

IN THE SUPREME COURT OF FLORIDA
Case No. SC04-1051

Upon Request from the Attorney General
for an Advisory Opinion as to the
Validity of a Financial Impact Statement

**ADVISORY OPINION TO
THE ATTORNEY GENERAL**

RE: THE MEDICAL LIABILITY CLAIMANT'S
COMPENSATION AMENDMENT

**AMENDED COMBINED INITIAL AND ANSWER BRIEF
OF FLORIDIANS FOR PATIENT PROTECTION**

IN OPPOSITION TO THE FINANCIAL IMPACT STATEMENT

JON MILLS
Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
P.O. Box 2099
Gainesville, Florida 32602
Telephone: (352) 378-4154
Facsimile: (352) 336-0270

PAUL JESS
Florida Bar No. 348082
218 South Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 224-9403
Facsimile: (850) 224-4254

Counsel to Interested Party
Floridians for Patient Protection

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND STANDARD FOR REVIEW 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. THE PROPOSED FINANCIAL IMPACT STATEMENT IS DEFECTIVE BECAUSE IT DOES NOT DISCLOSE THAT THE FISCAL ANALYSIS PREDICTS SIGNIFICANT COSTS DEPENDENT ON VARIED INTERPRETATIONS OF THE INITIATIVE’S AMBIGUOUS LANGUAGE, IT IS INACCURATE, AND IT IS INCONSISTENT WITH OTHER SUCH STATEMENTS PROPOSED AT THE SAME TIME 4

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF TYPEFACE COMPLIANCE 12

TABLE OF AUTHORITIES

Cases:

Armstrong v. Harris,
773 So. 2d 7 (Fla. 2000) 3,4,6

Askew v. Firestone,
421 So.2d 151 (Fla. 1982) 3

Fremont Lumber Co. v. Energy Facility Siting Council,
936 P.2d 968 (Or. 1997) 6,7,8

*In re Advisory Opinion to the Attorney General re
Casino Authorization, Taxation and Regulation*,
656 So. 2d 466 (Fla. 1995) 3

*In re Title, Ballot Title & Submission Clause, & Summary,
Concerning Ltd. Gaming in the City of Antonito*,
873 P.2d 733 (Colo. 1994) 6

In re Proposed Initiative on Parental Rights,
913 P.2d 1127 (Colo. 1996) 5-6,9

Florida Constitutional Provisions:

Article IV, Section 10 2

Florida Statutes:

Section 16.061, as amended by Chapter 04-33, Laws of Florida 2

Section 100.371, as amended by Chapter 04-33, Laws of Florida 1-3

Section 101.161, as amended by Chapter 04-33, Laws of Florida 3

STATEMENT OF THE CASE AND
STANDARD FOR REVIEW

This combined Initial and Answer brief is filed to discuss the standard for review for a proposed financial impact statement, and to demonstrate how the proposed financial impact statement in this case is incomplete, inaccurate, and inconsistent with other such statements proposed at the same time. The proposed financial impact statement does not reflect the actual analysis made by the Financial Impact Estimating Conference, and should be remanded for revision.

This matter involves the Court's review of a financial impact statement for an initiative entitled "The Medical Liability Claimant's Compensation Amendment." Section 100.371(6)(a), Fla. Stat., provides that the "Financial Impact Estimating Conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative." The proposed financial impact statement shall be "clear and unambiguous," and no more than 75 words long. § 100.371(6)(b)3., Fla. Stat. The proposed financial impact statement may set forth a range of estimated costs. *Id.* If a majority of the Financial Impact Estimating Conference cannot agree on a proposed financial impact statement, the statement shall read "The financial impact of this measure, if any, cannot be

reasonably determined at this time.” § 100.371(6)(b)4., Fla. Stat..

On June 25, 2004, the Financial Impact Estimating Conference submitted a proposed financial impact statement to the Attorney General. The proposed financial impact statement reads, in its entirety: “The direct financial impact this amendment will have on state and local government revenues and expenditures cannot be determined.”

On June 29, 2004, the Attorney General sent the financial impact statement to the Court for review under Art. IV, § 10, Fla. Const., and § 16.061, Fla. Stat., and this Court requested interested parties to file briefs regarding this Court’s duties and responsibilities in a review of the financial impact statement under § 100.371, Fla. Stat., and the application of those duties to the proposed statement. The substance of this proposed initiative was briefed and argued in Case No. 04-310.

The statutory standard for review by this Court is: “Any financial impact statement that a court finds not to be in accordance with this section shall be remanded solely to the Financial Impact Estimating Conference for redrafting.” § 100.371(6)(b)3., Fla. Stat.

This is the first opportunity for the Court to implement the new financial impact statement procedure amended this year. Nevertheless, this Court has some guidance concerning the implementation of this new procedure. Section

100.371(6)(b)3. requires financial impact statements to be “clear and unambiguous.”¹

These requirements are reinforced by similar standards for ballot title and summary under § 101.161(1), Fla. Stat. (Ballot title and summary shall be “clear and unambiguous,” and shall set forth the “chief purpose” of the proposed amendment). Thus, the chief difference between the standards for this review and for a ballot title and summary is that a title and summary need only disclose the “chief purpose” of an amendment, while the financial impact statement could disclose effects beyond the “chief purpose.” Otherwise, the clarity and ambiguity standards would seem to be similar.

¹ This Court has a long history of cases addressing clarity and ambiguity in ballot titles and summaries. *See, e.g., Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982) (if an amendment does not do what its summary says, the summary is defective); *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000) (voters must be told “true meaning and ramifications of the amendment”). Where the financial impact statement contains a suggestion that is erroneous as a matter of law, the statement should be considered defective. *In re Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (summary created a false impression by suggesting it would help ban casinos when it actually authorized them); *Armstrong v. Harris*, 773 So. 2d at 17 (citizens reading summary may have voted for amendment thinking they were protecting state rights, when in reality they were lessening them).

In addition, several other states have similar procedures which can guide this Court in its review. Some of these and other Florida precedents in this area are treated in detail in Floridians for Patient Protection’s Combined Initial and Answer Brief in Case No. 1052, at 3-5.

SUMMARY OF ARGUMENT

The one-sentence proposed financial impact statement does not reflect the full analysis by the Financial Impact Estimating Conference. The Conference found that the proposed amendment was so ambiguous that costs would be determined by which interpretations were selected. The financial impact statement itself must disclose that there is a likely expectation that there will be such costs, and that if there are any such costs, they will be substantial. In addition, the proposed statement makes errors of legal interpretation in making its analysis, and such errors would invalidate financial impact statements in other states. Finally, the proposed statement here is substantially different than those proposed in other similar cases, and in a manner which adversely affects the public debate. The proposed financial impact statement should be remanded for revision.

ARGUMENT

I. THE PROPOSED FINANCIAL IMPACT STATEMENT IS DEFECTIVE BECAUSE IT DOES NOT DISCLOSE THAT THE FISCAL ANALYSIS PREDICTS SIGNIFICANT COSTS DEPENDENT ON VARIED INTERPRETATIONS OF THE INITIATIVE'S AMBIGUOUS LANGUAGE, IT IS INACCURATE, AND IT IS INCONSISTENT WITH OTHER SUCH STATEMENTS PROPOSED AT THE SAME TIME.

The proposed one-sentence financial impact statement is not adequate. First,

it fails to reflect the actual analysis completed by the Estimating Conference. This initiative is so ambiguous that it could be reasonably interpreted any number of ways. *See* Initial Br. of Floridians for Patient Protection, Case No. 04-310, at 1-6. The full fiscal analysis of the Financial Impact Estimating Conference reflects the ambiguity of the proposed amendment:

The Financial Impact Estimating Conference principals have found it difficult to determine the potential financial impact on state and local governments. Terms such as “reasonable and customary costs,” “received by the claimant” and “all damages received” versus “all damages” are subject to varying definition and financial impacts.”

INITIATIVE FINANCIAL INFORMATION STATEMENT – The Medical Liability Claimant’s Compensation Amendment (“Information Statement”), at 1.

The proposed impact statement here fails to make clear that the reason the impact cannot be determined is not because there will not be costs, but because the initiative is so ambiguous that any of a variety of possible costs could be considered.² In other states, this type of ambiguity has to be reflected in the financial impact statement. *See, e.g., In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1133 (Colo. 1996)(upholding statement reading “because the

² Since the proposed amendment states that it is effective immediately and self-executing, these questions are unlikely to be remedied by the courts before any of these costs fall on state and local governments. *See, e.g.,* Initial Brief of Floridians for Patient Protection, Case No. 04-310, at 14-18.

simplicity of the measure raises a question as to the scope of its interpretation, the fiscal impact of the measure is indeterminate.”).³

Yet that is not the most significant problem with the proposed financial impact statement. The most egregious ambiguity in the proposed amendment is in its failure to either treat or exclude liens; this is also the source of the most difficulty in estimating costs. In its answer brief, the sponsor conceded that the only way to avoid single-subject problems was to add language to or interpret the initiative as though it exempted liens and third-party obligations from the scope of the “guarantee” that a claimant would “receive” at least 70% of what the claimant “received.” *See* Answer Br. of Citizens for a Fair Share, Case No. 04-310 at 16.

Under this Court’s ballot title and summary decisions, a statement which conceals dramatic ambiguities would be fatally defective. *See, e.g., Armstrong*, 773 So. 2d at 18 (voters must be told of “true meaning and ramifications of the amendment”). Yet this financial impact statement contains no such information for

³ *See, also, e.g., Fremont Lumber Co. v. Energy Facility Siting Council*, 936 P.2d 968, 973 (Or. 1997)(fiscal impact statement on regulation invalid because it failed to “state clearly and affirmatively that costs might be involved, so that interested persons are alerted to that possibility”); *In re Title, Ballot Title & Submission Clause, & Summary, Concerning Ltd. Gaming in the City of Antonito*, 873 P.2d 733, 742 (Colo. 1994)(Board must present a clear, fair and neutral fiscal impact statement so that the electorate is appropriately informed of the measure’s fiscal impact); .

the voters. It simply says that costs “cannot be determined.”

Either this statement is not true or it is misleading. The full analysis makes clear that unless liens are excluded in some fashion from the amendment, there will be a financial effect on state and local governments; the principals simply cannot figure out the “exact costs.” Information Statement, at 1, 3.

If public assistance liens are within the definition of “reasonable and customary costs,” then there will not be a financial impact on state and local governments. If public assistance liens are not within the definition of “reasonable and customary costs,” then there may be a financial impact on state and local governments based on uncollected liens. The Financial Impact Estimating Conference principals are **unable to determine the exact cost to state and local governments as a result of uncollected liens**, but the state may face some unrecoverable Medicaid costs.

Information Statement, at 1 (emphasis added).

Yet where there will be some costs, but the magnitude is unpredictable, the statement must still alert voters to the likelihood of **some** costs. *See, e.g., Fremont Lumber Co.*, 936 P.2d at 973 (fiscal impact statement invalid because it failed to “state clearly and affirmatively that costs might be involved, so that interested persons are alerted to that possibility.”).

It is important to note that the Information Statement uses **different** logic than the sponsors to justify excluding liens from the scope of the proposed amendment. Sponsors simply say that liens are excluded without further

explanation. Answer Br., *supra*, at 16 (“the amendment does no such thing.”). The Information Statement excludes them as “reasonable and customary costs.” But “reasonable and customary costs” are usually related to bringing or maintaining the suit, while liens are virtually always pre-existing and independent of the suit.

In other states, mistakes of this significance would doom a financial impact statement. *See, e.g., Fremont Lumber Co.*, 936 P.2d at 265 (Or. 1997) (“an honest error about the law is, nevertheless, an error, and may render a statement of fiscal impact inadequate.”). Thus, the proposed financial impact statement is defective both because it does not tell voters that there may be a significant fiscal effect depending on reasonable interpretations of the many ambiguities in the initiative, and because it uses a flawed legal analysis to reach its conclusion. This statement is fatally flawed for the same reason that the underlying amendment is flawed: the initiative is so ambiguously drafted that it will require substantial judicial interpretation to avoid any fiscal impact. That fact must be disclosed to the voters.

In a final contrast, the proposed financial impact statements for the three other amendments referred by the Attorney General to the Court on June 29 make clear that the Financial Impact Estimating Conference is capable of making these fine predictions and distinctions. Each of the other three statements explains fiscal impact in greater detail. While two of the three state that costs “cannot be

determined” or “cannot be fully determined,” they also add additional information for the voters. One proposed statement explicitly discusses both direct and indirect costs. Only the instant proposed statement offers voters no clues that they may be buying significant costs.

The proposed financial impact statement is due some deference, but it must alert voters that there is potential fiscal impact from the ambiguities in the amendment. It must also be based on accurate understandings of the law involved. Only in that way can it be both “clear and unambiguous” to the voters. This proposed statement is neither clear nor unambiguous to the voters.

The proposed statement should be remanded to the Financial Impact Estimating Conference with instructions to revise it to incorporate a statement regarding the inability to estimate the magnitude of costs but that substantial costs can be expected, depending on how the amendment is interpreted.

As an example, a variation of that approved in *Parental Rights*, 913 P.2d at 1133, would be both clear and unambiguous:

Because the proposed amendment has many possible interpretations of its scope and effects, the full financial impact of the measure cannot be reasonably determined at this time, but there are expected to be substantial financial impacts under some of these

interpretations.

CONCLUSION

The proposed Financial Impact Statement should be remanded for revision.

RESPECTFULLY SUBMITTED,

JON MILLS

Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
P.O. Box 2099
Gainesville, Florida 32602

PAUL JESS
Florida Bar No. 348082
218 South Monroe Street
Tallahassee, Florida 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 6th day of July, 2004, to the following:

The Honorable CHARLES J. CRIST
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

The Honorable JOHNNIE BYRD
The Florida House of Representatives
The Capitol, Suite 420
Tallahassee, Florida 32399-1300

The Honorable GLENDA E. HOOD
Office of the Secretary of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250

The Hon. STEPHEN H. GRIMES,
Esq. SUSAN L. KELSEY, Esquire
Holland & Knight, LLP
P.O. Box 810
Tallahassee, Florida 32302-0810

The Honorable JEB BUSH
Office of the Governor
PL 05 The Capitol
Tallahassee, Florida 32399-0001

The Hon. SANDRA B. MORTHAM
Citizens for a Fair Share
P.O. Box 10269
Tallahassee, Florida 32302

The Honorable JAMES E. KING, JR.
The Florida Senate
The Capitol, Suite 409
Tallahassee, Florida 32399-1100

Mr. JAMES LaCROSSE,
Financial Impact Estimating Conf.
Office of Econ. & Demographic
Research
Claude Pepper Building, Room 576
111 West Madison Street
Tallahassee, Florida 32399-1400

PAUL JESS
Florida Bar No. 348082

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP. P.

PAUL JESS
Florida Bar No. 348082