

SUBJECT: Prohibiting disclosure of attorney's fee statements to liability insurer

COMMITTEE: Insurance — favorable, without amendment

VOTE: 6 ayes — Averitt, Burnam, G. Lewis, J. Moreno, Olivo, Thompson
2 nays — Smithee, Seaman
1 absent — Eiland

SENATE VOTE: On final passage, April 30 — voice vote (Haywood recorded nay)

WITNESSES: (*On similar house bill, HB 1433:*)
For — Thomas E. Bishop, Bishop & Hummert, P.C. and Texas Association of Defense Counsel; David Chamberlain and James R. Old, Jr., Texas Association of Defense Counsel; Ross Spence.

Against — Ronald Cobb, American Insurance Association; Jay Thompson, Association of Fire and Casualty Companies in Texas and Farm Bureau Insurance Company.

BACKGROUND: Insurance contracts not only provide that the insurer will pay for liabilities the insured incurs, but also require the insurer to defend covered claims against the insured. The duty to defend involves hiring attorneys for the insured.

Information shared between the client and attorney is privileged from admission in court under Texas Rules of Evidence (TRE) 503 and from discovery by an opponent under Texas Rules of Civil Procedure (TRCP) 193.3.

With certain exceptions, the Texas Disciplinary Rules of Professional Conduct 1.04 forbid an attorney from disclosing client information — both that privileged under TRE 503 and other unprivileged client information obtained by the attorney during the course of the attorney's representation of the client.

An attorney's work product, which includes the materials prepared and mental impressions developed in anticipation of litigation or for trial, generally is protected from discovery under TRCP 192.5.

DIGEST:

HB 1433 would prohibit liability insurers from:

- ! disclosing their insured's attorney's billing statements regarding the services performed in defending claims against the insured to a third party, or
- ! requiring an attorney they hired to defend an insured to disclose his or her billing statements to anyone but the insurer or an employee of the insurer.

Any contract between the insurer and the insured or the attorney or waiver of this right by the insured to permit the insurer to disclose billing statements to a third party would be void and unenforceable as against public policy.

An exception for disclosure would exist in cases in which there was a lawsuit over payment of the fees, but such a disclosure would not waive the attorney-client privilege in those billing statements.

The bill would give the insured a cause of action against the insurer for damages suffered due to a violation of the disclosure prohibition and for an injunction against further disclosures. An insured who prevailed in such a suit would be entitled to attorney's fees and costs.

The insurer also would be subject to a civil penalty of up to \$5,000 for the first of second violation, and up to \$10,000 for any violation thereafter. The insurance commissioner could ask the attorney general to bring suit to collect.

The bill would take effect on September 1, 2001, and would apply only to disclosures made on or after the effective date of the bill.

SUPPORTERS
SAY:

SB 1653 would protect the attorney-client privilege and confidentiality between an insured and his or her insurer-hired attorney and would protect the work product of the attorney. Despite the privileged nature of the information contained in attorney billing statements, many insurance

companies disclose those fees to third-party auditors or require that the attorney do so. The disclosures usually are made based on provisions in the insurance contract that permit disclosure. Unfortunately, when privileged information is disclosed to third parties, it typically waives the confidentiality that protects that information. Thus, by getting a waiver from the insured to permit the insurer to disclose the fee statements, the insurer is forcing the insured to waive any privilege in the information in those statements. Once such a waiver occurs, a third party can claim that the information is no longer confidential and protected from discovery or use in court. This practice is a disservice to the insured and undermines the public policy in favor of making communications between attorneys and clients and the attorney's work product confidential.

The bill also properly would void contracts and waivers by the client that would permit disclosures to third parties. There is no reason insureds would provide consent if fully informed of the consequences to their confidentiality with their attorney. The only result of permitting such a waiver would be to promote situations in which the attorney were pressured by the insurance company to convince the insured to permit disclosure. Further, by forbidding contractual provisions for disclosure (for instance, in the insurance contract), the bill would protect insureds who often either do not understand the consequences of permitting disclosure of fee statement to outside auditors or could not re-negotiate the terms of their insurance contracts if they did.

The bill would not prohibit insurance companies from auditing a defense counsel's fee statements. It simply would require them to do it in a way that did not waive the confidentiality of the insured's communications with their attorney and their attorney's work product.

**OPPONENTS
SAY:**

SB 1379 would make insurance more expensive and thus would harm liability insurance consumers. As the party who must pay for the defense attorney's services, the insurance company must be able to review attorney's fee statements for the reasonableness of those fees. Sometimes, this requires the expertise of outside auditors. By effectively prohibiting such reviews or audits, this bill would make insurers less able to guarantee that the attorneys they hired to defend their insureds did not over-bill the insurer by performing unnecessary services. This would increase the insurance companies' costs

SB 1653
House Research Organization
page 4

and thus the cost of insurance, which the insurance consumer ultimately would have to bear.

NOTES:

A related bill, SB 1654 by Bernsen, passed the Senate on May 1 and was reported favorably, as amended, by the House Civil Practices Committee on May 17, and was set on the Major State Calendar for May 22.