

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1539
SPONSOR(S): Berfield
TIED BILLS:

Florida Birth-Related Neurological Injury Compensation Plan
IDEN./SIM. BILLS: SB 1172

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--|-----------------|---------------|------------------|
| 1) <u>Civil Justice Committee</u> | <u>4 Y, 0 N</u> | <u>Kruse</u> | <u>Billmeier</u> |
| 2) <u>Insurance Committee</u> | <u></u> | <u>Cooper</u> | <u>Cooper</u> |
| 3) <u>Health Care Appropriations Committee</u> | <u></u> | <u></u> | <u></u> |
| 4) <u>Justice Council</u> | <u></u> | <u></u> | <u></u> |
| 5) <u></u> | <u></u> | <u></u> | <u></u> |

SUMMARY ANALYSIS

This bill clarifies that pursuant to the Florida Birth-Related Neurological Injury Compensation Plan (plan), the administrative law judge presiding over a claim for compensation has the exclusive jurisdiction to make the factual determination of whether the statutory notice provision 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 currently has authority to invest plan funds, and HB 1539 clarifies that the State Board of Administration is one of the entities with whom NICA may contract for this service.

This bill does not have a fiscal impact on state or local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

The Florida Birth-Related Neurological Injury Compensation Plan (the “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

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 and 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 or association). Under s. 766.315(4), F.S., NICA’s duties 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

The association 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

¹ Chapter 88-1, ss. 60-75, L.O.F., was 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).

⁴ The Governor’s Select Task Force on Healthcare and Professional Liability Insurance (“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 had been conducted. See *supra* at p. 308.

⁵ Section 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*, available at http://nica.com/jsps/whatis/whatis_nica.jsp.

⁷ Section 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.

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

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.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 administrative law judge (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; and
- How much compensation, if any, is awardable under s. 766.31, F.S.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 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 Requirement under S. 766.316, F.S.

Section 766.316, F.S., requires any hospital with a participating physician on its staff, and each participating physician under the Florida Birth-Related Neurological Injury Compensation Plan to

⁸ Section 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.

¹¹ Section 766.313, F.S.

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

¹³ Section 766.301(1)(d), F.S.

¹⁴ Section 766.309(1), F.S. The determination of notice is not explicitly provided for in this section.

¹⁵ Section 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.

¹⁶ Section 766.311(1), F.S.

provide notice to an obstetrical patient as to the limited no-fault alternative for birth-related neurological injuries. The notice must:

- be provided on forms furnished by the association; and
- include a clear and concise explanation of a patient's rights and limitations under the plan.

This section also states that notice does not need to be provided to a patient when the patient has an emergency medical condition or when notice is not practicable.

The notice provision is a critical factor in the Florida Birth Related Neurological Injury Compensation plan. The issues of the importance of the notice and the timeliness of the notice came before the Florida Supreme Court in *Galen of Florida, Inc., v. Braniff*, 696 So. 2d 308 (Fla. 1997). In this case, the court had to consider the question of whether a health care provider must provide notice to an obstetrical patient *pre-delivery* of the provider's participation in the Florida Birth Related Neurological Injury Compensation plan in order for the provider to invoke NICA as the patient's exclusive remedy.¹⁷ The court found that the notice requirement must be delivered to the obstetrical patient in a reasonable amount of time prior to delivery, except where notice was impractical.¹⁸ The court made clear that the pre-delivery notice was essential to give the obstetrical patient an opportunity to choose another non-participating provider, which in turn would preserve the patient's civil remedies.¹⁹

Who determines whether notice has been properly provided has also come before the courts. Granting to the ALJ exclusive jurisdiction to determine notice will enact into law what is apparently 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. In *Tabb v. Florida Birth-Related Neurological Injury Compensation Association*, 880 So. 2d 1253, 1256 (Fla. 1st DCA 2004), 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.

HB 1539

Notice

This bill addresses the administrative law judge's jurisdiction regarding notice determinations in claims filed under the Florida Birth-Related Neurological Injury Compensation Plan (the "plan"). The bill adds a paragraph to s. 766.309(1), F.S., to clarify that it is the exclusive jurisdiction of the administrative law judge (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, this bill may prevent separate circuit court proceedings any time notice becomes an issue in a claim under ss. 766.301-766.316, F.S.

The bill also states that it is the intent of the Legislature that the amendment contained in this act clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.31, F.S., are satisfied.

Contracts for Investment

This bill also authorizes NICA, which administers the plan, to contract with the State Board of Administration to invest and reinvest plan funds. NICA currently has the authority to invest plan funds,

¹⁷ *Id.* at 308, 309.

¹⁸ *Id.* at 310.

¹⁹ *Id.*

and this 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.

C. SECTION DIRECTORY:

Section 1. Amends s. 766.309, F.S., to clarify that it is the exclusive jurisdiction of the administrative law judge to determine whether the notice requirement in s. 766.316, F.S., has been met.

Section 2. States that it is the intent of the Legislature that the amendment contained in this act clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.31, F.S., are satisfied.

Section 3. Amends s. 766.315, F.S., to authorize the State Board of Administration to invest and reinvest funds for NICA.

Section 4. Provides that the bill will take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.

2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.

2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Currently, there are four cases from the Second District Court of Appeal that have been certified to the Florida Supreme Court on conflict jurisdiction for a ruling on the issue of whether the administrative law judge has the exclusive jurisdiction to determine whether the notice requirement under s. 766.316, F.S., has been satisfied.²⁰ No final determination of benefits under the Birth-Related Neurological Injury Compensation Plan can be made until notice has been determined. Parents and guardians who have filed for compensation for birth-related neurological injuries in these cases will not receive any benefits until a determination on the notice requirement is made. By providing that the administrative law judge has the exclusive jurisdiction to determine notice, these cases may be resolved.

D. FISCAL COMMENTS:

None.

²⁰ 3/21/05 Conversation with NICA representative.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Florida courts have found that the Legislature has the authority to apply law retroactively as long as the new law does not impair a vested right.²¹ Courts have used a weighing process to decide whether to sustain the retroactive application of a statute that has three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.²² In this instance, the bill does not appear to impair a vested right of a claimant or defendant, but rather seeks to serve the public interest. The bill makes clear that an administrative law judge (ALJ) has exclusive jurisdiction to determine if the notice requirements were met.

B. RULE-MAKING AUTHORITY:

N/A.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A.

²¹ *Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 277 (Fla. 1978) (citing *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949)).

²² *Supra Knowles* at 1158.