

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL: SB 1172

SPONSOR: Senator Jones

SUBJECT: Birth-Related Neurological Injury

DATE: April 4, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Chinn</u>	<u>Maclure</u>	<u>JU</u>	Favorable
2.	<u>Munroe</u>	<u>Wilson</u>	<u>HE</u>	Favorable
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 1172 clarifies that under the Florida Birth-Related Neurological Injury Compensation Plan (the “plan”), the administrative law judge (“ALJ”) presiding over a claim for compensation has the exclusive jurisdiction to make the factual determination of whether the statutory notice requirement has been met. Additionally, the bill authorizes the Florida Birth-Related Neurological Injury Compensation Association (NICA), which administers the plan, to contract with the State Board of Administration to invest and reinvest plan funds. NICA already has the authority to invest plan funds, and Senate Bill 1172 is clarifying that the State Board of Administration is one of the entities with whom NICA may contract for this service.

This bill amends sections 766.309 and 766.315, Florida Statutes.

II. Present Situation:

The Florida Birth-Related Neurological Injury Compensation Plan was enacted by the Legislature in 1988.¹ Currently, Virginia is the only other state in the nation that has a no-fault coverage plan that is similar to Florida’s plan.² The compensation plan was created to provide compensation, long-term medical care, and other services to persons with birth-related neurological injuries. Although the benefits paid under the plan are more restricted than the remedies provided by tort law, the plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing to resolve the claim.³

¹ Sections 60-75, ch. 88-1, L.O.F., were enacted by the Legislature in an attempt to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics, according to the legislative findings and intent cited in s. 766.301(1)(c), F.S.

² Governor’s Select Task Force on Healthcare Professional Liability Insurance, *Report and Recommendations*, p. 307 (2003).

³ See *Florida Birth-Related Neurological Injury Compensation Ass’n v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).

A “birth-related neurological injury” as defined in s. 766.302(2), F.S., is an injury to the brain or spinal cord of a live infant caused by oxygen deprivation or by mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital. An injury addressed by this statute renders the infant permanently, substantially mentally, *and* physically impaired.⁴

Florida Birth-Related Neurological Injury Compensation Association (NICA)

The entity charged with administering the plan is the Florida Birth-Related Neurological Injury Compensation Association (NICA). Under s. 766.315(4), F.S., NICA’s duties in association with “administering the plan” include:

- Administering the plan, itself;
- Administering the funds collected;
- Reviewing and paying claims;
- Directing the investment and reinvestment of any surplus funds over losses and expenses;
- Reinsuring the risks of the plan in whole or in part;
- Suing and being sued, appearing and defending, in all actions and proceedings in its name; and
- Taking such legal action as may be necessary to avoid payment of improper claims.⁵

NICA states that its mission is to encourage physicians to practice obstetrics and make obstetrical services available to patients, to stabilize and help make malpractice insurance available to all physicians, and to provide needed care to injured children.⁶

The funding for the plan is derived from an appropriation by the Legislature when the plan was created and annual fees paid by physicians and hospitals.⁷ For a physician to participate in the plan’s coverage, the physician must pay an annual fee of \$5,000.⁸ For birth-injured infants, funds from the plan are used to provide the following:

- Necessary and reasonable care, services, drugs, equipment, facilities, and travel;⁹
- One-time cash award, not to exceed \$100,000, to the infant’s parents or guardians;¹⁰

⁴ The Governor’s Select Task Force on Healthcare Professional Liability Insurance (the “task force”) suggested that the definition of “birth-related neurological injury” could be expanded to include mental *or* physical injury, but the task force recommended against making any changes to plan eligibility until further inquiry has been conducted. See *supra* note 2, at p. 308. The Office of Program Policy Analysis and Government Accountability conducted a study of NICA eligibility requirements and issued a report January, 2004. (OPPAGA Report #04-04)

⁵ s. 766.315(4), F.S.

⁶ Florida Birth-Related Neurological Injury Compensation Association (NICA), “What is NICA?” *NICA – Florida’s Innovative Alternative to Costly Litigation*, at http://nica.com/jsps/whatis/whatis_nica.jsp.

⁷ s. 766.314, F.S., requires non-participating physicians to pay \$250 per year, participating physicians to pay \$5,000 per year, and hospitals to pay \$50 per infant delivered during the prior year.

⁸ s. 766.314(4)(d), F.S., allows a hospital located in a county with a population of more than 1.1 million to pay the physician’s dues of \$5,000.

⁹ Expenses that can be compensated by state or federal governments, or by private insurers, are not covered by the plan.

¹⁰ Often the award is paid out over time to assist the parents or guardians in making necessary modifications to living quarters to accommodate a disabled child.

- Death benefit of \$10,000 for the infant; and
- Reasonable expenses for filing the claim, including attorney's fees.

Section 766.315(5)(e), F.S., specifies that funds held on behalf of the plan are funds of the State of Florida. NICA may only invest plan funds in the investments and securities described in s. 215.47, F.S., and NICA is subject to the limitations on investments contained in that section. All income derived from investments is credited to the plan.

Filing for Benefits Under s. 766.305, F.S.

A claim for benefits under the plan must be filed within five years of the birth of the infant alleged to be injured.¹¹ First, the parents or guardian of the infant must file a petition with the Division of Administrative Hearings (DOAH). Then, DOAH serves a copy of the petition upon NICA, the physician(s) and hospital named in the petition, and the Division of Medical Quality Assurance in the Department of Health.¹² Within ten days of filing the petition, the parents or guardian must provide NICA all medical records, assessments, evaluations and prognoses, documentation of expenses, and documentation of any private or governmental source of services or reimbursement relative to the impairments.

Upon receipt of the petition and medical records, NICA has 45 days to file a response to the petition and submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. NICA bases its response to the petition on a review of the medical documentation submitted with the claim and an independent medical examination of the infant or child. An ALJ from DOAH will set a hearing on the claim to be conducted 60-120 days from the petition filing date.

The issue of whether the claim for compensation is covered by the plan is determined exclusively in an administrative proceeding.¹³ The ALJ presiding over the hearing makes the following determinations:

- Whether the injury claimed is a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician;
- How much compensation, if any, is awardable under s. 766.31, F.S.; and
- Whether the notice requirements under s. 766.316, F.S., have been met.¹⁴

If the ALJ determines that an injury meets the definition of a birth-related neurological injury, compensation from the plan is the exclusive legal remedy.¹⁵ If the ALJ determines that the injury alleged is not a birth-related neurological injury or that the obstetrical services were not delivered by a participating physician, the ALJ will enter an order to that effect. If any party

¹¹ s. 766.313, F.S.

¹² Only infants born in a hospital are covered by the plan.

¹³ s. 766.301(1)(d), F.S.

¹⁴ The first three determinations listed are found in s. 766.309(1), F.S. The determination of notice is not explicitly provided for in this section; however case law suggests that the determination of notice is also within the ALJ's exclusive jurisdiction.

¹⁵ s. 766.303(2), F.S., only allows a civil action in place of a claim under the plan where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property.

chooses to appeal the ALJ's order under s. 766.309, F.S., the appeal must be filed in the District Court of Appeal.¹⁶

Notice Requirements Under s. 766.316, F.S.

Section 766.316, F.S., requires each hospital with a physician participating in the plan and each physician participating in the plan to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. The notice must be provided on forms furnished by NICA and must include a clear and concise explanation of a patient's rights and limitation under the plan. The hospital or participating physician may elect to have the patient sign a form acknowledging receipt of the notice. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements have been met.

III. Effect of Proposed Changes:

Notice

Senate Bill 1172 addresses the ALJ's jurisdiction regarding notice determinations in claims filed under the plan. The bill adds a paragraph to s. 766.309(1), F.S., to clarify that it is the exclusive jurisdiction of the ALJ to determine whether the notice requirement in s. 766.316, F.S., has been met. By clearly providing the ALJ jurisdiction to determine notice, the bill would prevent separate circuit court proceedings any time notice becomes an issue in a claim under ss. 766.301-766.316, F.S.

Section 766.301(1)(d), F.S., currently provides that, "[t]he issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding." In addition, s. 766.309(1), F.S., provides specific determinations of fact that the ALJ must find in order to grant benefits under the plan. The proposed language combines the ideas espoused in these sections and in court rulings to unequivocally provide that the determination of whether notice has been satisfied rests with the ALJ.

Granting exclusive jurisdiction to determine notice to the ALJ will enact into law what is already the practice in four of the five District Courts of Appeal. At present, with the exception of the Second District Court of Appeal, the District Courts of Appeal interpret the statute to provide that the ALJ already has the exclusive jurisdiction over determining whether the notice requirement has been met.¹⁷ In *Tabb v. Florida Birth-Related Neurological Injury Compensation Association*, the First District Court of Appeal reasoned that "[i]n order to 'hear and determine' a claim, an ALJ must, almost of necessity, decide whether notice was given, because if no notice was given, the exclusivity provision of the statute does not apply." In addition, the court pointed to recent amendments to the statute that implicitly acknowledge the existing case law indicating that an ALJ has jurisdiction to determine whether notice was provided.¹⁸

¹⁶ s. 766.311(1), F.S.

¹⁷ See *Tabb v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 880 So.2d 1253, 1258 (Fla. 1st DCA 2004) [following *O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 757 So.2d 624 (Fla. 5th DCA 2000); *Univ. of Miami v. M.A.*, 793 So.2d 999 (Fla. 3d DCA 2001); *Gugelman v. Div. of Admin. Hearings*, 815 So.2d 764 (Fla. 4th DCA 2002)].

¹⁸ *Tabb*, 880 So.2d at 1257, notes that, in 2003, the Legislature added s. 766.309(4), F.S., which reads

Section 2 of the bill specifies that the amendment to s. 766.309, F.S., contained in the bill is intended to clarify that since July 1, 1998, the ALJ has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.316, F.S., are satisfied.

Contracting for Investment

Senate Bill 1172 authorizes NICA, which administers the plan, to contract with the State Board of Administration to invest and reinvest plan funds. NICA already has the authority to invest plan funds, and the bill is clarifying that the State Board of Administration is one of the entities with whom NICA may contract for this service.

NICA is currently authorized to invest plan funds in the investments and securities described in s. 215.47, F.S., and is also subject to the same limitations found in that section. The bill authorizes NICA to utilize the State Board of Administration to provide NICA an additional source for managing investments at no cost to the state.

This bill provides that it will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Section 2 of the bill specifies that the amendment to s. 766.309, F.S., contained in the bill is intended to clarify that since July 1, 1998, the ALJ has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.316, F.S., are satisfied. Currently, there are four cases in the Second District Court of Appeal that have been certified to the Florida Supreme Court for a ruling on the issue of whether the ALJ

If it is in the interest of the judicial economy or if requested to by the claimant, the administrative law judge may bifurcate the proceeding addressing compensability and notice pursuant to s. 766.316 first, and addressing an award pursuant to s. 766.31, if any, in a separate proceeding. The administrative law judge may issue a final order on compensability and notice which is subject to appeal under s. 766.311, prior to issuance of an award pursuant to s. 766.31.

has the exclusive jurisdiction to determine whether the notice requirement under s. 766.316, F.S., has been satisfied. No final determination of benefits under the plan can be made until notice has been determined. Parents and guardians who have filed for compensation for birth-related neurological injuries will not receive any benefits until a determination on the notice requirement in these cases is made. A bill may provide that its provisions apply retroactively if there is no constitutional proscription against making them retroactive; the act overcomes the presumption that it applies only prospectively by explicitly providing for retroactive application; and its title conveys notice of this retroactive application.¹⁹ There is no express constitutional prohibition against retroactive noncriminal statutes, however retroactive application of statutes that impair the obligations of contracts or vested rights is invalid.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Currently, there are four cases in the Second District Court of Appeal that have been certified to the Florida Supreme Court for a ruling on the issue of whether the ALJ has the exclusive jurisdiction to determine whether the notice requirement under s. 766.316, F.S., has been satisfied. No final determination of benefits under the plan can be made until notice has been determined. Parents and guardians who have filed for compensation for birth-related neurological injuries will not receive any benefits until a determination on the notice requirement in these cases is made. By providing that the ALJ has the exclusive jurisdiction to determine notice, these cases could be resolved.

C. Government Sector Impact:

Providing a clear directive that it is the ALJ who has exclusive jurisdiction for the determination of notice in claims filed under ss. 766.301-766.316, F.S., would streamline the claims process. In addition, it would remove cases that could be settled at the administrative hearing phase from the court system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

¹⁹ See *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077 (Fla. 1978) and *Chiapetta v. Jordan*, 16 So.2d 241 (Fla.1943) as cited in *The Florida Senate Manual for Drafting General Bills*, Fifth Edition, 1999

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
