EXTENDING SOVEREIGN IMMUNITY TO FLORIDA MEDICAID PROVIDERS:

A FISCAL AND LEGAL ANALYSIS

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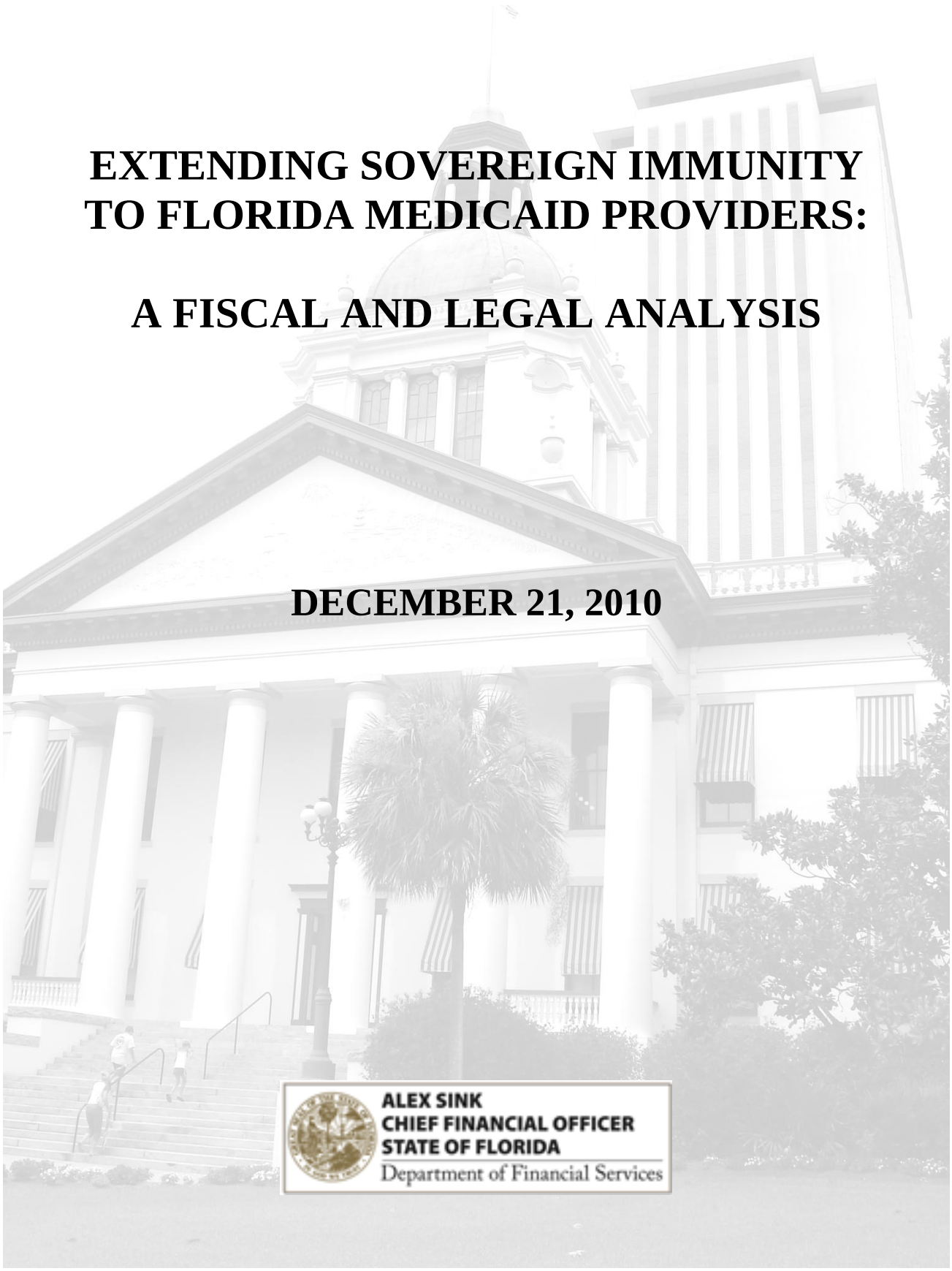

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Introduction

On November 16, the Florida Legislature passed, by voice vote, a resolution expressing its intent to reform the Florida Medicaid program during the 2011 regular session. Part of the resolution stated that "the Florida Legislature resolves to enact reforms that establish a more fair and predictable civil justice system and reduce disincentive for serving Medicaid participants." (S.B. 4A – Nov. 16, 2010). The intent of this provision is to extend sovereign immunity protection to all health care providers who treat Medicaid patients. In the 2010 regular session, the Legislature considered a bill to extend sovereign immunity protection to emergency healthcare providers, but that bill did not make it out of committee. The Medicaid sovereign immunity bill is likely to be structured in the same manner as the proposed emergency healthcare bill.

This report discusses the background of sovereign immunity and its function within Florida law, including the likely method of giving Medicaid providers sovereign immunity protection. The report then analyzes the fiscal impact of extending sovereign immunity. The fiscal analysis includes both the potential savings to healthcare providers and the potential cost to the state. Finally, the report discusses possible legal challenges to extending sovereign immunity.

The Function of Sovereign Immunity

The term "sovereign immunity" comes from the English common law concept that the government, in the form of the King, could not be sued because "the King can do no wrong." Today, sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of those government entities, although the state may chose to waive its sovereign immunity protection.

Article X, s.13 of the Florida Constitution recognizes the existence of sovereign immunity and gives the Legislature the right to waive that immunity through general law. Section 768.28, Fla. Stat., contains the limited waiver of sovereign immunity passed by the Legislature. Under that section, employees, officers, and agents of the state and local governments are not held personally liable for negligence committed during the scope of his or her employment or function, unless the employee acts in bad faith or with malicious purpose.

Instead of holding the employee or agent liable, the state takes the place of the employee and defends the claim. Section 768.28(5) limits the amount of recovery in any claim against the state to $100,000 per person and $200,000 per incident. Effective October 1, 2011, the limits will rise to $200,000 per person and $300,000 per incident.

In order to extend the state's sovereign immunity protection to healthcare providers, the providers will need to be designated as agents of the state within the meaning of §768.28, Fla. Stat. Agents of the state are provided with sovereign immunity through a contractual relationship. The emergency healthcare immunity bill would have created voluntary, uncompensated contracts between the state and healthcare providers in order to provide the healthcare providers with sovereign immunity. The legislation extending sovereign immunity to Medicaid providers will likely use the same method, requiring providers to enter into agency contracts with the state in order to receive immunity.

To establish a legally valid agency relationship, the state agency acting as the principal must retain direction and control over the manner and scope of work to be completed by the agent. Simply calling a healthcare provider an "agent of the state" in a contract may not be enough if the state agency has little involvement in actually directing and controlling the agent's work. Under generally established principles of agency law, an agent is held immune from negligence liability because it is equitable to do so if the agent was only doing the bidding of the principal, and the agent had no real control over the actions that led to the liability.

The Cost of Extending Sovereign Immunity and State Insurance Coverage

A. Summary of Findings

The total fiscal impact to the state of Florida under the proposed legislation is estimated to be approximately $69,000,000 per year. This estimate is based upon the state being responsible for indemnity payments of as much $200,000 per claimant and $300,000 for multiple claimants under the revised Tort Claims Act limits effective October 1, 2011.

The cost of any claims bills that may be passed by the legislature to compensate claimants in excess of these limits has not been included in this estimate due to lack of claims bill experience applicable to the proposed legislation. The $69,000,000 estimated fiscal impact is based upon the state administering, investigating and defending an estimated 551 claims per year costing an average of $125,000 each.

The future fiscal impact on the state will depend upon trends in the number of medical professional liability (MPL) claims and the average cost per claim. The number of MPL claims has been declining, but the average cost per MPL claim has been increasing, consequently total costs of closed claims have been relatively stable for the last four years.

Future trends in the number of claims and average cost per claim are difficult to predict. However, because of the liberalized eligibility provisions in the federal *Patient Protection and Affordable Care Act*, it is expected that Medicaid enrollment will increase in the future, and consequently, it is expected that the fiscal impact upon the state of the proposed legislation will increase in the future.

The Florida Office of Insurance Regulation's 2009 Medical Malpractice Closed Claim Database (Database), which forms the basis of this analysis, may not be representative of current MPL claim cost trends and conditions, because MPL claims are reported at closure, which is often several years after the date of occurrence. Nevertheless, the total cost of closed MPL claims has been very stable for the last four years (Exhibit 2). The average time from occurrence of an MPL claim until its final disposition is estimated to be approximately 3.4 years (Exhibit 4).

B. Methodology

The Florida Office of Insurance Regulation's 2009 Medical Malpractice Closed Claim Database (Database) was used to estimate the fiscal impact to the state of the proposed legislation. The following table summarizes the MPL claims experience in the Database (Exhibit 2):

Indemnity	$570,322,129
Legal Defense Fees	129,387,693
Other Cost Containment Expenses	37,154,083
Total Cost	$736,863,905
Number of Closed Claims	3,087
Average Closed Claim	$238,699

To estimate the fiscal impact under the proposed legislation the indemnity of each claim in the Database was limited to a maximum of $200,000. Legal defense fees and other cost containment expenses were then allocated based on the ratio of excess indemnity to total indemnity for claims with indemnity greater than $200,000. The resulting total costs are a conservative estimate of the costs less than the Tort Claims Act limits, because they do not consider the higher cap of $300,000 for multiple claimants arising out of a single occurrence.

An adjustment based on actuarial judgment was then applied to adjust for the $300,000 limit for multiple claimants. The resulting costs divided between costs below and in excess of the Tort Claims Act Limits are as follows (Exhibit 3):

	$200,000 Limit	%	$200,000 / $300,000 Limit
Less Than Tort Limits	$347,178,405	47.1%	50.0%
Greater Than Tort Limits	$389,685,500	52.9%	50.0%
	$736,863,905	100.0%	100.0%

The estimated fiscal impact to the state assumes that Medicaid enrollees cost their pro rata share (based on percentage of the population enrolled in Medicaid) of the cost of MPL claims. Medicaid enrollees are estimated to compose 17.8% of the population of the state of Florida. The pro rata calculation of the fiscal impact to the state is summarized in Exhibit 1. It is assumed that some additional administrative overhead expense costs will also be incurred by the state in addition to the costs included in the Database.

Such costs are estimated to be 5.0% of the fiscal impact of the cost of claims and include overhead expenses from other state agencies, such as information systems, general accounting and state administration. Additionally such administrative overhead costs are assumed to include: 1) fees of adjusters and settling agents, 2) attorney fees incurred in the determination of coverage, and 3 fees or salaries for appraisers, private investigators,

hearing representatives, re-inspectors and fraud investigators, if working in the capacity of an adjuster.

C. Data Sources

The data used in this analysis was taken from the *Annual Reports, Medical Malpractice Financial Information, Closed Claim Database and Rate Filings* issued by the Florida Office of Insurance Regulation and from the Medical Professional Liability Closed Claim Database used to prepare the *2010 Annual Report, Medical Malpractice Financial Information, Closed Claim Database and Rate Filings.*

The following disclaimer has been issued for this data: "Neither the Department of Financial Services nor the state of Florida accepts legal liability or responsibility for the accuracy, completeness or usefulness of this information on closed claim reports filed by insurers".

The Database has not been audited or validated, and it cannot be assured that all of the entities required to report to the Database have reported.

The Database includes closed MPL claims reported by: "self-insurers, commercial self-insurance funds, authorized insurers, surplus lines insurers, risk retention groups, and joint underwriting associations providing professional liability insurance to medical providers," (s. 627.912, F.S.).

Each reporting entity is required to report for each claimant the total dollars awarded to all claimants, regardless of each claimant's actual share of damages. Therefore, duplicate dollars are input into the database. However, it has been determined in the course of this analysis that the Office of Insurance Regulation has eliminated these duplicates from the Database provided for this analysis and from its annual reports.

The Database may not be representative of current MPL trends and conditions, because claims are reported at closure, which is often several years after the date of occurrence. Nevertheless, the total cost of closed MPL claims has been very stable for the last four years (Exhibit 2). The average time from occurrence of an MPL claim until its final disposition is estimated to be approximately 3.4 years (Exhibit 4).

D. Assumptions Used in Calculation

The fiscal impact analysis is based on the following key assumptions:

1) The 2009 closed claim experience used for the *2010 Annual Report, Medical Malpractice Financial Information, Closed Claim Database and Rate Filings* is representative of what the state of Florida can expect to experience in the future after passage of the proposed legislation. It is believed that this assumption is reasonable, because the total cost of closed MPL claims has been very stable for the last four years (Exhibit 2)

2) Medicaid enrollees' MPL claims costs are comparable to the costs of non-Medicaid recipients. Consequently, Medicaid enrollees' share of statewide MPL claims costs will approximate their share of the population of the state of Florida.

3) The total costs to the state will include administrative costs as well as costs to indemnify injured Medicaid enrollees, the cost to defend all claims made against the state, the costs of expert witnesses, surveillance expenses; fixed amounts for medical cost containment expenses; litigation management expenses; fees or salaries for appraisers, private investigators, hearing representatives, re-inspectors and fraud investigators, if working in defense of a claim, and fees or salaries for rehabilitation nurses.

4) Administrative costs will equal 5.0% of the MPL claims costs assumed by the state under the proposed legislation. Such administrative costs will include overhead expenses from other state agencies, including information systems, general accounting, and state administration. Administrative costs will also include fees of adjusters and settling agents; attorney fees incurred in the determination of coverage; and fees or salaries for appraisers, private investigators, hearing representatives, re-inspectors and fraud investigators, if working in the capacity of an adjuster.

5) In addition to the above assumptions stated in the report, other assumptions underlie the calculations and results.

Legal Challenges to Extending Sovereign Immunity

A. Access to the Courts

Extending sovereign immunity protection to Medicaid providers would effectively create a two-tiered justice system for medical malpractice claims – recovery would be capped for some plaintiffs but not for others. Article I, Section 21 of the Florida Constitution provides that the court system "shall be open to any person for redress of any injury, and justice shall be administered without sale, denial, or delay." Any law extending sovereign immunity protection would be challenged as violating the "access to the courts" provision of the Constitution.

The Florida Supreme Court held in *Kluger v. White* that the Legislature may not abolish or modify a cause of action in the courts without "providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."[1] The *Kluger* decision concerned a limitation on the minimum amount of damages awardable, but in *Smith v. Department of Insurance*, the Court affirmed that the *Kluger* holding was applicable to restrictions on the maximum amount of recoverable damages, holding that "neither restriction is permissible unless one of the *Kluger* exceptions is met."[2]

There is no indication that the Legislature will provide an alternative to the courts for Medicaid patients who desire to bring malpractice claims against their healthcare providers. Therefore, in order to pass the *Kluger* test, the Legislature must show an "overwhelming necessity" for extending sovereign immunity to Medicaid providers. If the Legislature cannot show such necessity in the Legislative findings and intent portion of the bill extending sovereign immunity, the bill will be unable to pass the *Kluger* test for constitutionality.

B. Determination of Agent Status

The extension of sovereign immunity to Medicaid providers may also be challenged on the grounds that the Medicaid providers are not truly agents of the state and thus not protected by the state's immunity. A person may share in governmental immunity only when acting within the scope of a true agency relationship with a sovereign government.[3] The existence of a true agency relationship is normally a question for the fact finder to decide. The elements necessary to establish an agency relationship are: 1) acknowledgement by the principle that the agent will act for him, 2) the agent's acceptance of the task, and 3) control by the principle over the actions of the agent.[4]

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[1] *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).
[2] *Smith v. Department of Insurance*, 507 So. 2d 1080, 1088 (Fla. 1987).
[3] *Dorse v. Armstrong World Industries, Inc.*, 513 So. 2d 1265, 1268 (Fla. 1987).
[4] *Goldschmidt v. Holman*, 571 So. 2d 422, 424 (Fla. 1990).

Any challenge to the agency status of Medicaid providers will focus on the third element, control over the agent's actions. The right of control, not actual control, determines the agency relationship.[5] Therefore, the agency contract between the Medicaid providers and the State of Florida must reserve for the state the right to control the actions of the providers when they treat Medicaid patients. If the state lacks the right of control, the providers will not be agents of the state and will not share in the extension of the state's sovereign immunity.

[5] *Hickman v. Barclays Intern. Realty, Inc.*, 5 So. 3d 804, 806 (Fla. 4th DCA 2009).

Conclusion

Extending sovereign immunity protection to Medicaid providers will be very expensive for the state of Florida. The cost to the state is estimated to be $69 million, and that cost will likely increase as more individuals become eligible for Medicaid. In addition, any law extending sovereign immunity protection is likely to be challenged on constitutional grounds, and there is no guarantee that the courts will uphold such a law.

The rationale for giving Medicaid providers sovereign immunity protection is that the liability caps associated with sovereign immunity will make healthcare providers more willing to take on Medicaid patients. However, no research has been done that supports that rationale. Florida is the first state in the country to consider extending sovereign immunity protection to Medicaid providers, and the Legislature should carefully consider all possible ramifications of such a decision.

Exhibit 1

Extension of Sovereign Immunity to Medicaid Providers
Fiscal Impact of Legislation

	Per Claim	Total
(1) Closed Claims Costs for 2009 Calendar Year		$736,863,905
(2) Medicaid Enrollees		3,307,686
(3) Florida Population		18,537,969
(4) Percent of Florida Population Enrolled in Medicaid		17.8%
(5) Number of Medical Liability Closed Claims in 2009 Calendar Year		3,087
(6) Medical Liability Claims Costs for Medicaid Enrollees	$238,699	$131,476,885
(7) Number of Claims by Medicaid Enrollees		551
(8) Percent of Claims Costs Less Than Tort Claims Act Limits	50.0%	50.0%
(9) Savings on Claims in Excess of Tort Claims Act Limits	$119,350	$65,738,443
(10) Cost of Claims Below Tort Claims Act Limits	$119,350	$65,738,443
(11) Adminstrative Costs per Closed Claim	$5,967	$3,286,922
(12) Total Fiscal Impact of Legislation	$125,000	$69,000,000

Notes:

(1) Exhibit 2
(2) www.StateHealthFacts.org, Florida, 2010
(3) US Census Bureau estimate for 12/31/09
(4) (2) / (3)
(5) Exhibit 2
(6) (1) x (4)
(7) (4) x (5)
(8) Exhibit 3, Column (5)
(9) (6) - (10)
(10) (6) x (8)
(11) 5.0% x (10), based on actuarial judgment. Includes overhead expenses from other state agencies, such as information systems, general accounting, or state administration. Also includes: 1) fees of adjusters and settling agents, 3) attorney fees incurred in the determination of coverage, 4) fees or salaries for appraisers, private investigators, hearing representatives, re-inspectors and fraud investigators, if working in the capacity of an adjuster.
(12) (10) + (11), rounded to the nearest thousand dollars per claim and nearest million dollars in total.

Exhibit 2

Medical Malpractice Closed Claims
State of Florida

		2009	2008	2007	2006	2005
(1)	Indemnity	$570,322,129	$519,091,049	$523,644,436	$530,973,921	$492,869,563
(2)	Legal Defense Fees	129,387,693	137,413,305	174,737,224	166,031,692	133,984,552
(3)	Other Cost Containment Expenses	37,154,083	43,685,772	42,263,676	61,597,440	50,088,039
(4)	Total Cost	$736,863,905	$700,190,126	$740,645,336	$758,603,053	$676,942,154
(5)	Number of Closed Claims	3,087	3,336	3,553	3,811	3,751
(6)	Average Closed Claim	$238,699	$209,889	$208,456	$199,056	$180,470

Notes:

(1) - (3) & (5) Florida Office of Insurance Regulation, Annual Reports, Medical Malpractice Financial Information, Closed Claim Database and Rate Filings

(5) Approximately half the closed claims had zero payment for indemnity.

(6) (4) / (5)

Exhibit 3

Extension of Sovereign Immunity to Medicaid Providers
Percentage of Costs Less Than Tort Claims Act Limits

	(1)	(2)	(3)	(4)	(5)
	Indemnity	Defense and Cost Containment	$200,000 Limit	%	$200,000 / $300,000 Limit
Costs Less Than Tort Claims Act Limits	$213,877,633	$133,300,772	$347,178,405	47.1%	50.0%
Costs Greater Than Tort Claims Act Limits	$356,444,496	$33,241,004	$389,685,500	52.9%	50.0%
	$570,322,129	$166,541,776	$736,863,905	100.0%	100.0%

Notes:

(1) Florida Office of Insurance Regulation, 2009 Medical Malpractice Closed Claim Database. Indemnity capped at $200,000 per claim. This is a conservative estimate of the costs less than the Tort Claims Act Limits, because it does not consider the higher cap of $300,000 for multiple claimants arising out of a single occurrence.

(2) Defense and cost containment expenses allocated based on the ratio of excess indemnity to total indemnity for claims with indemnity greater than $200,000.

(3) (1) + (2)

(4) (3) / (3) Total

(5) Application of a $200,000 limit for single claimants and a $300,000 limit for multiple claimants, based on actuarial judgment

Exhibit 4

Extension of Sovereign Immunity to Medicaid Providers
Average Time to Settle Medical Liability Claims

	Total days	Report to Disposition	Occurrence to Report
Admiral Insurance Company	1,027	437	590
Anesthesiologists Professional Assurance Company	1,344	1,126	218
Columbia Casualty Company	1,748	1,241	507
Continental Casualty Company	1,218	699	519
Darwin Select Insurance Company	552	267	285
Doctors' Company, An Interinsurance Exchange (The)	1,245	646	599
Evanston Insurance Company	887	298	589
First Professionals Insurance Company, Inc	1,524	975	549
Florida Doctors Insurance Company	868	403	464
Healthcare Underwriters Group Of Florida	1,159	729	430
Lexington Insurance Company	1,154	771	387
MAG Mutual Insurance Company	1,424	823	601
Medical Protective Company (The)	1,699	1,093	606
National Union Fire Insurance Co. Of Pittsburgh, PA	730	246	484
Ophthalmic Mutual Insurance Company (A R.R.G.)	2,417	1,676	741
Physicians Insurance Company	1,105	634	472
Physicians Professional Liability Risk Retention Group, Inc.	1,365	950	416
Podiatry Insurance Company Of America	1,375	781	594
Proassurance Casualty Company	1,521	1,010	511
Samaritan Risk Retention Group, Inc.	783	218	564
Average Days	1,257	751	506
Average Years	3.44	2.06	1.39

Note:

Florida Office of Insurance Regulation, 2010 Annual Report, Medical Malpractice Financial Information, Closed Claim Database and Rate Filings