SUBJECT: Subrogation rights of political subdivisions in third-party tort actions

COMMITTEE: Insurance — committee substitute recommended

VOTE: 7 ayes — Smithee, Taylor, Eiland, Hancock, Martinez, Vo, Woolley

0 nays

2 absent — T. Smith, Thompson

WITNESSES: For — Scott Wilson, TML Intergovernmental Employee Benefits Pool

Against — Guy Choate, Texas Trial Lawyers Association

BACKGROUND: Local Government Code, sec. 172 authorizes political subdivisions to provide group health insurance benefits for their employees, either directly or through a risk pool. In a third-party tort case, the provider of employee benefits, whether a political subdivision, group of subdivisions, or carrier to one of these entities, must subrogate its interests to the employees' right of recovery for personal injuries.

DIGEST: CSHB 1226 would amend Local Government Code, sec. 172, in regard to subrogation of claims in a tort claim involving a third party.

The bill would specify that if an injured party was not able to realize a complete and adequate recovery for injuries sustained as the result of the actionable fault of a third party, the employee benefits provider would be entitled to a pro rata recovery of one-third of the covered individual's total recovery or the total cost of employee benefits paid by the health plan as a direct result of the tortious conduct of the third party, unless another agreement was made with the covered individual. The common law doctrine that requires an injured party to be made whole before a subrogee makes a recovery would not apply to the recovery of employee benefits in this situation.

An individual covered by the health plan could bring an action for declaratory judgment to establish that the provider of employee benefits was entitled to a lesser amount of the pro rata recovery than that specified in the bill. The individual would have to prove by a preponderance of the

evidence that the individual's total recovery was less than 50 percent of the value of the individual's underlying claim for damages. In such a case, a court could establish the benefit provider's pro rata recovery in an amount not less than 15 percent and not more than one-third of the covered individual's total recovery.

If a covered individual showed by clear and convincing evidence that this pro rata share would result in manifest injustice, the court could establish that the benefits provider be paid less than 15 percent but at least 5 percent of the covered individual's total recovery. The court could not require the benefits provider to pay costs or attorneys fees in an action brought to contest the pro rata recovery.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007. The bill would apply only to a cause of action that accrues on or after the effective date of the bill.

SUPPORTERS SAY:

CSHB 1226 would help ensure that cities, counties and other political subdivisions that provide employee health benefits were fairly compensated for health care costs they have paid for their covered employees in an injury caused by a third party.

The current law was intended to give subrogation rights to benefits providers so that they could claim a portion of the amount recovered from a third party. However, some attorneys have used the "made whole" doctrine to deny benefits providers a portion of the settlement payment by a third party, claiming that even sizable settlements were insufficient to make their clients whole.

CSHB 1226 would clarify in statute that these benefit plans had a right to a share of the settlement in third-party tort actions and would establish the pro rata share to which the plans were entitled if the parties did not agree on another amount. Injured parties would have the right to dispute the pro rata amounts if they could prove that a settlement covered less than half of the costs related to the injury.

This procedure reflects a common practice in third-party tort claims in which the recovery is divided three ways among the injured party, the injured employee's attorney, and the political subdivision or pool that paid out medical benefits on behalf of the employee.

OPPONENTS SAY:

Current law should not be changed to compensate benefits providers in third-party claims before an individual is "made whole" after an injury. These health plans or insurance pools are in the business of providing health insurance for individuals, and paying for health care costs related to an injury are part of their cost of doing business. They should not be entitled to reimbursement for all or part of these expenses before an injured person is compensated adequately by the third party in a tort claim.

NOTES:

The committee substitute added provisions allowing an injured employee to challenge a benefit provider's pro rata share in court.

The companion bill, SB 561 by Carona, passed the Senate by 29-1(Nelson) on April 16 and was reported favorably, without amendment, by the House Insurance Committee on May 2, making it eligible to be considered in lieu of HB 1226.