

- SUBJECT:** Limiting the contractual subrogation rights of certain insurers
- COMMITTEE:** Judiciary and Civil Jurisprudence — committee substitute recommended
- VOTE:** 9 ayes — Lewis, Farrar, Farney, Gooden, Hernandez Luna, Hunter, K. King, Raymond, S. Thompson
0 nays
- WITNESSES:** For — David Chamberlain, Texas Chapters of American Board of Trial Advocates; Guy Choate; Jay Harvey; Mike Hull, Texas Alliance for Patient Access; Judy Kostura; Alice London; Dustin Strelsky; Jennifer Strelsky; (*Registered, but did not testify*: Jason Byrd, Texas Trial Lawyers Association; George Christian, Texas Association of Defense Counsel; Ware Wendell, Texas Watch)

Against — Jerry Fazio, Texas Alliance of Nonsubscribers; Jay Thompson, Texas Association of Life and Health Insurers; Scott Wilson, TML Intergovernmental Employee Benefits Pool; (*Registered, but did not testify*: David Gonzales, Texas Association of Health Plans; Gregg Knaupe, Seton Healthcare Family; Mark Mendez, Tarrant County; Mike Meroney, Huntsman Corp.; Kaden Norton, TML Intergovernmental Employee Benefits Pool and Texas Association of Benefit Administrators)

On — Jay Dyer, Office of the Attorney General; (*Registered, but did not testify*: Doug Danzeiser, Texas Department of Insurance)
- BACKGROUND:** Local Government Code, sec. 172.015, governs subrogation rights and recovery procedures for the Texas Political Subdivisions Uniform Group Benefits Program.
- DIGEST:** (*Floor substitute analyzed in lieu of CSHB 1869*)
CSHB 1869 would limit the contractual subrogation rights of certain health benefit plans and specify how a court could award attorney's fees.

Applicability. This bill would apply to issuers of health benefit plans that provide benefits for medical and surgical expenses as a result of a health condition, accident, or sickness, disability benefit plans, employee welfare plans, franchise insurance policy or insurance agreements, or group

hospital service contracts. It also would apply to individual or group evidence of coverage, including insurance companies and other similar types of coverage under the Insurance Code. This bill would specify all other health and benefit plans to which it applied.

The bill would not apply to:

- a worker's compensation insurance policy or other source of worker's compensation medical benefits;
- Medicare;
- a Medicaid medical assistance program or a Medicaid managed care program;
- the state children's health plan (CHIP) or another state children's health plan; and
- self-funded plans under the Employee Retirement Income Security Act of 1974 (ERISA).

This bill would define "covered individual" as someone entitled to benefits. It would define "payor of benefits" or "payor" as an issuer of a plan that had contractual subrogation rights and paid benefits to (or on behalf of) a covered individual injured after the tortious conduct of a third party.

Limited subrogation rights. In a health benefit plan, a payor could contract for subrogation and reimbursement rights. This would entitle the payor to recover for payments made and benefits provided to an individual covered by a plan who was injured by a third-party tortfeasor. If an injured covered individual was entitled by law to seek recovery from a third party, then all payors would be entitled to a portion of the recovery.

If a covered individual was not represented by an attorney when seeking recovery, a payor's portion of the recovery would be limited to the lesser of:

- one-half of the covered individual's gross recovery; or
- the total cost of the benefits paid, provided, or assumed by the payor as a direct result of the third party's tortious conduct.

If the covered individual was represented by an attorney, the payor's portion of the recovery would be limited to the lesser of those amounts after the attorney's fees and procurements costs had been deducted.

The common law doctrine that would require an injured party to be “made whole” before a payor with subrogation rights was entitled to a portion of the recovery would not apply to these cases. This bill would repeal the subrogation rights and recovery procedures for the Texas Political Subdivisions Uniform Group Benefits Program.

Attorney’s fees. If a covered individual were represented by an attorney and the payor was not, the payor would have to pay an agreed-upon portion of the attorney’s fees and a proportional share of incurred expenses. If the covered individual’s attorney and the payor did not reach a fee agreement, the court would have to award a reasonable attorney’s fee out of the payor’s portion of the recovery. This award could not exceed one-third of the payor’s recovery.

If both the covered individual and payor were represented by attorneys in a recovery action, the court would have to award the attorney’s fees out of the payor’s portion of the recovery. In awarding fees, the court would need to consider how the payor benefitted from each attorney’s service, and total fees could not exceed one-third of the payor’s recovery.

If there were a declaratory judgment, a court could not award costs or attorney’s fees to any party.

No first-party recovery. A payor would be prohibited from pursuing a portion of a covered individual’s first-party recovery, except that a payor could pursue a portion of uninsured/underinsured motorist coverage or medical payment coverage if the covered individual’s family did not pay the premiums.

Rules. This bill would control if it conflicted with another law. It would not create a cause of action and could not be interpreted as preventing a payor from waiving, negotiating, or not pursuing a subrogation right. If any part of the bill were found to be unconstitutional, that part would be eliminated and the rest of the bill would remain in effect. This bill would apply only to subrogation rights in causes of action that accrued on or after January 1, 2014.

This bill would take effect January 1, 2014.

SUPPORTERS

CSHB 1869 would be a fair and equitable approach to contractual

SAY: subrogation rights. When an individual is injured by a third party, the person's insurer will pay for medical and surgical expenses. Almost all insurance and benefit contracts have subrogation clauses that entitle an insurer to be reimbursed for these expenses with any money recovered from the third party who caused the injury. Injured parties are also entitled to recover from the third party for expenses, such as future medical costs and lost wages, which are not covered by an insurer.

Often, however, a third party does not have enough money to pay the entire recovery judgment. When this happens, current subrogation laws heavily favor insurance companies, making it difficult for injured parties to obtain any portion of the recovery. This is especially devastating for individuals who will suffer from a serious injury for the rest of their lives. By limiting contractual subrogation rights, this bill would ensure that injured parties received a larger, fairer share of the recovery.

This bill also would make cases easier to settle. Current law allows insurance companies to insist on very high recovery amounts, which third parties often are unwilling to pay. When the parties cannot agree to a settlement, the cases go to trial. By limiting the amount an insurer could recover, this bill would encourage settlement agreements and reduce litigation.

While some argue that this approach to recovery could reduce the amount recovered by insurers and increase premiums, it is more likely that it would facilitate settlements, ultimately increasing the amount insurers recover through the subrogation process.

OPPONENTS SAY: CSHB 1869 could increase premiums. When deciding how much to charge policyholders, insurers take into consideration the amount of money they could recover through the subrogation process. If insurers recover less from subrogation, they might need to increase premiums to make up the difference.

OTHER OPPONENTS SAY: CSHB 1869 should further limit contractual subrogation rights. Several states prohibit subrogation in situations where the third party does not have enough money to pay an entire judgment. Texas should adopt this approach or further decrease the amount an insurer can recover. This would better ensure that injured parties were fairly compensated.

NOTES: Compared with the committee substitute, the floor amendment would:

- exempt specific types of health and benefit plans;
- increase a payor's potential portion of a recovery from one-third to one-half of the covered individual's gross recovery;
- require the court to award and apportion attorney's fees if both the covered individual and the payor were represented by attorneys;
- allow first-party recovery in certain situations;
- repeal the subrogation rights and recovery procedures for the Texas Political Subdivisions Uniform Group Benefits Program;
- specify that if any part of the bill were found to be unconstitutional, that part would be eliminated and the rest of the bill would remain in effect; and
- specify a later effective date.