

BILL ANALYSIS

C.S.H.B. 1226

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Insurance

Committee Report (Substituted)

BACKGROUND AND PURPOSE

Section 172.015, Local Government Code provides as follows:

"The payor of employee benefits, whether a political subdivision, group of political subdivisions, pool, or carrier providing reinsurance to one of those entities, shall be subrogated to the employees' right of recovery for personal injuries caused by the tortious conduct of a third party."

The provision was placed in the statute in 1989 with the idea that a political subdivision (such as a city) or a pool (composed of political subdivisions) would have a preferential (in other words, first place in the payment line) right of subrogation. That means, by way of example, that if the political subdivision risk pool paid out \$5000 to health care providers on behalf of a city employee who was injured by the negligence of a third party, the risk pool would "step into the shoes" of the injured city employee to recover the first \$5000 paid by the negligent third party.

In the case of *Texas Association of School Boards, Inc. v. Ward* (TASB v. Ward), 18 S.W.3d 256 (Tex. App. Waco- 2000) the court held that while a pool of political subdivisions does have a right of subrogation against third parties, it also held that the pool may not be reimbursed until the claimant is made whole for his injuries. In other words, until the injured city employee (claimant) is made whole (recovers money damages for all its injuries), the risk pool cannot recover any of the \$5000 that it paid on behalf of the claimant for claimant's medical costs. This creates a problem because sometimes there is not enough money available to pay "all injuries".

As a result, cities, counties, and other political subdivisions (and pools) have had difficulty recovering public monies that were paid out due to the negligence of a third party who is financially able to reimburse the political subdivision because of insurance or other assets.

The purpose of this bill is to modify the holding in TASB v. Ward with the result that the risk pool or other political subdivision under Chapter 172, Local Government Code, will have a better chance to recover some of the employee benefits paid out to an injured worker due to an injury from a negligent third party.

C.S.H.B. 1226 will not put the political subdivision first in line, but it will provide for a formula or methodology that will allow the political subdivision, in the typical case, to recover up to one-third of the amount recovered from the responsible third party or the amount of its subrogation claim, whichever is less.

Additionally, the bill provides that, in the absence of an agreement for the payment of attorney's fees between the payor of employee benefits and the covered individual, the court will award the attorney a reasonable fee not to exceed one-third of the payor's recovery.

C.S.H.B. 1226 also provides a methodology by which the political subdivision will recover less if the plaintiff can show the court that the amount recovered (from the third party) is less than 50% of the underlying claim. In that case, the political subdivision's subrogation interest can be lowered to not less than 15%.

And finally, in cases where "manifest injustice" would result if the subrogation interest of the political subdivision were not lowered, the court may reduce the interest of the political subdivision payor to not less than five percent of the total recovery.

RULEMAKING AUTHORITY

It is the opinion of the committee that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1226 relates to the subrogation interests of certain political subdivisions or insurance carriers providing reinsurance for subdivisions.

SECTION 1 Amends Section 172.015, Local Government Code by adding the words “Adequate Recovery” to the heading and defines "covered individual" as a person who is covered by the pool. The term includes an official, an employee, a retiree, and an employee of an affiliated service contractor and their dependents. Also, the bill makes conforming changes by replacing the word "employees" with the phrase "covered individual's".

The bill also adds several subsections to Section 172.015. The first new subsection added to Section 172.015 states that a payor of employee benefits whose interest is not actively represented by an attorney in a third-party action shall pay to an attorney representing the covered individual a fee in an amount determined under an agreement between the attorney and the payor of employee benefits. Except as provided by Subsection (i), in the absence of an agreement, the court shall award to the attorney, payable out of the recovery of the payor of employee benefits, a reasonable fee for recovery of the interest of the payor of employee benefits, not to exceed one-third of the payor's recovery. Subsection (d) of Section 172.015 states that if the injured covered individual is not able to realize a complete and adequate recovery for injuries sustained as a result of the actionable fault of a third party the payor of employee benefits is entitled to a pro rata recovery described by Subsection (e). A common law doctrine that requires that an injured party be made whole before a subrogee makes a recovery does not apply to the recovery of the payor of employee benefits under this subsection. Section 172.015 Subsection (e) states that unless otherwise agreed by a covered individual and the payor of employee benefits subject to Subsection (f), the payor's pro rata share under Subsection (d) is an amount that is equal to the lesser of one-third of the covered individual's total recovery; or the total cost of employee benefits paid by the payor as a direct result of the tortious conduct of the third party. Subsection (f) provides that a covered individual may bring an action for declaratory judgment to establish that the amount of the pro rata recovery to which the payor of employee benefits is entitled is an amount that is less than the pro rata share described by Subsection (e). To prevail in such an action brought under this subsection, the covered individual must prove by a preponderance of the evidence that the amount of the covered individual's total recovery is less than 50 percent of the value of the covered person's underlying claim for damages. Next, Subsection (g) says that except as otherwise provided by this subsection, the court shall establish the payor's pro rata recovery under Subsection (f) in an amount that is not less than 15 percent of and not more than one-third of the covered individual's total recovery. However, if a covered individual shows by clear and convincing evidence that the pro rata share otherwise described by this subsection would result in manifest injustice, the court shall establish the payor's pro rata recovery in an amount that is less than 15 percent of and equal to or greater than five percent of the covered individual's total recovery. Subsection (h) states that notwithstanding Chapter 37, Civil Practices and Remedies Code, or any other law, in an action brought under Subsection (f) the court may not award costs or attorney's fees to any party in the action. Next, Subsection (i) provides that notwithstanding Subsection (c), a payor of employee benefits may not be assessed out of the recovery to which the payor is entitled under Subsection (e) or (f) any attorney's fees under any theory or rule of law, including the common fund doctrine.

Next, SECTION 2, Section 172.015 of the Local Government Code, as amended by this Act, applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law applicable to the action immediately before the effective date of this Act, and that law is continued in effect for that purpose. Finally, SECTION 3 lays out the effective date of this Act.

EFFECTIVE DATE

Upon passage, or, if the Act does not receive the necessary vote, the Act takes effect September 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 1226 add additional subsections (Subsections (g) and (h)) to SECTION 1 Section 172.015. Also, C.S.H.B. 1226 changes and moves the original language of Subsection (f) of the original house bill.

Subsection (f) SECTION 1 Section 172.015 now provides that a covered individual may bring an action for declaratory judgment to establish that the amount of the pro rata recovery to which the payor is entitled is an amount that is less than the pro rata share described by Subsection (e). To prevail in such an action brought under this subsection, the covered individual must prove by a preponderance of the evidence that the amount of the covered individual's total recovery is less than 50 percent of the value of the covered person's underlying claim for damages.

Next, as added by C.S.H.B. 1226, Subsection (g) of SECTION 1 Section 172.015 says that, except as otherwise provided by this subsection, the court shall establish the payor's pro rata recovery under Subsection (f) in an amount that is not less than 15 percent of and not more than one-third of the covered individual's total recovery. However, if a covered individual shows by clear and convincing evidence that the pro rata share otherwise described by this subsection would result in manifest injustice, the court shall establish the payor's pro rata recovery in an amount that is less than 15 percent of and equal to or greater than five percent of the covered individual's total recovery. The newly added Subsection (h) of SECTION 1 Section 172.015 states that notwithstanding Chapter 37, Civil Practices and Remedies Code, or any other law, in an action brought under Subsection (f) the court may not award costs or attorney's fees to any party in the action.

Finally, the wording in Subsection (f) of the original bill was both moved to Subsection (i) SECTION 1 Section 172.015 in C.S.H.B. 1226 and was conformed to reflect the rest of C.S.H.B. 1226. Subsection (i) of SECTION 1 Section 172.015 now reads that, notwithstanding Subsection (c), a payor of employee benefits may not be assessed out of the recovery to which the payor is entitled under Subsection (e) or (f) any attorney's fees under any theory or rule of law, including the common fund doctrine.