



Insight from Carlton Fields

2011

Presuit Nuts 'n Bolts

By Edward J. Carbone

“Presuit is a joke anyway — it’s just a hurdle they make us jump through before we can file suit.”

(anonymous plaintiff’s medical malpractice attorney, paraphrased)

Florida is one of several states that has perceived a litigation crisis affecting the health care industry and has responded to that crisis by placing restrictions on the filing and prosecution of lawsuits for medical malpractice. Florida’s approach to medical malpractice reform began in 1985 by requiring potential plaintiffs in medical malpractice cases to provide a notice of intent to each prospective defendant, and to certify in any eventual complaint that they had conducted a reasonable investigation resulting in a good faith belief that sufficient grounds existed to support the filing of the action.¹ In 1988, the Legislature added a “presuit investigation” requirement, which included provisions permitting potential parties to conduct “informal discovery” before a complaint was filed.² Florida’s “presuit” statutory scheme has been modified several times since then, with the most recent revisions coming as part of the comprehensive medical malpractice reform special legislative session in 2003.³

As evidenced by the quote at the top, not all participants in the presuit process take it seriously. Some — perhaps many — view it as perfunctory, a nuisance,

a mere speed bump on the way to a lawsuit. Beyond argument, not all participants in the presuit process are fully engaged in an attempt to seek prompt resolution of a potential malpractice claim. But just because “they” aren’t doesn’t mean you shouldn’t be. Presuit poses challenges but it also provides opportunities. Prospective defendants, their insurers, and their counsel should be aware of the challenges and should take full advantage, where appropriate, of the opportunities provided by the Florida Legislature.

This article will provide a detailed look at the presuit process as it currently exists, highlighting some of the recent changes to the statutory scheme and paying particular attention to the history of appellate opinions discussing judicial sanctions for presuit misconduct.

I. Overview of Florida Medical Malpractice Statutory Scheme

A. What claims must be subjected to presuit screening?

All claims for “medical negligence” are subject to the statutory presuit requirements. A claim for medical negligence is defined as “a claim, arising out of the rendering of, or the failure to render, medical care or services.”⁴ Simple enough, right? Wrong. Is it a claim for medical negligence when a claim alleges burns from a cup of hot tea requested by a hospital patient, obtained and served by a hospital nurse?⁵ How about

©2012 Carlton Fields, PA. All rights reserved.

Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our website at www.carltonfields.com. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the author and do not necessarily reflect those of the Firm.



Presuit Nuts 'n Bolts

a slip-and-fall by a hospital patient walking from hospital bed to patient room bathroom?⁶ How about an injured jaw when a dental x-ray machine hits the patient while being positioned by the dental technician?⁷ How about burns when an electrical stimulation machine malfunctions during physical therapy treatment?⁸ How about an improper Baker Act commitment because of a laboratory error?⁹ How about a tainted meal served to a hospital patient by the hospital nursing staff?¹⁰ OK, what about a claim alleging that a hospital's purchasing and supply staff failed to take a recalled surgical stapler out of circulation, thus permitting it to be used in a surgical procedure, in which the stapler misfired resulting in injury?¹¹

Though the interpretation and application of the standard might possibly be described as inconsistent, the definition of a claim for medical negligence remains unchanged and deceptively simple: a claim arising out of the rendering of, or the failure to render, medical care or services. In general, it seems that if the conduct that led to injury was an intrinsic part of the patient's treatment, presuit requirements apply. If the conduct was not an intrinsic part of the patient's treatment, even if it occurred during the course of treatment, and even if it could not possibly have occurred absent treatment, presuit requirements do not apply.

B. What is the statutory goal?

The stated statutory goal of the presuit scheme varies based on when the question is asked, which edition of the scheme is in effect — and who is being asked to define it. However, the stated goal is typically a variation on the same theme: to assure the availability of quality medical care to Floridians by controlling the high and escalating cost of medical liability claims. The present edition of the presuit scheme, in the Legislature's estimation, is designed to alleviate the high cost of medical negligence claims by requiring

early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.¹² The entire concept of "presuit" was designed to deter meritless claims and to facilitate the early determination and prompt resolution of medical malpractice claims.¹³

C. How did we get here?

In the beginning, there were sections 768.495 and 768.57, which begat section 766.104 and 766.106. And it was good. Well, sort of. But not good enough. So on the second day, the Legislature created sections 766.201 through 766.212.¹⁴ And it was good. Well, sort of. But it wasn't entirely consistent with what had come before. There were conflicting arbitration provisions,¹⁵ references to statutory definitions that no longer existed, and other similar glitches. For fifteen years, Florida health care providers and medical malpractice lawyers went forth and multiplied in this legislative wilderness with only the occasional common law directional sign¹⁶ to guide them.

Then, in 2003, the Legislature enacted a comprehensive reform of the medical malpractice statutory scheme. As part of that reform — far less publicized than the damage caps that attracted all the media attention — the Legislature made some minor changes to harmonize the "Old Testament" (766.104 and 766.106) and the "New Testament" (766.201-.212) of chapter 766 presuit law, and inserted some substantive changes of varying significance into each.

The 2003 medical malpractice reform brought four principal changes to the presuit statutory scheme, each of which will be discussed in greater detail below:



Presuit Nuts 'n Bolts

- 1) the definition of who can testify as a standard of care expert in medical malpractice actions was clarified, and an attempt was made to narrow it;¹⁷
- 2) theory finally acknowledged years of practice, as “written questions” were expressly added to the list of informal discovery techniques permitted during presuit;¹⁸
- 3) the arbitration process in section 766.106 was deleted, leaving only the section 766.207 “New Testament” version;¹⁹ and
- 4) the damages available in arbitration under section 766.207 were expressly limited to those provided by general law,²⁰ eliminating the “glitch” that had previously affected arbitration of wrongful death claims.²¹

D. What does the current statutory scheme entail?

The current presuit statutory scheme consists of two main phases — both called “presuit investigation” in the statute, but which this discussion will call “presuit screening” and “presuit investigation” — and an optional phase, presuit arbitration. The presuit screening period begins when a potential claimant gets the idea that he or she might be a claimant, and ends when a Notice of Intent to Initiate Medical Negligence Litigation (Notice of Intent or NOI) is served on one or more potential defendants. The presuit investigation period begins when a potential defendant receives a Notice of Intent, and ends either when that potential defendant serves a response to the Notice of Intent or at the expiration of the statutory 90-day period, whichever comes first. Presuit arbitration only happens if one potential party requests voluntary binding arbitration of damages and at least one potential adversary accepts that offer.

The next section of this article will examine each of the major components of presuit in greater detail.

II. Presuit Screening Period (Claimant’s Pre-NOI Investigation)

Section 766.203(2) succinctly imposes upon medical malpractice claimants two simple obligations. First, conduct a reasonable investigation — before sending a Notice of Intent — to ascertain a) that there are reasonable grounds to believe that any named defendant was negligent and b) that such negligence resulted in injury to the claimant. Second, obtain corroboration of reasonable grounds to initiate medical negligence litigation by obtaining a verified written medical expert opinion (Written Opinion).

Section 766.204 aids claimants in undertaking a reasonable investigation by requiring record holders to supply copies of medical records within 10 business days of a request for copies. Failure to comply, or failure to charge a reasonable charge for the copies, constitutes evidence of that party’s failure to comply with good faith discovery requirements and, more importantly, “shall waive the requirement of written medical corroboration by the requesting party.”²² In other words, if a health care provider fails to provide records within 10 business days of a claimant’s request, that health care provider is no longer entitled to a Written Opinion corroborating any eventual claim against it.²³

According to the plain language of section 766.203(2), the investigation shall be conducted before the claimant issues a Notice of Intent, and the Written Opinion shall be submitted at the time the Notice of Intent is mailed. So, at least in theory, the way the Legislature drew it up, a potential medical malpractice plaintiff and his or her attorney are supposed to conduct a reasonable investigation into the validity of the claim and obtain a Written Opinion from



Presuit Nuts 'n Bolts

a medical expert confirming that there are reasonable grounds to proceed, all before sending a Notice of Intent to a prospective defendant.²⁴

A. Reasonable Investigation

A claimant is required to conduct a reasonable investigation to ascertain that there are reasonable grounds for a claim of negligence — which includes both a deviation from the standard of care and a causative link between that deviation and the claimant's damages.²⁵ An attorney must review the case against each and every potential defendant, consult with a medical expert, and obtain a Written Opinion from said expert.²⁶ Beyond that, what constitutes a "reasonable evaluation" is evaluated on a case-by-case basis, with courts afforded wide discretion to determine what they consider "reasonable."

B. Verified Written Medical Expert Opinion

1. What does it have to say?

The Written Opinion is nothing more than a medical expert's confirmation that reasonable grounds exist for a medical negligence claim. The purpose of the Written Opinion is to assure that the claim is not a "frivolous" medical malpractice claim.²⁷ It also serves to assure potential defendants that the claim was preceded by a reasonable investigation.²⁸ It is not required to delineate exactly how the potential defendant was negligent.²⁹

The Written Opinion is, however, required to demonstrate that a reasonable investigation into the claim was undertaken.³⁰ There is a conflict among the District Courts of Appeal as to whether the Written Opinion must specifically identify, by name or job title or job description, each potential defendant against whom a claim is contemplated.³¹ Practitioners in the Second District may be able to enforce a requirement

that they be individually named; elsewhere the validity of such a requirement is doubtful at best. There appears to be consensus, however, that the Written Opinion supplied with a Notice of Intent must, at minimum, show that the conduct of the potential defendant to whom that Notice of Intent is directed was reviewed by a medical expert who felt that reasonable grounds existed to conclude that it was negligent.³²

Written Opinions are also required to specify if any previous opinion by the same medical expert has been disqualified, and if so the name of the court and the case number must be provided.³³

2. Who can be a Medical Expert?

A Written Opinion must be issued by a medical expert as defined in section 766.202(6).³⁴ Section 766.202(6) defines a "medical expert" as: "a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in section 766.102."

Section 766.102(5)-(12) governs the qualifications of expert witnesses in medical negligence actions. The qualifications were substantially revised as part of the 2003 reform package. Among other things, the Legislature removed the distinction that used to exist between experts who provided Written Opinions and experts who testified at trial.³⁵ Now in order to provide a Written Opinion, an expert must meet the same standard as if he or she were to testify at trial. However, there are no fewer than six such standards, depending on what type of health care provider is the subject of the testimony.

If the prospective defendant is a "specialist," an expert witness must either be a specialist in the same specialty, or must specialize in a similar specialty



Presuit Nuts 'n Bolts

that includes the evaluation, diagnosis or treatment of the condition that is the subject of the claim and have prior experience treating similar patients.³⁶ The expert witness must also have either practiced or consulted in that same or similar specialty; or taught in that specialty in an accredited health professional school, residency or clinical research program; or conducted clinical research in that specialty in affiliation with an accredited health professional school, residency, or clinical research program during the 3 years before the date of the occurrence at issue.³⁷ The Legislature did not define what it meant by “specialist.”

If the prospective defendant is a “general practitioner,” an expert witness must have either practiced or consulted as a general practitioner, taught the general practice of medicine in an accredited health professional school or residency program, or conducted clinical research in the general practice of medicine in affiliation with an accredited medical school or teaching hospital.³⁸ At least one of these activities must have taken place during the five years before the date of the occurrence at issue.³⁹

If the prospective defendant is a “health care provider other than a specialist or a general practitioner,” an expert witness must have either practiced or consulted with respect to the same or similar health profession as the prospective defendant; or taught in an accredited health professional school or residency program in the same or similar health profession as the prospective defendant; or conducted clinical research in affiliation with an accredited medical school or teaching hospital in the same or similar health profession as the prospective defendant.⁴⁰ At least one of these activities must have taken place during the three years before the date of the occurrence at issue.⁴¹

Any physician who qualifies as an expert witness under section 766.102(5) and who has knowledge

In many cases, the entire presuit screening process happens “silently,” with the health care provider having no clue that the provider is about to become a prospective defendant.

of the applicable standard of care from active clinical practice or instruction of students may give expert testimony with respect to the standard of care of a nurse, nurse practitioner, certified registered nurse anesthetist, certified registered nurse midwife, or physician assistant.⁴²

In addition, any person with “substantial knowledge” from training and experience concerning the standard of care among hospitals or other facilities can give expert testimony on the appropriate standard of care as to “administrative and other nonclinical issues.”⁴³

However, if the prospective defendant is a physician who provided emergency medical services in a hospital emergency department, an expert witness must have had “substantial professional experience” in the preceding five years while assigned to provide emergency medical services in a hospital emergency department.⁴⁴ In other words, if an emergency room physician sees an obstetrical patient on an emergency basis in the emergency department, an obstetrician is not qualified to testify against him or her — only an emergency physician is qualified.⁴⁵

And since it just wouldn't be medical malpractice law if the Legislature didn't leave at least one confusing provision, the 2003 reform left untouched section 766.102(8), which provides that if a prospective defendant is evaluating, treating, or diagnosing a condition not within his or her specialty, then a specialist who is trained in the evaluation, treatment,



Presuit Nuts 'n Bolts

or diagnosis of that condition shall be considered a “similar health care provider.” However, this no longer has any clear relevance to determining whether that specialist is qualified as an expert witness, since the remainder of section 766.102 no longer uses the term “similar health care provider” in connection with expert witness qualifications — the language is an unfortunate holdover from the pre-reform structure of the section.⁴⁶

III. Notice of Intent

In many cases, the entire presuit screening process happens “silently,” with the health care provider having no clue that he/she/it is about to become a prospective defendant. Usually the only hint a health care provider receives is a request for a copy of medical records from an attorney or from the patient. Months, or sometimes even years, go by. But then one day a certified letter arrives, and its contents magically transform the health care provider into a prospective defendant. The letter is a Notice of Intent, and it marks the transition from the presuit screening period to the presuit investigation period.

Medical malpractice claimants are required to send each prospective defendant a Notice of Intent before filing a complaint for medical negligence.⁴⁷ The Notice must be sent to each prospective defendant by certified mail, return receipt requested.⁴⁸ However, sending a Notice to one prospective defendant is sufficient to give notice to any other prospective defendant that bears a legal relationship to the noticed prospective defendant.⁴⁹

The purpose of the Notice of Intent is to give a prospective defendant notice of the incident in order to allow investigation of the matter and promote presuit settlement of the claim.⁵⁰ Taken together with the Written Opinion, the Notice of Intent must sufficiently indicate the manner in which the prospective

defendant allegedly deviated from the standard of care and must provide adequate information for the prospective defendant to evaluate the merits of the claim.⁵¹

The required content of a Notice of Intent was substantially revised as part of the 2003 medical malpractice reform legislation. A Notice of Intent now must include, if available: 1) a list of all known health care providers seen by the claimant for the injuries at issue since the alleged act of negligence,⁵² 2) a list of all known health care providers who treated or evaluated the claimant for two years before the alleged act of negligence,⁵³ 3) copies of all medical records relied upon by claimant’s medical expert who signed the Written Opinion,⁵⁴ and 4) the Written Opinion.⁵⁵ However, a claimant’s failure to provide the lists of known health care providers may not serve as grounds for imposing sanctions for failure to provide presuit discovery.⁵⁶

Notices of Intent commonly contain, or are accompanied by, an initial set of requests for informal discovery, compliance with which is one of several obligations imposed on prospective defendants during the presuit investigation period.

IV. Presuit Investigation Period

When a prospective defendant receives a Notice of Intent, that begins a 90-day period during which the claimant must refrain from filing suit against the prospective defendant, and the prospective defendant is obligated to conduct a review to determine its liability for the claim against it.⁵⁷ The parties may agree to extend this period.⁵⁸ However, there is some doubt whether an extension of the presuit investigation period preserves all of a potential defendant’s options for responding at the end of the extended period.⁵⁹ As there is no Florida appellate authority interpreting these statutory anomalies, the safest



Presuit Nuts 'n Bolts

practice appears to be to memorialize any extension of the presuit investigation period with language that explicitly preserves the potential defendant's right to choose any of the available options — specifically including the right to request voluntary binding arbitration — at the close of the extended period.

The prospective defendant's review is far from the only activity contemplated in the presuit investigation period. The prospective defendant is also well advised — but not technically required — to obtain external review of the claim by a medical expert. In addition, during the presuit investigation period both the prospective defendant and the claimant are ordered to share information with each other and are provided access to informal discovery tools otherwise unavailable outside litigation, to assist in fact-gathering to investigate the claim. The Legislature provided sanctions as well, to force the parties to play nice and participate in good faith: any failure to cooperate during the presuit investigation may be grounds to strike any claim made, or defense raised, in suit.⁶⁰ Then, at the conclusion of the 90-day period, with the prospective defendant at least in theory having had a sufficient opportunity to investigate the claim and determine its liability, the prospective defendant must choose one of four possible responses to the Notice of Intent.

A. Internal review by prospective defendant

The prospective defendant is required to investigate the claim against it in good faith.⁶¹ The prospective defendant is required to employ one or more of the following in its review: 1) internal review by a qualified claims adjuster; 2) creation of a review panel comprised of an experienced medical malpractice attorney, a health care provider in the same specialty as the prospective defendant, and a qualified claims adjuster; 3) referral to a medical review committee

of a state or local professional society of health care providers; or 4) any other similar procedure which fairly and promptly evaluates the pending claim.⁶² The prospective defendant may require the claimant to appear before a pretrial screening panel or medical review committee, and may also require the claimant to submit to a physical examination.⁶³

B. External review by medical expert

Nothing in chapter 766 explicitly requires a prospective defendant to obtain an external review of any claim against it by a medical expert. However, if the prospective defendant intends to reject the claim at the end of its investigation, it is required to submit a Written Opinion from a medical expert corroborating reasonable grounds for lack of negligent injury.⁶⁴ This, of course, is difficult to do if the prospective defendant has not obtained an external review.

On the other hand, chapter 766 provides prospective defendants multiple options for ending the pre-suit investigation period that do not require obtaining an external review. As a practical matter, however, most prospective defendants do typically seek external review of the claims against them. And in many cases, the result of that external review plays a significant role in the prospective defendant's end-of-presuit decisionmaking.

C. Informal discovery

To most attorneys, and many experienced health care providers, the presuit investigation period is all about informal discovery. Informal discovery requests and responses take up a great deal of the effort expended during the 90-day pre-suit investigation period. Section 766.106(6) broadly dictates that the parties shall make discoverable information available without formal discovery, and reiterates that the failure to do so is grounds for dismissal of claims or defenses ultimately asserted. Section 766.205(2)



Presuit Nuts 'n Bolts

echoes the sentiment, but then section 766.205(3) takes it further, warning that “[f]ailure of any party to comply with this section shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the party seeking production.”⁶⁵

Originally, the statutory scheme provided for three specific types of informal discovery: unsworn statements, production of documents or things, and physical and mental examinations.⁶⁶ However, over time, practice diverged from theory and a fourth type of informal discovery became customary: written interrogatories. As part of the 2003 reform, the Legislature formalized and regulated that well-established practice by adding written questions to the categories of officially-recognized informal discovery devices.⁶⁷ The Legislature also added a mechanism by which prospective defendants can discuss the claim with the claimant’s treating physicians,⁶⁸ which was previously impossible outside of litigation due to the ban on *ex parte* communications between defense attorneys and treating physicians.⁶⁹

1. Interrogatories

Any party may request answers to written questions from another party.⁷⁰ Answers should be served within 20 days after receipt of the questions.⁷¹ This deadline is rarely honored and never enforced except when the delay becomes truly extraordinary.⁷² The number of questions is limited in the same way as interrogatories in litigation — 30, including subparts.⁷³

The reference in section 766.106(6) to “discoverable” information being made available leads to the conclusion that objections are available to parties in presuit investigation just as they are in litigation, and that is definitely reflected in practice. One significant difference, however, is that neither party has realistic

access to the court to obtain a ruling on an adversary’s objection or compel better answers to questions until after the presuit investigation period has ended. This emboldens some attorneys — like the one quoted at the outset of this presentation — to provide even more unhelpful answers than typically seen in response to interrogatories in litigation. The general reluctance of courts to sanction parties for any but the most egregious presuit abuses only encourages such practices to continue.

On the other hand, the informal nature of presuit discovery and the prohibition against its later use paradoxically leads some attorneys to provide more forthcoming answers in some regards than ever would be contemplated in litigation. The latter course, obviously, is much more in line with the Legislature’s intent.

2. Requests for Production

Any party may request production of documents or things from another party.⁷⁴ The requested items must be produced within 20 days after receipt of the request.⁷⁵ The requesting party is required to bear the expense of production.⁷⁶

All of the comments above with regard to objections to interrogatories apply with equal force to requests for production.

3. Unsworn Statements

Any party may require other parties to appear for the taking of an unsworn statement, which is like a deposition except without placing the witness under oath.⁷⁷ Such statements may be used only within the presuit investigation process.⁷⁸ They are not discoverable or admissible in any civil action, for any purpose, by any party.⁷⁹



Presuit Nuts 'n Bolts

In all other regards, unsworn statements work just like depositions. Reasonable written notice must be provided to all parties.⁸⁰ All parties may be represented by counsel.⁸¹ The statement may be recorded electronically or stenographically, and it may be videotaped.⁸² The section states only that “parties” may be required to appear for the taking of an unsworn statement.⁸³ Other witnesses cannot be compelled to appear. In the case of individual claimants and individual health care providers, this is fairly easy to apply and enforce. But in the case of prospective corporate defendants such as health care facilities, it gets trickier. Is a facility required to produce only one corporate representative for statement? Do all of a facility’s employees count as “parties” for purposes of unsworn statements?⁸⁴ What about former employees?⁸⁵ Somewhat surprisingly, there is no Florida appellate authority answering any of these questions. Parties are left to their own devices to resolve these issues, guided only by the Legislature’s vague command to “cooperate” in “good faith.” In practice, facilities generally seem willing to produce their current employees who were involved in the claimant’s care and treatment for unsworn statements without much resistance. However, the statute appears to leave practitioners significant room to take a different position on a case-by-case basis.

In the 2003 reform, the Legislature added another category of individuals who may be subject to unsworn statements: the claimant’s treating physicians. Claimants are required to execute medical information releases that allow prospective defendants to take unsworn statements of the claimant’s treating physicians, limited to those areas that are potentially relevant to the claimant’s claim.⁸⁶ Unsworn statements of treating physicians are subject to the same procedural requirements as statements of parties.⁸⁷ There is no device provided in the section to compel a treating physician’s attendance, and because the

treating physician is not a “party,” the various sanctions provisions of chapter 766 all appear to be powerless against a treating physician who prefers not to give an unsworn statement. However, in practice, as long as the unsworn statement is coordinated with the treating physician’s calendar⁸⁸ and he or she is properly compensated, treating physicians typically agree to provide unsworn statements in most cases.

There is much debate among defense practitioners as to the wisdom and desirability of taking the claimant’s unsworn statement. Resolving this debate, or even reporting the various viewpoints in the debate fairly and accurately, is well beyond the scope of this article. The following is a necessary simplification. Those who favor taking statements seem to view the statement as a good opportunity to hear the claimant’s side of the story and obtain information about what the claimant feels is the basis of his or her claim beyond that typically available through the Notice of Intent, Written Opinion, and answers to presuit interrogatories. Those who eschew taking statements typically feel that it accomplishes little other than tipping one’s hand and allowing the claimant an opportunity to practice and rehearse answers to questions so that the claimant can give a better performance when he or she later becomes a plaintiff giving a deposition. Each viewpoint has some merit, making this ultimately a decision of individual preference.

4. Physical and mental examinations

A prospective defendant may require the claimant to submit to an examination by an appropriate health care provider.⁸⁹ Regardless of the number of defendants, the claimant is only generally required to submit to one examination.⁹⁰ A report of the examination is available to all parties and their attorneys upon payment of the reasonable cost of reproduction.⁹¹ It may only be used within the presuit



Presuit Nuts 'n Bolts

investigation process.⁹² Outside the investigation process, the report is confidential and exempt from disclosure even in response to a public records request.⁹³ The section is silent with regard to selection and compensation of the examiner. In practice, the requesting party typically selects the examiner and is responsible for payment. The amount of compensation is typically a matter of negotiation between the requesting party and the examiner.⁹⁴

D. Protection against discovery or admissibility in litigation

“No statement, discussion, written document, report, or other work product generated solely by the presuit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party.”⁹⁵ This broad protection for presuit investigation materials has been nitpicked by aggressive litigants on both sides of the aisle, but with one notable exception Florida courts have generally construed it to provide exactly the immunity from use that it seems to confer.⁹⁶

Unsworn statements are further protected from use by their own particular statutory language: “[s]uch statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party.”⁹⁷

Reports of presuit physical and mental examinations are also protected by specific statutory language: “[s]uch examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.”⁹⁸

However, one category of pre-suit information is expressly subject to discovery: medical expert opinions. “The medical expert opinions required by [section 766.203] are subject to discovery.”⁹⁹ This provision, added by the 2003 reform, has not yet been construed in any reported opinion. It may be significant that the Legislature used slightly different language in this section than it did elsewhere when discussing Written Opinions. In section 766.203(2) and section 766.203(3), the Legislature refers to a Written Opinion as a “verified written medical expert opinion” — the standard legislative term used to describe a Written Opinion in chapter 766. However, in section 766.203(4) the Legislature dropped the words “verified” and “written,” stating only that “medical expert opinions” required by that section are subject to discovery. Perhaps the Legislature meant merely that a party must produce Written Opinions in its possession upon formal discovery request. Or did the Legislature intentionally not limit subsection (4) to Written Opinions because it intended for parties to be entitled to depose an adversary’s presuit medical expert about that expert’s opinion — even if the presuit medical expert is not expected to testify at trial? The answer remains unclear at present.¹⁰⁰

V. Response at Conclusion of Presuit Investigation Period

At the end of the presuit investigation period, a prospective defendant must choose one of the four possible responses authorized by chapter 766. The prospective defendant may reject the claim,¹⁰¹ make a settlement offer,¹⁰² offer to admit liability and proceed to arbitration on the issue of damages,¹⁰³ or do nothing, which will be deemed to be a rejection of the claim.¹⁰⁴ Regardless of the response chosen by the prospective defendant, the response serves to terminate the presuit investigation period. Depending on the response chosen, it may also trigger certain duties on the part of the claimant.



Presuit Nuts 'n Bolts

A. Rejection

Rejection is the only one of the four response options that has a prerequisite: pursuant to section 766.203(3), a prospective defendant must submit a Written Opinion from a medical expert with any response rejecting the claim.¹⁰⁵ The Written Opinion submitted with the rejection must “corroborate reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.”¹⁰⁶ Clear as mud, right? In essence, the prospective defendant is required to obtain a Written Opinion confirming that reasonable grounds exist to support a conclusion that either there was no deviation from the standard of care or that any deviation that occurred did not cause injury to the claimant. The First District has instructed that “the response and the corroborating medical expert opinion, taken together, must sufficiently indicate that the defendant doctor did not deviate from the standard of care, or that the defendant doctor was not liable for the claimant’s injury, or that the claimant suffered no injury.”¹⁰⁷

If the prospective defendant rejects the claim, the claimant is free to proceed with a lawsuit. Damages potentially recoverable in the lawsuit are limited only by general law, including the limits on non-economic damages enacted as the centerpiece of the 2003 medical malpractice reform.

B. Settlement Offer

Prospective defendants who cannot obtain a favorable Written Opinion — or who, for whatever reason, choose not to submit a Written Opinion — can end the presuit investigation period by making a formal settlement offer to the claimant. There is no minimum amount set out in the statute, so even a nominal or “nuisance value” settlement offer is effective to end the presuit investigation period in compliance with section 766.103(3). There is also

no duration specified in the statute, so — at least in theory — the prospective defendant could revoke the settlement offer the very next day. However, such a tactic might well be construed as a failure to participate “in good faith” in the presuit investigation process, so any prospective defendant who opts for a “one-day settlement offer” is necessarily accepting some degree of risk. Regardless of the amount and duration selected by the prospective defendant, if no settlement results and litigation ensues, neither the fact nor the amount of the prospective defendant’s settlement offer is admissible in evidence.¹⁰⁸

If the prospective defendant ends the presuit investigation period with a settlement offer, the claimant is free to proceed with a lawsuit. Damages potentially recoverable in the lawsuit are limited only by general law, including the limits on non-economic damages enacted as the centerpiece of the 2003 medical malpractice reform.

C. Arbitration Offer

Once upon a time, presuit arbitration was, in all likelihood, the most valuable tool afforded to civil defendants in all of Florida law. However, two developments in the last seven years have substantially lessened the benefits of presuit arbitration offers for prospective defendants. Despite that undeniable fact, however, presuit arbitration remains a useful tool for prospective defendants in many cases. Prospective defendants should consider its desirability carefully as part of the presuit investigation process.

Prospective medical malpractice defendants have the opportunity to unilaterally cap the non-economic damages recoverable against them at amounts potentially far below the limits enacted as part of the 2003 reform — and, in all likelihood, completely remove the possibility of having punitive damages awarded against them.¹⁰⁹ Under the right facts, it is



Presuit Nuts 'n Bolts

theoretically possible for a health care provider to “save” over one million dollars by employing the arbitration option.¹¹⁰

1. How does it work?

By offering arbitration, a prospective defendant is offering to admit liability and have the claimant’s damages determined by an arbitration panel. If the claimant accepts the offer of arbitration, the claimant is prohibited from proceeding with a lawsuit against that prospective defendant. Instead, a three-person arbitration panel will be selected to hear the case. The claimant will be entitled to recover the following amounts as damages, if that element of damages would have been recoverable by the claimant under general law: net economic damages, including past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments; and non-economic damages based on a percentage reduction in the claimant’s capacity to enjoy life, with a maximum of \$250,000 per claimant.¹¹¹ The prospective defendant will also be responsible for paying all costs of the arbitration proceeding, the fees of two of the three arbitrators, and the claimant’s reasonable attorney’s fees and costs. The award of attorney’s fees and costs is capped at a limit of 15 percent of the present value of the total award. Damages for future economic losses may be paid by periodic payments and shall be offset for future collateral source payments. Punitive damages are not awardable. If multiple prospective defendants all opt for arbitration, each defendant is jointly and severally liable for all damages assessed in the arbitration proceedings.¹¹²

If the claimant rejects the offer of arbitration, the claimant is free to proceed with a lawsuit. However, the damages awardable at trial shall be limited to net economic damages, including past and future medical expenses and 80 percent of wage loss and loss of

earning capacity, offset by any collateral source payments; plus non-economic damages not to exceed \$350,000 per claimant. Damages for future economic losses may be paid by periodic payments and shall be offset by future collateral source payments. The prospective defendant is free to defend the lawsuit; the fact that the defendant had offered arbitration, which necessarily included an offer to admit liability, does not estop the defendant from defending the lawsuit. In fact, the fact that the prospective defendant offered arbitration is not admissible in evidence.

2. Why isn’t it as useful anymore?

Two relatively recent developments have made presuit arbitration a less attractive option for prospective defendants. The first came in 2000, when the Florida Supreme Court effectively rewrote chapter 766 to provide medical malpractice claimants many multiples of the remedy the Florida Legislature had established.¹¹³ The second came in 2003, when the Florida Legislature literally rewrote chapter 766 to provide all medical malpractice defendants a cap on non-economic damages at a level that in many cases is actually lower than the arbitration cap in the aftermath of the Supreme Court’s revision of the statute. The end result of these two developments is that offering arbitration is not an advantageous option for prospective defendants except in certain factual scenarios.

When the Legislature created the arbitration option for prospective defendants, it decided that the limit of non-economic damages recoverable in presuit arbitration proceedings should be \$250,000 per incident.¹¹⁴ This rather draconian limitation reflected a policy decision that historically (and, well, constitutionally) is solely the province of the Legislature. The presuit arbitration statutory scheme was found unconstitutional by the Florida Supreme Court in



Presuit Nuts 'n Bolts

1993, which held that the limitation on damages was constitutional because — among other things — the no-fault aspect and prompt payment provisions of the arbitration option provided a commensurate benefit to claimants.¹¹⁵

Seven years later, the medical malpractice presuit arbitration system was back before the Florida Supreme Court. The certified question before the court was whether the non-economic damages available to claimants in presuit arbitration were limited to \$250,000 per incident, or \$250,000 per claimant.¹¹⁶ The court looked at the plain language of section 766.207, which stated that:

Noneconomic damages shall be limited to a maximum of \$250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50 percent reduction in his or her capacity to enjoy life would warrant an award of not more than \$125,000 noneconomic damages.¹¹⁷

The Florida Supreme Court decided that the reference to “claimant” in the singular in the latter half of the sentence rendered the reference to “incident” in the former half of the sentence vague and ambiguous.¹¹⁸ It then proceeded to examine legislative intent, history, other statutes, and eventually reached the bizarre conclusion that when the Legislature wrote that non-economic damages “shall be limited to a maximum of \$250,000 per incident,”¹¹⁹ the Legislature really meant that non-economic damages shall be limited to a maximum of \$250,000 per claimant.¹²⁰ The court also announced that, even though it had considered and rejected an equal protection challenge to the arbitration system in *Echarte*, interpreting the statute to limit non-economic damages to \$250,000 per incident would “offend the fundamental notion of equal justice under the law” and “create equal protection concerns.”¹²¹

The Florida Supreme Court's *Phillipe* decision substantially increased the amount of damages potentially available to medical malpractice claimants when a prospective defendant requests presuit arbitration. As a result, prospective defendants requested presuit arbitration far less frequently. Given the new damage cap post-*Phillipe*, presuit arbitration became significantly less attractive in cases where multiple claimants existed. However, in cases with potentially catastrophic non-economic damage claims and weak liability defenses, even the post-*Phillipe* damage calculation was often a better deal for prospective defendants than simply denying the claim and taking the case to trial without no cap on damages at all.

Then came the 2003 medical malpractice reform. Suddenly, every claim had a cap on non-economic damages; the Legislature took care to make it excruciatingly clear that the cap it was enacting was an aggregate cap, on a per incident basis, regardless of how many claimants were involved. Sure, the cap was much higher than \$250,000, but in cases where there were at least five potential claimants, the statutory cap on non-economic damages against practitioners was actually lower than the arbitration cap.

In a strange irony, at the same time as it enacted a non-economic damages cap that severely eroded the benefit to prospective defendants of presuit arbitration, the Legislature amended the presuit arbitration provisions to supercede the *Phillipe* decision. But it wasn't the per incident/per claimant holding of *Phillipe*. The Legislature inexplicably left that language intact. Instead, the 2003 reform corrected the holding from the third section of *Phillipe*, that the Wrongful Death Act did not limit the economic damages available to claimants in presuit arbitration proceedings. The Legislature inserted specific language in section 766.207 making it clear that the damages available in presuit arbitration were limited



Presuit Nuts 'n Bolts

by general law, including the Wrongful Death Act. And yet the Legislature neither clarified its intent to make the \$250,000 limit an aggregate limit per incident, nor changed the language to implement the Florida Supreme Court's per claimant interpretation. Instead, the statute continues to read "per incident," and yet per *Phillipe* it continues to mean per claimant.¹²²

Now, in a post-*Phillipe*, post-cap world, the universe of claims in which a prospective defendant can limit its liability by offering presuit arbitration is smaller than ever. Presuit arbitration remains a useful option, however, in many types of claims, for example: claims with only one claimant and only one defendant of the same type (practitioner or non-practitioner); claims with two claimants and only one defendant of the same type if the facts of the case would justify the higher statutory cap; or claims against a single non-practitioner with as many as four claimants if the facts of the case justify the higher statutory cap. The math and logic involved in calculating whether a prospective defendant would benefit from an offer of presuit arbitration is increasingly complex, and demands a careful, case-specific examination by the prospective defendant and counsel before the close of the presuit investigation period.

D. No Response = Rejection

The last option technically available to prospective defendants is to do nothing. Pursuant to section 766.106(3)(c), the absence of a response by the expiration of the presuit investigation period will be deemed a "final rejection" of the claim.¹²³ Of course, if a prospective defendant "rejects" the claim by doing nothing, that prospective defendant is at high risk for a claim that it did not evaluate the claim in good faith and/or did not participate in good faith in the presuit investigation process.¹²⁴ To survive such a claim with its defenses intact, such a prospective defendant would be well-served to make sure that it complied

with all presuit discovery requests and obtained an external review culminating in a Written Opinion corroborating the rejection of the claim. If a prospective defendant does not obtain a Written Opinion but proceeds nonetheless to reject the claim sub silentio, there is grave danger: if no Written Opinion is provided before the expiration of the statute of limitations, dismissal is authorized.¹²⁵ However, even then the trial court will retain discretion to impose a lesser sanction if it chooses.¹²⁶

VI. What's the Worst Thing That Could Happen?

The last 20 years of caselaw have provided some truly extreme scenarios of presuit gone awry. So what did the courts do about it, and what does that tell us about what you can, and can't, do in presuit?

One clear trend — for which defendants should be thankful — is that claimants get hammered by courts more often than prospective defendants. This makes some sense, of course, because the presuit process is a condition precedent instituted by the Legislature that must be satisfied in order to be entitled to bring a lawsuit.¹²⁷ If a claimant fails or refuses to satisfy that condition precedent as required by the Legislature, dismissal is the appropriate sanction. And so, when a claimant does everything else right but fails to obtain a Written Opinion from a physician in the right specialty, it results in dismissal.¹²⁸ If the Written Opinion fails to properly identify a particular prospective defendant, the result, again, is dismissal.¹²⁹ But a prospective defendant can fail to respond altogether to a Notice of Intent, and a lesser sanction is sometimes administered.¹³⁰ In fact, the author was not able to locate a single reported Florida appellate opinion affirming the striking of a medical malpractice defendant's defenses for presuit misconduct, or reversing a trial court's refusal to strike defenses, after 2001.¹³¹



Presuit Nuts 'n Bolts

Another trend, although less clear, is that courts have become more lenient about presuit discovery responses over time. In 1990, the Fourth District affirmed the dismissal of an action for insufficient responses to presuit discovery requests.¹³² Not a failure to respond at all, and not a failure to provide a Written Opinion, but simply presuit discovery answers that were not good enough.¹³³ By 2000, the Second District wrote that even “gross negligence” by a claimant’s attorney resulting in no response whatsoever to presuit discovery requests did not justify dismissal of the complaint.¹³⁴ In 2003, the Fourth District held that dismissal of a claim for failure to respond to presuit discovery requests was an abuse of discretion because the responses were provided before the expiration of the statute of limitations, albeit after the presuit investigation period had ended.¹³⁵ And last year the Fifth District held that sanctions for failure to respond to presuit discovery requests are entirely discretionary.¹³⁶ So in 17 years Florida appellate courts have gone from dismissing an action for answers that weren’t good enough to, perhaps, no sanctions at all for ignoring presuit discovery altogether.

If any of this has created the impression that you can ignore Notices of Intent and presuit discovery requests with absolute impunity, remember this small point. Trial judges have broad discretion in this realm. If you end up with the wrong trial judge, conduct that was permitted in another case might become sanctionable in your case. You can appeal — more accurately, petition for a writ of certiorari — but the appellate standard requires you to show that the order departs from the essential requirements of law, making it extremely difficult to obtain relief. And if you end up with Judge Gary Farmer of the Fourth District on your panel, beware:

The issue raised in this medical malpractice case is whether a trial court should strike a doctor’s defenses

when the doctor fails entirely to conduct any presuit screening or investigation after receiving a notice of intent to initiate litigation. In my opinion, the statute requires the presumptive remedy to be a dismissal of the doctor’s defenses unless there are special reasons to decline to do so.

* * *

Given the precise purpose of the presuit screening process and the statutory text, a proper construction of [section 766.106(3)(a)] is that when a judge finds both that a provider has failed to investigate and screen the claim after receipt of the notice, and that the failure is unreasonable (whether through simple negligence or otherwise), the judge should ordinarily strike the defenses, unless special circumstances make it unjust to do so. The burden should be on the provider to establish the special circumstances. In short, dismissing defenses is the presumptive remedy, not the exceptional one.¹³⁷

Judge Farmer’s view has not been adopted by any Florida appellate court ... but that could change. Don’t be that case.

For more information, please contact:

Edward J. Carbone
ecarbone@carltonfields.com
www.carltonfields.com/ecarbone
813.229.4307

1 § 768.57, Fla. Stat. (1987); *Id.* §768.495(1).

2 §§ 766.106, 766.201-.206, Fla. Stat. (1989).

3 Sharp-eyed readers will note that some of the sections governing the pre-suit process were further amended in 2004. The 2004 amendments, however, were not substantive; they merely corrected one misspelling and a handful of erroneous cross-references.

4 §766.106(1)(a), Fla. Stat. (2007).

5 *No. Quintanilla v. Coral Gables Hosp.*, 941 So. 2d 468 (Fla. 3d DCA 2006).

6 *No. Lake Shore Hosp. v. Clarke*, 768 So. 2d 1251 (Fla. 1st DCA 2000).



Presuit Nuts 'n Bolts

7 No. *Mobley v. Hirschberg*, 915 So. 2d 217 (Fla. 4th DCA 2005).

8 Yes. *Corbo v. Garcia*, 32 Fla. L. Weekly D621 (Fla. 2d DCA March 2, 2007).

9 Yes. *Mt. Sinai Med. Ctr. v. Fotea*, 937 So. 2d 146 (Fla. 3d DCA 2006).

10 It depends on whether the patient required a special diet as part of his/her medical treatment. If so, yes. *Puentes v. Tenet Hialeah Healthsystem*, 843 So. 2d 356 (Fla. 3d DCA 2003). If not, no. *Lakeland Reg. Med. Ctr. v. Allen*, 944 So. 2d 541 (Fla. 2d DCA 2006).

11 Yes. *Caito v. Florida Health Sciences Ctr.*, No. 05-2106-B (Fla. 13th Cir. Ct. Jan. 31, 2007).

12 § 766.201(1)(d), Fla. Stat. (2007).

13 § 766.201(2), Fla. Stat. (1989); see, e.g., *Musculoskeletal Institute Chartered v. Parham*, 745 So. 2d 946, 949-50 (Fla. 1999), and cases cited therein.

14 Actually, it was three years later, but I'm not a Literalist.

15 Compare §766.106, Fla. Stat. (1993) with id. §§766.207-766.212.

16 See, e.g., *Platman v. Holmes Reg. Med. Ctr.*, 683 So. 2d 671 (Fla. 5th DCA 1996) (recognizing that section 766.106 and section 766.207 contain separate and inconsistent arbitration provisions and ruling that litigants must follow one or the other, but not a hybrid of both); *Tallahassee Mem. Reg. Med. Ctr. v. Kinsey*, 655 So. 2d 1191 (Fla. 1st DCA 1995) (arbitration provision in section 766.106 is inconsistent and irreconcilable with the provisions in sections 766.207-212; litigants must follow one or the other, but not a hybrid of both).

17 § 766.102(5-12), Fla. Stat. (2007).

18 Id. § 766.106(6)(b)(4).

19 Id. § 766.106.

20 Id. § 766.207(7).

21 *Barlow v. N. Okaloosa Med. Ctr.*, 877 So. 2d 655 (Fla. 2004).

22 § 766.204(2), Fla. Stat. (2007).

23 Well, at least in general. Courts have occasionally excused non-compliance, especially where the claimant contributed to the non-compliance. See, e.g., *Yocom v. Wuesthoff Health Sys.*, 880 So. 2d 787 (Fla. 5th DCA 2004).

24 In practice, of course, the timing requirement has been completely eviscerated. In this context, "shall" apparently means "may," as Florida appellate courts have repeatedly held that a Written Opinion need not be obtained before sending a Notice of Intent as long as the Written Opinion is obtained before the expiration of the statute of limitations. E.g., *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996); *Shands Teaching Hosp. v. Miller*, 642 So. 2d 48 (Fla. 1st DCA 1994).

25 See § 766.203(2)(a-b), Fla. Stat. (2007).

26 Id. §766.202(5) (defining "investigation").

27 *Michael v. Med. Staffing Network*, 947 So. 2d 614, 618 (Fla. 3d DCA 2007) (quoting *Kukral*, 679 So. 2d at 282).

28 *Largie v. Gregorian*, 913 So. 2d 635, 637 (Fla. 3d DCA 2005).

29 *Kukral*, 679 So. 2d at 282; *Michael v. Med. Staffing Network*, 947 So. 2d at 620; *Columbia/JFK Med. Ctr. L.P. v. Brown*, 805 So. 2d 28, 29 (Fla. 4th DCA 2001).

30 *Michael v. Med. Staffing Network*, 947 So. 2d at 620.

31 Compare *id.* (affidavit is not required to be defendant-specific, but must only somehow demonstrate that a reasonable investigation was undertaken) and *Mirza v. Trombley*, 946 So. 2d 1096, 1100 (Fla. 5th DCA 2006) (failure to name particular defendant is not a fatal defect as long as affidavit otherwise makes clear that defendant's actions were properly reviewed) with *Bonati v. Allen*, 911 So. 2d 285, 288 (Fla. 2d DCA 2005) (affidavit did not serve purpose of corroborating reasonable investigation against potential defendant because it failed to mention potential defendant by name) and *Largie v. Gregorian*, 913 So. 2d 635, 641 (Fla. 3d DCA 2005) (affidavit insufficient because it did not suggest, much less demonstrate, that any expert concluded that there were reasonable grounds to believe that specific defendant was negligent).

32 See *Michael v. Med. Staffing Network*, 947 So. 2d at 620; *Mirza*, 946 So. 2d at 1100; *Largie*, 913 So. 2d at 641; *Bonati*, 911 So. 2d at 288.

33 § 766.203(4), Fla. Stat. (2007).

34 Id. § 766.203(2).

35 See *Yocom v. Wuesthoff Health Sys.*, 880 So. 2d 787 (Fla. 5th DCA 2004).

36 Id. § 766.102(5)(a)(1).

37 Id. § 766.102(5)(a)(2).

38 Id. § 766.102(5)(b)(1-3).

39 Id. § 766.102(5)(b).

40 Id. § 766.102(5)(c)(1-3).

41 Id. § 766.102(5)(c).

42 Id. § 766.102(6).

43 Id. § 766.102(7).

44 Id. § 766.102(9), Fla. Stat. (2007).

45 *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005).

46 Cf. § 766.102(2)(c), Fla. Stat. (2001) ("Any health care provider may testify as an expert in any action if he or she is a similar health care provider pursuant to paragraph (a) or paragraph (b); or is not a similar health care provider pursuant to paragraph (a) or paragraph (b) but, to the satisfaction of the court, possesses sufficient training, experi-

ence, and knowledge ... to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine.").

47 § 766.106(2)(a), Fla. Stat. (2007); but see *Warren v. Shands Teaching Hosp. & Clinics*, 700 So. 2d 702 (Fla. 1st DCA 1997), permitting claimants to go ahead and file the complaint first with relative impunity, because the proper remedy is only dismissal with leave to amend. The defendant may be entitled to recover its fees and costs resulting from the premature filing. See *Hosp. Corp. of America v. Lindberg*, 571 So. 2d 446 (Fla. 1990).

48 § 766.106(2)(a), Fla. Stat. (2007); but see *Patry v. Capps*, 633 So. 2d 9 (Fla. 1994) (other service methods may be acceptable if provider cannot show prejudice).

49 Fla. R. Civ. P. 1.650(b)(1); *Mirza v. Trombley*, 946 So. 2d 1096 (Fla. 5th DCA 2006).

50 *Kukral v. Mekras*, 679 So. 2d 278, 282 (Fla. 1996) (quoting *Stebilla v. Mussallem*, 595 So. 2d 136, 138 (Fla. 5th DCA 1992)).

51 *Largie v. Gregorian*, 913 So. 2d 635, 643-44 (Fla. 3d DCA 2005); *Maldonado v. EMSA L.P.*, 645 So. 2d 86, 89 (Fla. 3d DCA 1994).

52 § 766.106(2)(a), Fla. Stat. (2007).

53 Id. § 766.106(2)(a).

54 Id. § 766.106(2)(a).

55 Id. § 766.203(2), Fla. Stat. (2007); but see *Shands Teaching Hosp. v. Miller*, 642 So. 2d 48 (Fla. 1st DCA 1994), holding that it is not necessary for the Written Opinion to be provided along with the Notice of Intent as long as it is submitted within the statute of limitations.

56 § 766.106(2)(a), Fla. Stat. (2007).

57 *Boyd v. Becker*, 627 So. 2d 481 (Fla. 1993).

58 §766.106(4), Fla. Stat. (2007).

59 See sections 766.106(3)(b) and 766.207(2), Florida Statutes (2007), each of which requires the prospective defendant to request arbitration at or before the end of the 90-day presuit investigation period. Actually, section 766.207(2) requires the request to be within 90 days of service of the Notice of Intent, which would actually be before the expiration of the investigation period.

60 § 766.106(7), Fla. Stat. (2007).

61 Id. § 766.106(3)(a).

62 Id. § 766.106(3)(a)(1-4).

63 Id. § 766.106(3)(a).

64 Id. § 766.203(3).

65 This probably is not how the Legislature intended it, but as phrased this ends up being a provision that can only penalize claimants, since the duty to comply with the section is triggered by the claimant's mailing of a Notice of Intent corroborated by a medical expert opinion — which necessarily means that the claimant has already provided written medical corroboration.

66 § 766.106(7), Fla. Stat. (2001), previously § 768.57, Fla. Stat. (1989).

67 § 766.106(6)(b)(4), Fla. Stat. (2007).

68 Id. § 766.106(6)(b)(5).

69 *Acosta v. Richer*, 671 So. 2d 149, 152 (Fla. 1996); *Lemieux v. Tandem Health Care of Fla.*, 862 So. 2d 745 (Fla. 2d DCA 2003).

70 § 766.106(6)(b)(4), Fla. Stat. (2007).

71 Id.

72 See, e.g., *Woodall v. Hillsborough County Hosp. Auth.*, 778 So. 2d 320 (Fla. 2d DCA 2000) (reversing order dismissing complaint where claimant's attorney completely failed to respond to presuit discovery requests, under theory that claimant should not be punished for misdeeds of attorney); *Preferred Med. Plan v. Ramos*, 742 So. 2d 322 (Fla. 3d DCA 1999) (order striking pleadings for failure to comply with presuit discovery was abuse of discretion); *Estevez v. Montero*, 662 So. 2d 1268 (Fla. 3d DCA 1995) (affirming striking of pleadings where prospective defendant completely failed to investigate claim at all).

73 § 766.106(6)(b)(4), Fla. Stat. (2007).

74 Id. § 766.106(6)(b)(2).

75 Id.

76 Id.

77 §766.106(6)(b)(1), Fla. Stat. (2007).

78 Id.

79 Id.

80 Id.

81 Id.

82 Id.

83 Id.

84 I think not, especially in light of the fact that individual facility employees may be named as prospective defendants themselves, even in the same Notice of Intent. See Fla. R. Civ. P. 1.650(b)(1).

85 Almost certainly not, as a separate Notice of Intent would be required to make a former employee — who no longer bears a legal relationship to his or her former employer — a prospective defendant. See Fla. R. Civ. P. 1.650(b)(1).

86 § 766.106(6)(b)(5), Fla. Stat. (2007).

87 Id.

88 Of course, coordinating a convenient date may very well take the parties outside the 90-day presuit investigation period — especially in a case where there are multiple prospective defendants.

89 § 766.106(6)(b)(3), Fla. Stat. (2007).



Presuit Nuts 'n Bolts

90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 More accurately described as a matter of dictation by the examiner and acceptance by the requesting party.
95 §766.205(4), Fla. Stat. (2007); see also §766.106(5), Fla. Stat. (2007).
96 See *Cohen v. Dauphinee*, 739 So. 2d 68, 73 (Fla. 1999) (Written Opinion protected from discovery or admission into evidence); but see *Adventist Health Sys./Sunbelt v. Watkins*, 675 So. 2d 1051, 1052 (Fla. 5th DCA 1996) (Written Opinion executed by trial expert in a different case is admissible and usable for impeachment).
97 § 766.106(6)(b)(1), Fla. Stat. (2007).
98 *Id.* § 766.106(6)(b)(3).
99 *Id.* § 766.203(4).
100 Of course, if the plaintiff affirmatively uses the verified written expert opinion — for example, to oppose a defendant's motion for summary judgment — the expert and his or her opinion become fair game for discovery.
101 § 766.106(3)(b)(1), Fla. Stat. (2007).
102 *Id.* § 766.103(3)(b)(2).
103 *Id.* § 766.103(3)(b)(3) & § 766.207(2).
104 § 766.106(3)(c), Fla. Stat. (2007).
105 But only if a response rejecting the claim is actually sent, since not sending a response at all is deemed to be a rejection but is not required to be accompanied by a Written Opinion. See *Damus v. Parvez*, 556 So. 2d 1136 (Fla. 3d DCA 1989). At any rate, attempting to reject without a Written Opinion is a definite high-risk maneuver. See *id.*
106 § 766.203(3), Fla. Stat. (2007).
107 *Duffy v. Brooker*, 614 So. 2d 539, 545 (Fla. 1st DCA 1993).
108 See § 766.103(5), Fla. Stat. (2007).
109 If arbitration is accepted, there is no question: punitive damages are unavailable. § 766.207(7)(d), Fla. Stat. (2007). If arbitration is rejected, however, there is an excellent argument that punitive damages are not recoverable because they are not within the categories of damages enumerated in the statute as recoverable by a claimant who rejects a prospective defendant's offer of presuit arbitration. See § 766.209(4)(a), Fla. Stat. (2007).
110 If a non-practitioner is the sole defendant, the total possible liability for non-economic damages is \$1.5 million. If there is only one claimant, the total possible liability for non-economic damages in the event of an offer of arbitration would become \$350,000 — a "savings" of \$1.15 million.
111 The statute says "per incident." But it really means "per claimant." Confused? See section 2 below for a discussion of how "incident" actually means "claimant."
112 § 766.207(7)(h), Fla. Stat. (2007). Ironically, this may end up being one of the last vestiges in Florida of joint and several liability. This provision likely survives the general abolition of joint and several liability, due to the principle of statutory interpretation that the more specific statute prevails over the more general statute. Of course, there is a counterargument that the more recent enactment should prevail over the prior enactment. The issue will probably result in additional litigation in cases where multiple defendants opt for arbitration.
113 *St. Mary's Hosp. v. Phillippe*, 769 So. 2d 961 (Fla. 2000).
114 §766.207(7)(b), Fla. Stat. (1989).
115 *Univ. of Miami v. Echarte*, 618 So. 2d 189, 194 (Fla. 1993).
116 *St. Mary's Hosp. v. Phillippe*, 769 So. 2d 961, 963 (Fla. 2000).
117 §766.207(7)(b), Fla. Stat. (1989).
118 *St. Mary's Hosp. v. Phillippe*, 769 So. 2d at 968.
119 § 766.207(7)(b), Fla. Stat. (1989).
120 *St. Mary's Hosp. v. Phillippe*, 769 So. 2d at 972.
121 *Id.* at 971; but see *id.* at 974 (Justice Anstead, in dissent, observing that the equal protection challenge rejected in *Echarte* actually was predicated on a per incident interpretation of section 766.207.)
122 This is not the only instance in which the present version of chapter 766 lacks clarity. For example, section 766.118(2)(a) limits non-economic damages against practitioners with respect to a cause of action for "personal injury or wrongful death arising from medical negligence" to a maximum of \$500,000, but section 766.118(2)(b) raises that maximum to \$1,000,000 if the negligence resulted in death. Since all wrongful death claims by definition involve the death of the patient, the limitation on wrongful death damages in subsection (a) is rendered meaningless by subsection (b).
123 There is ambiguity even here, as the language actually says that failure to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim. This language at least facially appears to be in tension with the language in the very next subsection of section 766.106 explicitly authorizing parties to stipulate to extend the presuit investigation period.
124 See *Damus v. Parvez*, 556 So. 2d 1136 (Fla. 3d DCA 1989), in which a physician did exactly that and ended up having to defend the good faith of his denial at an evidentiary hearing.
125 *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996); *Estevez v. Montero*, 662 So. 2d 1268 (Fla. 3d DCA 1995).
126 See, e.g., *McPherson v. Phillips*, 877 So. 2d 755 (Fla. 4th DCA 2004) (holding that court had discretion to refuse to strike physician's pleadings even though physician completely failed to respond to Notice of Intent; physician never submitted Written Opinion at

all); *De La Torre v. Orta*, 785 So. 2d 553 (Fla. 3d DCA 2001) (striking pleadings for failure to respond to Notice of Intent was excessive; physician did eventually submit Written Opinion but arguably outside statute of limitations); *Woodall v. Hillsborough Co. Hosp. Auth.*, 778 So. 2d 320 (Fla. 2d DCA 2000); (holding that even "gross negligence" by attorney does not justify dismissal of action, as client should not be punished for misdeeds of attorney); *Pagan v. Smith*, 705 So. 2d 1034 (Fla. 3d DCA 1998) (stating that physician should not bear brunt of attorney's failure to respond to Notice of Intent at all; physician did eventually submit Written Opinion but arguably outside statute of limitations).
127 See *Fla. Hosp. Waterman v. Stoll*, 855 So. 2d 271, 276 (Fla. 5th DCA 2003), which also instructs that since presuit compliance is a condition precedent and not jurisdictional, it can be waived by a defendant's failure to raise it in a timely manner. *Id.*; see also *Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991).
128 *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005).
129 *Largie v. Gregorian*, 913 So. 2d 635 (Fla. 3d DCA 2005); *Bonati v. Allen*, 911 So. 2d 285 (Fla. 2d DCA 2005).
130 *De La Torre v. Orta*, 785 So. 2d 553 (Fla. 3d DCA 2001); *McPherson v. Phillips*, 877 So. 2d 755 (Fla. 4th DCA 2004); *Pagan v. Smith*, 705 So. 2d 1034 (Fla. 3d DCA 1998).
131 *Grau v. Wells*, 795 So. 2d 988 (Fla. 4th DCA 2001) (affirming, as within trial court's discretion, order striking pleadings and entering default against physician who submitted Written Opinion from business partner under circumstances that called into question reasonableness of investigation).
132 *Dressler v. Boca Raton Comm. Hosp.*, 566 So. 2d 571 (Fla. 4th DCA 1990).
133 *Id.* at 572-73.
134 *Woodall v. Hillsborough Co. Hosp. Auth.*, 778 So. 2d 320, 321 (Fla. 2d DCA 2000).
135 *Vincent v. Kaufman*, 855 So. 2d 1153 (Fla. 4th DCA 2003).
136 *Phillips v. Cook*, 927 So. 2d 130 (Fla. 5th DCA 2006).
137 *Plemendon v. Fernandez*, 602 So. 2d 1379, 1380-82 (Farmer, J., dissenting).