kentucky, 309 U.S. 83 at 88 (1940), and even if everyone subject to a tax is not taxed equally, that in and of itself does not make taxation arbitrary or violative

of the equal protection clause. Smith v. Department of Revenue, 512 So.2d 1008 (Fla. 1st DCA 1987).

Furthermore, the Legislature is free to tax the licenses of occupations or businesses for regulatory and revenue-raising purposes. Young v. Thomas, 17 Fla. 169 (1879); City of Jacksonville v. Ledwith, 7 So. 885 (Fla. 1890). This was more fully discussed in State ex rel. Bonsteel v. Allen, 91 So. 104 (Fla. 1922), when the court held:

> While it is within the power of the courts to declare Laws levying license taxes void because of the unreasonable and arbitrary exercise of the state's power either in the classification or in fixing the amount of the license, such power will not be exercised unless the amount of the license tax is so great, or the classification so palpably arbitrary as to be beyond the necessities for the legislation, or equivalent to an impairment of the constitutional rights of property, or tend to prevent a great number, if not all persons, from pursuing otherwise lawful occupations which do not impair public safety, public health or destroy property. Id. at 105.

The assessment at issue here meets none of the criteria for finding a tax unconstitutional as articulated in Bonsteel or the cases that followed it. The amount of the license tax is not so great, nor is the classification so palpably arbitrary, as to be beyond necessity for the legislation. Plaintiffs are simply one of five contributing funding sources to the Plan, and no evidence was presented at the final hearing which demonstrated that the proportionate share contributed by Plaintiffs is grossly unequal or discriminatory.

The assessment is not equal to an impairment of the constitutional rights of property and, from the evidence considered or presented in this cause, does not tend to prevent a great number of persons from pursuing the medical profession.

Plaintiffs claim that the tax is unconstitutional because they receive no direct benefit is without merit. There is no constitutional requirement that a person subject to a tax must receive a direct benefit in return for the money contributed. Rather, the legitimacy and constitutionality of a tax is determined by the criteria discussed above.

E. The Statute is a Valid Exercise of the Police Power

Generally, the exercise of the state's police power must relate to the health, safety and welfare of the public and may not be arbitrarily and capriciously applied. Graham v. Estuary Properties, Inc., 399 So.2d 1374 at 1379 (Fla. 1981). A reviewing court such as this one will not usually disturb legislative discretion in classifying the subject of police regulation unless it is wholly without a reasonable basis; such a classification will not be declared unreasonable solely because opinions differ as to what should have been included or omitted in the legislation. Barts v. State, 447 So.2d 410 at 411 (Fla. 1st DCA 1984). Thus, as long as a classificatory scheme chosen by the Legislature rationally advances a legitimate governmental objective, the courts will disregard the method used in achieving the objective and the challenged enactment will be upheld. Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), aff'd, 452 So.2d 932 (Fla. 1984), appeal dismissed, 469 U.S. 1030 (1984). A court must not be concerned with whether the particular legislation in question is the most prudent choice, or is the perfect panacea, to cure the ill or achieve the interest intended; if there is a legitimate state interest which the Legislature aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld. State v. Walker, 444 So.2d 1137 at 1139 (Fla. 1st DCA 1984).

The legitimate state interests served by the legislation are clearly set forth in the preamble to Chapter 88-1, Laws of Florida:

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their non-economic losses, and
>
> WHEREAS, the people of Florida are concerned with the increased cost of litigation and the

need for a review of the tort and insurance laws, and

WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced, and

WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for non-economic losses which be awarded in certain civil actions, recognizing that such non-economic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensation for such losses is ultimately borne by all persons, rather than the tortfeaser alone, and

WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action, NOW, THEREFORE....

Given this strong pronouncement of compelling social need and the inherent authority and discretion of the Legislature to address such needs, Plaintiffs simply did not convince this court that the Legislature's decision to include them in the financing scheme of the Plan was "wholly without a reasonable basis."

(1) Due Process

The Legislature has broad discretion in determining necessary measures for the protection of the public health, safety and welfare and when the Legislature acts in these areas, a court may not substitute its judgment for that of the Legislature. State v. Thomas, 428 So.2d 327 at 331 (Fla. 1st DCA 1983).

In Department of Insurance v. Dade County Consumer Advocates Office, 492 So.2d 1032 (Fla. 1986), the Supreme Court noted the narrow grounds upon which a successful due process challenge can be waged: "When considering the validity of a legislative enactment, this Court may overturn the act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare or that the statute has no reasonable relationship to the state's avowed purpose."

Plaintiffs have conceded the Plan as a whole served legitimate state interests. See Plaintiffs' Motion for Summary Judgment, Page 7. However, Plaintiffs complained that the decision to require them to contribute financially to the Plan was unreasonable and violative of the due process clause because Plaintiffs bore no more relationship to the goals of the plan than a member of the general public. Specifically, Plaintiffs alleged the assessment is unconstitutional because physicians who are required to pay it do not obtain benefits from the Plan. This is so, they argued, because physicians who do not practice obstetrics and gynecoloy are not permitted to practice obstetrics within hospital settings and, since they cannot practice obstetrics, they do not receive the benefits otherwise provided to participating physicians.

The lack of participation and coverage in the face of the required fees and possible assessments formed the primary basis for Plaintiffs' constitutional attack on the statute. This position was entirely without merit.

The Plan bears a reasonable relationship to its stated purposes, by insuring the availability of obstetrical care to Florida citizens and by providing for the care of Florida children who suffer birth-related neurological injuries, and Plaintiffs bear a reasonable relationship to the Plan. As documented and reported by the Academic Task Force, physicians play a critical role in the delivery of health care services and all physicians were adversely affected by the medical malpractice crisis which

engulfed this state and severely disrupted the delivery of health care services and the day-to-day operations of hospitals throughout the state.

The Defendant's witness, Mr. Jay Weinstein, an expert in hospital administration, provided unrefuted testimony regarding the extent and effects of the disruption in the delivery of health care services. See Transcript of final hearing, pages 71-79, 81-85.

For example, various critical services including emergency room, trauma, obstetrical, and neurosurgery were reduced or eliminated and, consequently, remaining services were overloaded. Referrals among physicians were reduced and hospitals found it difficult to recruit and maintain staff. Access to major health care services was limited and, as a result, the relationship between the public and the medical profession deteriorated.

The effects of the disruption of obstetrical services are particularly severe. When those services are not provided, the emergency room staff is overloaded and "the system is pushed to the wall." Negative economic consequences befall the hospital as well, since mothers are a primary source of patient referrals for physicians in all specialties.

The devasting effects of the disruption in the delivery of obstetrical services were confirmed even by Plaintiffs' expert, Dr. Masterson, who, during questioning, testified:

Question: "Hypothetically, let's assume for a moment that all of the obstetrical physicians on that staff, because of malpractice premiums and because of--frankly, because of the problems associated with malpractice, including having to come to the courthouse and testify, and so forth, decided they had had enough. And they had decided that they have had enough so much that they decided to stop either treating indigent patients, which are sometimes a common problem pregnancy, or otherwise just stop practicing OB. Based on that hypothetical I gave you and your small knowledge of Jackson, would that have an effect on that hospital's operations?"

Answer: "It would be disastrous."

Question: "That disaster would permeate that hospital; wouldn't it?"

Answer: "I presume, yes."

See Transcript of final hearing, page 35.

Additionally, hospitals which do not provide obstetrical services are also negatively impacted by the crisis as they struggle to refer their patients to other, unfamiliar facilities.

Conversely, when the malpractice crisis is lessened and health care services can be delivered smoothly and efficiently, benefits will be seen and felt throughout the health care industry.

For example, access to health care services will be expanded as services which were eliminated or reduced during the crisis are again offered. Emergency rooms and trauma centers will re-open. Patient referrals will increase and physicians will be able to practice in pleasant and full service facilities. Essentially, the negative consequences of the malpractice crisis will be alleviated.

In light of these facts, Plaintiffs' claim that they are not related to the goals of this plan cannot be sustained. Health care services are delivered by a team of providers, all of whom interact and depend on one another. The malpractice crisis severely disrupted the delivery of health care services and all members of the "team" suffered. Since one of the goals of the Plan is to help alleviate the crisis and permit the efficient delivery of health care services by all members of the team, Plaintiffs are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization. This act is not a cure all, but will be a major contribution to the cure. Thus, the Legislature's decision to require Plaintiffs to contribute to the Plan was not wholly unreasonable, arbitrary, or capricious.

The Legislature has chosen a similar financing scheme in regard to another statutorily created plan, the Public Medical Assistance Trust Fund, found in Sections 409.266(2)(3), Florida Statutes, and related to the provisions of Section 395.101, Florida Statutes. See Transcript of final hearing, pages 109-11, 126. Under the provisions of the statutes which govern this trust fund, hospitals contribute to a fund to pay for indigent

care provided by hospitals around the state whether or not the hospitals themselves receive any benefits from the fund. In other words, the idea of requiring health care providers to contribute to a fund to "benefit" or pay for services rendered by others is nothing new. This fact supports the reasonableness of the Legislature's action in enacting the legislation at bar.

Perhaps there was another way to finance the plan; perhaps the Legislature could have chosen not to act at all. However, this court cannot and will not be concerned with whether the Legislature's choice was the most prudent or the most effective way to address the ill perceived. That is not the issue before this court. As long as the financial scheme chosen by the Legislature rationally advances a legitimate government objective, as so found today, this court will not second guess the method used in achieving the objective.

(2) Equal Protection

To comply with the requirements of the equal protection clause, statutory classifications must be reasonable and not arbitrary and all persons in the class must be treated alike. Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). The regulation of the practice of medicine does not involve a fundamental right or suspect class for purposes of the equal protection analysis, so the rational basis analysis applies. Woods v. Holy Cross Hospital, 591 F.2d 1164 (C.A. Fla. 1979).

The equal protection clause requires that a statutory line which draws distinctions and classifications be a rational one, bearing some rational relationship to a legitimate state purpose. Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075 (D.C. Fla. 1978). The equal protection clause does not require that the state choose between attacking every aspect of a problem or not attacking a problem at all; it is enough that the state's action be rationally based and free from invidious discrimination. Ivy Steel and Wire Company, Inc. v. City of Jacksonville, 401 F.Supp. 701 (M.D. Fla. 1975). The burden is on the party challenging a statute or regulation on equal protection grounds to show

there is no conceivable factual predicate which would rationally support the classification under attack. The rational basis for the governmental objective may be identified by statements of intent from legislative reports and journals, inferences by reference to similar legislation or actions taken by the legislative body, or from legal arguments of government before the court. Sasso v. Ram Property Management, 431 So.2d 204 at 216 (Fla. 1st DCA 1983). Where the challenging party fails to meet such a burden, the statute or regulation must be sustained. The Florida High School Activities Association, Inc. v. Thomas by and through Thomas, 434 So.2d 306 (Fla. 1983).

For the reasons already discussed, Plaintiffs' equal protection claim also cannot prevail. Plaintiffs have not demonstrated that the Legislature's classification was arbitrary or unreasonable or that there was no conceivable factual predicate to support the classification. To the contrary, the record established the legitimate public purposes served by the Plan, the Plaintiffs' relationship to the goals of the Plan, and the reasonableness of the classifications within the financing scheme. The method chosen by the Legislature to insure the financial viability of the Plan was reasonable and was not violative of the equal protection clause.

(F) The Assessment Does Not Improperly Pledge the Credit of the State or Delegate the State's Taxing Authority to the Commissioner of Insurance

Plaintiffs argued the imposition of the assessment contravenes Article VII, Section 10 of the Florida Constitution because the payments are made to the Florida Birth-Related Neurological Injury Compensation Association (hereafter the Association), which Plaintiff contends is a private entity. Plaintiffs' argument miscontrued the intent of the prohibition against pledging the state tax credit to aid a private entity.

Article VII, Section 10, provides, in pertinent part:

> Neither the state nor any county, school district, muncipality, special district, or agency of any of them, shall become a joint owner with, or stock holder of, or

> give, lend or use its taxing power or credit to aid any corporation, association, partnership or person.

Although the Association which administers the Plan is not an agency, board, or commission, it is not private in nature. The Association is exclusively a creature of the statute, formed solely to carry out the public purposes set forth by the Legislature. Payment of a state excise tax raised for a public purpose into a non-state entity has been accepted by the Florida Supreme Court. C.V. Floyd Fruit Company v. Florida Citrus Commission, 175 So. 248 (Fla. 1937). There is no "benefit or aid" inuring to the Association by virtue of its being the depository or manager of the Plan's various funds. To the contrary, all benefits that may arise from the Plan are for the general public, the infants whose injuries will be compensated, and the health care industry as a whole, including the Plaintiffs. When the Legislature makes a determination of public purposes, such as those purposes served by the legislation here, the party challenging that determination must show that such a determination was so clearly wrong as to be beyond the power of the Legislature. State v. Orange County Industrial Development Authority, 417 So.2d 959, 1962 (Fla. 1982). See also, State v. Osceola County Industrial Development Authority, 424 So.2d 739 (Fla. 1982). The Plaintiffs in this cause did not make such a showing.

Plaintiffs also contended that the provisions of the statute which grant to the Commissioner of Insurance the ability to levy additional assessments constitute an illegal delegation of the power to tax. This contention was without merit.

The provisions of Sections 766.314(7) and 766.315(5)(a)(c), Florida Statutes, (1988 Supp.), grant the Commissioner the authority to levy assessments to maintain the fund on an "actuarily sound basis" but only after an actuarial investigation has been completed.

The arguments raised by Plaintiffs in regard to this type of financing scheme have been addressed to, and disposed of by, the Florida Supreme Court. In Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983),

the Supreme Court dealt with a challenge to the authority granted to the Commissioner of Insurance to levy assessments against members of the Florida Patient's Compensation Fund. The court found no improper delegation of authority and upheld the constitutionality of the statute. The court noted that "the crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the Legislature's intent." The court then recognized that Florida courts have found the concept of actuarial soundness to be a meaningful standard and referred to Article X, Section 14, of the Florida Constitution which refers to a "sound actuarial basis." Article X, Section 14, Fla. Const.; Id. at 819.

The court further found there was no unconstitutional delegation simply because the Department of Insurance could determine the amount of the assessment. The Legislature may delegate to authorized officials and agencies the authority to determine facts to which the established policies of the legislature are to apply. The question of determining when a deficit exists or not is a technical issue of implementation and not a fundamental policy decision. Id. at 820.

The authority granted the Commissioner of Insurance to levy assessments as needed to maintain the (NICA) Plan on an actuarily sound basis satisfies the criteria set forth in Southeast Volusia Hospital District and does not constitute an unlawful delegation of the state's taxing authority.

The argument advanced by amicus curiae likewise fails when the provisions of Chapter 120, Florida Statutes, are considered. The Department's initial decision as to the amount of assessment to be levied, and the manner in which the assessment is distributed, constitutes "agency action", §120.52(2), Florida Statutes, giving rise to proceedings under §120.57, Florida Statutes.

As parties whose substantial interests are affected by the agency's free form action, amicus curiae, and others, will

have an opportunity to present evidence and argument in a trial type hearing. See McDonald vs. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

(G)The Assessment Does Not Violate the Privileges and Immunities Clause of the United States or Florida Constitutions

Finally, Plaintiffs alleged the assessment constitutes a violation of the privileges and immunities clause of the Florida and United States Constitutions. This argument was misplaced.

The singular goal of the privileges and immunities clause is to prohibit unequal treatment the citizens of one state in favor of the citizens of another. The privileges and immunities clause "was designed to insure to a citizen of state A who ventures into state B the same privileges which the citizens of state B enjoy." Toomer v. Witsell, 334 U.S. 385 (1948).

As clearly stated in Section 766.314(b), Florida Statutes (1988 Supp.), all physicians licensed under Chapters 458 and 459 of the Florida Statutes are subject to the equal assessment of $250. The excise applies equally to residents and non-residents of the state. It has absolutely no relation to the residence of the licensee but, instead, is an assessment upon the privilege of holding the license which enables the licensee to practice medicine in the State of Florida. As such, it is constitutionally sound. Winshare Club of Canada v. Department of Legal Affairs, 14 FLW 179, Florida Supreme Court, Opinion filed April 6, 1989.

While the assessment at issue may appear more burdensome or offensive to Florida licensed physicians who reside out-of-state and do not practice in the State of Florida, that perception is the result of the licensee's choice of residence and not as the result of any classification or special burden imposed by the statute.

CONCLUSION

In summary, this court recognizes and finds that statutes are presumed constitutional and any doubts regarding their validity should be resolved in favor of constitutionality. This court cannot substitute its judgment for that of the Legislature.

The financing scheme chosen by the Legislature to pay for the Florida Birth-Related Neurological Injury Compensation Plan is a valid exercise of the state's police power and is reasonably related to a legitimate governmental purpose. The assessment is not so oppressive or burdensome as to be unreasonable or arbitrary.

The statute contains sufficient guidelines to enable the Department of Insurance to levy assessments in a constitutional manner. The statute does not discriminate against out-of-state residents, since all licensed physicians, regardless of their residence, must pay an equal assessment.

Taken in their best light, Plaintiffs' complaints were primarily a disagreement with the Legislature's decision to fund the Plan through payments by physicians and others. Even if another financing method would have been better than the one chosen, such does not render this method unconstitutional. This court cannot inquire as to whether a legislative decision was the wisest or most effective but, rather, whether it was a reasonable one. The decision made by the Legislature in this instance was reasonable in light of the information before the Legislature and the severity of the problem it tried to address.

ORDERED AND ADJUDGED THAT:

Section 73 of Chapter 88-1, as amended by Sections 39 and 41 of Chapter 88-277, Laws of Florida, and codified at Section 766.314, Florida Statutes (1988 Supp.), is constitutional. Plaintiffs' request for relief is denied. The court retains jurisdiction regarding costs and fees.

DONE AND ORDERED this 12TH day of SEPTEMBER, 1989.

F.E. STEINMEYER, III
Circuit Court Judge

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766.314 Assessments; plan of operation.--

(4) The following persons and entities shall pay into the association an initial assessment in accordance with the plan of operation:. . .

(b)1. On or before October 15, 1988, all physicians licensed pursuant to chapter 458 or chapter 459 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.

766.314 Assessments; plan of operation.--

(5)(a) Beginning January 1, 1990, the persons and entities listed in paragraphs (4)(b) and (c), except those persons or entities who are specifically excluded from said provisions, 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). On January 1, 1991, and on each Janaury 1 thereafter, the association shall determine the amount of additional assessments necessary 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). On July 1, 1991, and on each July 1 thereafter, the persons and entities listed in paragraphs (4)(b) and (c), except those persons or entities who are specifically excluded from said provisions, shall pay the additional assessments which were determined on January 1. Beginning January 1, 1990, the entities listed in paragraph (4)(a), including those licensed on or after October 1, 1988, shall pay an annual assessment of $50 per infant delivered during the prior calendar year. The additional assessments which were determined on January 1, 1991, pursuant to the provisions of subsection (7) shall not be due and payable by the entities listed in paragraph (4)(a) until July 1.

766.314 Assessments; plan of operation--

(7)(b) 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.