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**TWELVE WAYS PLAINTIFFS ATTEMPT TO AVOID A DETERMINATION  
OF NICA COMPENSABILITY IN A MEDICAL MALPRACTICE CASE**

A medical malpractice claim almost always involves complicated medical and legal issues, years of litigation, large accumulation of legal costs and considerable risk of significant damages. These factors are enhanced in cases involving a neurological injury to a newborn infant.

The Florida legislature recognizes these greater risks and created The Florida Birth-Related Neurological Injury Compensation Association (NICA) in 1988. (No Fault Compensation for Birth-Related Neurological Injuries to Infants.) NICA is a statutorily based organization that manages the Florida Birth-Related Neurological Injury Compensation Plan. The plan provides payments from a statutorily created fund to care for neurologically impaired infants.

The NICA statute specifies several requirements for bringing a compensable claim under the plan. If a claim is not eligible under NICA, it can be pursued as a lawsuit in the circuit court where the case initiated, like any medical malpractice claim.

If the claim falls under the purview of NICA, its resolution is limited in several ways:

1. The claim will be determined in an administrative court by an administrative law judge, rather than a jury; and
2. The value of a claim will be limited to a recovery of \$100,000, regardless of the severity of the injuries or future cost for care. The value further will be limited to \$10,000 in the event the incident results in death to an infant.

There are at least **twelve** factors that must be met for a claim to be properly relegated to NICA compensability. They include the following:

1. **THE INJURY MUST BE A NEUROLOGICAL INJURY.**

A neurological injury is an injury to the brain or spinal cord. A brachial plexus injury does not qualify for NICA compensability when it involves a tear, rather than an avulsion of the spinal nerves.

2. **THE INJURY MUST HAVE OCCURRED DURING BIRTH.**

During birth, neurological injury must occur in the course of labor, delivery or resuscitation in the immediate post-delivery period. Thus, if any injury is one that creates a utero or one that occurs when the baby is a few weeks old, there is no NICA compensability.

3. **THE INJURY MUST BE DUE TO OXYGEN DEPRIVATION OR MECHANICAL INJURY.**

This is an either/or situation; the claim is compensable under NICA if there is either oxygen deprivation or mechanical injury which results in substantial mental and physical impairment.

4. **THE INJURY MUST BE A SUBSTANTIAL MENTAL AND PHYSICAL IMPAIRMENT.**

The NICA statute requires that the injury renders the infant permanently and substantially mentally and physical impaired. The infant must be substantially mentally **and** physically impaired.

5. **THE INFANT MUST BE BORN ALIVE.**

The definition of birth-related neurological injury provided in F.S. § 766.3(2) states that the injury must occur to a live infant. The term infant means a baby that is already born and living outside the mother's womb.

6. **THE BIRTH IN THE ALLEGED INJURY MUST OCCUR IN A HOSPITAL.**

Such an injury must occur "in a hospital." Hospital is defined by Florida Statutes as any hospital licensed in Florida. Births at home and at other non-hospital settings will be excluded.

7. **THE ALLEGED INJURY CANNOT BE DUE TO A GENETIC OR CONGENITAL ABNORMALITY.**

A congenital abnormality is not compensable under NICA.

8. **THE INFANT MUST WEIGH 2500 GRAMS OR 2000 GRAMS IN THE EVENT OF MULTIPLE GESTATION.**

The weight of the infant at time of birth must be at least 2500 grams or for multiple gestations, the weight must be at least 2000 grams. Often when an infant is born prematurely, the infant will not meet the weight requirement in the statute; thus, the claim will not be compensable.

9. **THE HEALTH CARE PROVIDERS MUST BE PARTICIPATING PHYSICIANS IN HOSPITALS.**

NICA requires that participating hospitals **and** physicians give pre-delivery notice to obstetrical patients of their participation in NICA.

10. **THE PATIENT MUST CONSENT TO TREATMENT BY NICA HEALTH CARE PROVIDERS.**

The participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met.

11. **THE CHILD MUST BE YOUNGER THAN 5 YEARS OLD AT THE TIME OF ABATEMENT TO NICA.**

There is a statute of repose on bringing the claim under NICA beyond the child's fifth birthday. This issue can come up where the parents were led to believe that the child's condition was due to a genetic issue but they later found out that the condition was something other than genetics and file a claim after the child's fifth birthday.

12. **THERE MUST NOT BE BAD FAITH OR MALICIOUS PURPOSE OR WILLFUL AND WANTON DISREGARD;**

Breaches in the standard of care that are done with bad faith, malicious purpose or willful and wanton disregard of human rights, safety, or property are not compensable under NICA.

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

12 Ways Plaintiffs Attempt to Avoid a Determination  
of NICA Compensability in a Medical Malpractice Case  
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The plaintiff retains the ability to return the matter to the court system in limited circumstances. If one of the factors listed above is not present, a plaintiff, after filing a petition for benefits under NICA, can move for the ALJ to issue a summary final order, which requires the ALJ to determine whether the claim is NICA compensable.

Doing so exhausts the administrative process; and thus, if the claim is not NICA compensable, civil remedies can then be sought in the circuit court case. The plaintiff can challenge a NICA compensability through a motion for final order challenging the applicability of anyone of the above twelve factors.

JAR/lcr/tsr

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