

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 542

INTRODUCER: Senator Jones

SUBJECT: Birth-Related Neurological Injury

DATE: February 27, 2006

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 542 provides that under the Florida Birth-Related Neurological Injury Compensation Plan (the 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 requirements have been met. The language also provides for retroactive application of the proposed statutory revision so that it will apply from July 1, 1998, forward.

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 the bill 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, and creates one undesignated section of law.

II. Present Situation:

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

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*, at 307 (2003).

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, 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 related to 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, and 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 Florida Birth-Related Neurological Injury Compensation 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 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:

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 Professional Liability Insurance 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 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*, 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.

⁸ Section 766.314(4)(d), F.S., allows a hospital located in a county with a population of more than 1.1 million as of January 1, 2003, to pay the physician’s dues of \$5,000.

- 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 under the plan, including attorney's fees.¹¹

Filing for Benefits

A claim for benefits under the plan must be filed within five years of the birth of the infant alleged to be injured.¹² 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.¹³ Within 10 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.¹⁴ 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.¹⁵

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.¹⁶ If the ALJ determines that the injury alleged is not a birth-related neurological injury or that a participating physician did not deliver the obstetrical services, the ALJ will enter an order to that effect. The ALJ may also

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 766.31, F.S.

¹² Section 766.313, F.S.

¹³ Only infants born in a hospital are covered by the plan.

¹⁴ Section 766.301(1)(d), F.S.

¹⁵ Section 766.309(1), F.S. The determination of notice by an ALJ is not explicitly provided for in *this* section but is alluded to in s. 766.309(4), F.S., where a bifurcated procedure is outlined for determining whether statutorily required notice under s. 766.316, F.S., has been met.

¹⁶ 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.

bifurcate the proceeding and address compensability and notice (see “Notice” subsection below) first, and address an award, if any, in a separate proceeding.¹⁷ 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.¹⁸

Notice

Section 766.316, F.S., requires any hospital with a participating physician on its staff and each participating physician under the plan, to 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 provides 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. This section does not specifically address the effect of failure to provide notice to the obstetrical patient.

Courts have addressed the issue of who determines whether notice has been properly provided. Four of the five District Courts of Appeal have held that the ALJ has the exclusive jurisdiction to determine whether notice has been properly provided. The Second District Court of Appeal most recently addressed the issue of notice determination in *Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Association*, affirming its approach that the ALJ’s jurisdiction extends only to the determination of whether the child suffered a neurological injury that was compensable under the plan.¹⁹ The court recognized the conflict with the other district courts of appeal, but declined to recede from its holding and certified the conflict to the Florida Supreme Court.²⁰ 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.”²¹ Additionally, the court in *Tabb* 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.

The Florida Supreme Court had not entertained arguments on whether the ALJ has the jurisdiction to decide whether the notice requirements have been met until recently, when the court heard oral arguments on two consolidated Second District cases on January 11, 2006.²² The court has yet to issue its ruling on these cases.

¹⁷ Section 766.309(4), F.S.

¹⁸ Section 766.311(1), F.S.

¹⁹ 893 So. 2d 636 (Fla. 2d DCA 2005).

²⁰ *Id.* at 637-638.

²¹ 880 So. 2d 1253, 1256 (Fla. 1st DCA 2004).

²² *Florida Birth-Related Neurological Injury Compensation Assn. v. Ferguson*, 869 So. 2d 686 (Fla. 2d DCA, 2004); *All Children’s Hosp., Inc. v. Dept. [sic.] of Admin. Hearings*, 863 So. 2d 450 (Fla. 2d DCA 2004) See Case No. SC04-227 and Case No. SC04-666.

III. Effect of Proposed Changes:

Notice

Senate Bill 542 addresses jurisdiction regarding notice determinations in claims filed under the plan. The bill adds a paragraph to s. 766.309(1), F.S., to provide that it is the exclusive jurisdiction of the ALJ to determine whether the notice requirements in s. 766.316, F.S., have been met. As discussed above, the notice provision requires any hospital with a participating physician on its staff and each participating physician under the plan, to provide notice to an obstetrical patient as to the limited no-fault alternative for birth-related neurological injuries. By clearly providing the ALJ jurisdiction to determine notice, the bill would prevent separate circuit court proceedings to determine notice in claims filed 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 would combine the ideas espoused in these sections and in court rulings to provide that, the determination of whether notice has been satisfied rests with the ALJ.

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 ALJ has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.316, F.S., have been satisfied.

Contracting for Investment of Funds

The bill 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.²³ 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 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.

²³ Section 766.315(5)(e), F.S.

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, Section 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:

Florida courts have found that the Legislature has the authority to apply a law retroactively as long as the new law does not impair a vested right.²⁴ Courts have used a weighing process to decide, whether to sustain the retroactive application of a statute, which 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.²⁵

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 administrative law judge has the exclusive jurisdiction to determine whether the notice requirements under s. 766.316, F.S., have been satisfied. The Supreme Court recently accepted review of two consolidated Second District cases and heard oral arguments on the issue of notice on January 11, 2006. 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 will not receive any benefits until a determination on the notice requirements 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.

²⁴ *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); *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949).

²⁵ *Knowles*, 402 So. 2d at 1158.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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